

Legislação&Tributos SP

Dispute boards: habemus dados!

Opinião Jurídica

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Tempo suficiente já passou a autorizar a afirmação de que o uso de dispute boards (ou DBs) em projetos de construção e infraestrutura é um caminho sem volta. Os DBs “pegaram” e já fazem parte da realidade de grande parte desses projetos, conhecidos por suas altas cifras e elevada complexidade.

Rápido, eficiente e especializado são alguns dos adjetivos comumente atribuídos a esse mecanismo, que é adotado pelas partes com dupla função: prevenir conflitos durante a execução das obras e, caso surjam, resolvê-los com a celeridade necessária para não prejudicar o andamento do projeto.

Ocorre que a difusão dessa adjetivação esteve fundada, basicamente, em impressões e experiências individualizadas dos usuários de DBs, sem amparo em estudos e análises empíricas conduzidas com rigor científico. Nesse sentido, criou-se no mercado e na academia uma verdade quase que universal sobre os benefícios que os DBs podem imprimir a um projeto, bem como sobre seu baixo custo em comparação com o valor das obras.

Agora, esse cenário mudou: finalmente, habemus dados! No início de dezembro de 2024, o Centre of Construction Law & Dispute Resolution da King's College London publicou a pesquisa “2024 Dispute Boards

International Survey: A Study on the WorldWide Use of Dispute Boards over the Past Six Years”. Trata-se da primeira pesquisa empírica internacional sobre DBs e cujo resultado confirma, em números, a precisão dos adjetivos que popularmente lhes são atribuídos.

O estudo contou com a participação de 213 entrevistados, organizados em quatro categorias: (i) pessoas físicas, (ii) entidades comerciais ou financeiras (empresas) envolvidas em projetos que foram acompanhados por DBs, (iii) instituições que atuam na criação, administração e funcionamento de DBs, e (iv) entidades financiadoras de projetos que adotaram DBs. A pesquisa considerou DBs havidos entre 2018 e 2023.

De início, os dados da pesquisa confirmam a eficiência do papel preventivo dos DBs, sobretudo por seu impacto na qualidade da gestão contratual.

Para 45% das pessoas físicas entrevistadas, as ferramentas preventivas implementadas pelos DBs foram responsáveis por evitar, por completo, o surgimento de disputas em seus contratos. Para 41%, essas ferramentas reduziram substancialmente o escopo das disputas. Na mesma linha, 86% das pessoas físicas e 75% dos financiadores responderam que os DBs foram “extremamente ou

muito úteis” na prevenção de disputas. Para as empresas, quase metade (46%) indicou esse mesmo entendimento.

Os dados também sinalizaram a eficácia pacificadora dos DBs quando chamados a resolver uma disputa. A pesquisa confirmou a qualidade, a precisão e a assertividade das decisões tomadas pelos DBs.

São, essencialmente, três informações extraídas da pesquisa que corroboram esse entendimento: (i) a tendência de cumprimento espontâneo das decisões ou recomendações tomadas pelos DBs; (ii) a boa aceitação das decisões de DBs, dado que aproximadamente 40% dos indivíduos e empresas afirmaram “nunca” ou “raramente” apresentar notificações de insatisfação; e (iii) o baixo índice de contestação das decisões dos DBs nas jurisdições estatal ou arbitral, que varia entre 0 e 10% para aproximadamente 70% dos entrevistados.

A qualidade das decisões dos DBs é confirmada, ainda, pelos casos em que são contestadas por arbitragem ou na jurisdição estatal. Isso porque 79% das pessoas físicas e 68% das empresas informaram que as decisões jurisdicionais “nunca” ou “raras vezes” são substancialmente distintas das decisões dos DBs.

Por fim, a pesquisa também corrobora o baixo custo dos

DBs em relação ao valor total do projeto. Para metade dos indivíduos (55%) e das empresas (50%), o custo do DB variou entre 0% e 0,5% do valor total do projeto. Trata-se de percentual que vai no mesmo sentido do índice de 0,05% a 0,25% indicado pela Dispute Resolution Board Foundation.

Os dados da pesquisa confirmam, em última análise, a relevância do papel dos DBs na prevenção e na resolução de controvérsias de forma célere, com baixo custo e alta qualidade. Trata-se de dados promissores e que chegam em um momento único do mercado brasileiro da infraestrutura.

Isso porque os DBs já entraram na ordem do dia dos órgãos da administração pública no Brasil e de seus respectivos projetos. A publicação de leis, decretos e normas regulamentando a utilização dos DBs em contratos públicos tem se tornado cada vez mais frequente, o que posiciona a administração pública brasileira na vanguarda da adoção de DBs em obras públicas.

Apenas nos últimos meses de 2024, diversos editais de licitação para projetos de concessões e parcerias público-privadas (PPPs) previram a utilização desse mecanismo. Desde projetos de rodovias estaduais e federais (Nova Raposo, Rota Sorocabana, Programa de

Concessões Rodoviárias do Mato Grosso, Pacote de Rodovias do Paraná) até projetos de infraestrutura social (como a PPP das Escolas do Estado de São Paulo) previram cláusulas robustas de DBs — algumas das quais com grande (e acertada) ênfase em sua função preventiva.

Não é exagero dizer, portanto, que a pesquisa da King's College London é um marco para o instituto dos DBs. Mais do que isso: chega em boa hora no Brasil, para reafirmar a importância de os players do mercado de infraestrutura compreenderem a magnitude do potencial benéfico que a sua correta utilização pode trazer para um projeto. Que os ventos de bom agouro continuem a soprar a favor dos DBs!

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MINISTÉRIO DA INFRAESTRUTURA
AGÊNCIA NACIONAL DE TRANSPORTES TERRESTRES
DIRETORIA COLEGIADA

RESOLUÇÃO Nº 5.845, DE 14 DE MAIO DE 2019

Dispõe sobre as regras procedimentais para a autocomposição, a arbitragem e os comitês de prevenção e solução de disputas no âmbito da ANTT.
(Redação dada pela [Resolução 6040/2024/DG/ANTT/MT](#))

[Redações Anteriores](#)

A Diretoria Colegiada da Agência Nacional de Transportes Terrestres - ANTT, no uso de suas atribuições, fundamentada no [Voto DEB - 177, de 07 de maio de 2019](#), e no que consta do Processo nº 50501.054940/2018-83, resolve:

Art. 1º A presente Resolução dispõe sobre os procedimentos e as regras referentes aos processos de Prevenção e Solução de Controvérsias entre a ANTT e os seus entes regulados. (Redação dada pela [Resolução 6040/2024/DG/ANTT/MT](#))

[Redações Anteriores](#)

Parágrafo único. (Suprimido pela [Resolução 6040/2024/DG/ANTT/MT](#))

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§ 1º Os processos de Prevenção e Solução de Controvérsias abrangem a autocomposição, nos termos da [Lei nº 13.140, de 26 de junho de 2015](#), a arbitragem, nos termos da [Lei nº 9.307, de 23 de setembro de 1996](#) e os comitês de prevenção e solução de disputas, nos termos da [Lei nº 8.987, de 13 de fevereiro de 1995](#) e da [Lei nº 14.133, de 1º de abril de 2021](#). (Acrescentado pela [Resolução 6040/2024/DG/ANTT/MT](#))

§ 2º Havendo divergência entre as disposições desta Resolução e aquelas constantes do contrato de concessão, prevalecerão aquelas registradas no contrato. (Acrescentado pela [Resolução 6040/2024/DG/ANTT/MT](#))

§ 3º O disposto nesta Resolução aplica-se também aos contratos de subconcessão. (Acrescentado pela [Resolução 6040/2024/DG/ANTT/MT](#))

CAPÍTULO I

DISPOSIÇÕES GERAIS

Art. 2º São considerados direitos patrimoniais disponíveis, sujeitos ao procedimento de autocomposição e arbitragem, regulados pela presente Resolução: (Redação dada pela [Resolução 6040/2024/DG/ANTT/MT](#))

[Redações Anteriores](#)

I - questões relacionadas à recomposição do equilíbrio econômico-financeiro dos contratos;

II - indenizações decorrentes da extinção ou transferência do Contrato;

III - penalidades contratuais e seu cálculo; (Redação dada pela [Resolução 5960/2022/DG/ANTT/MI](#))

[Redações Anteriores](#)

IV - o processo de relicitação do contrato nas questões que envolvam o cálculo das indenizações pelo órgão ou pela entidade competente; e

V - o inadimplemento de obrigações contratuais por qualquer das partes.

Parágrafo único. Quaisquer outros litígios, controvérsias ou discordâncias relativas a direitos patrimoniais disponíveis decorrentes do contrato não previstos acima, ou no art. 26-A desta Resolução, poderão ser resolvidos por arbitragem, desde que as partes, em comum acordo, celebrem compromisso arbitral, definindo o objeto, a forma, as condições, conforme definido no art. 12. *(Redação dada pela [Resolução 6040/2024/DG/ANTT/MT](#))*

[Redações Anteriores](#)

Art. 3º Não serão submetidos aos procedimentos de Prevenção e Solução de Controvérsias: *(Redação dada pela [Resolução 6040/2024/DG/ANTT/MT](#))*

[Redações Anteriores](#)

- I - questões relativas a direitos indisponíveis não transacionáveis;
- II - a natureza e a titularidade públicas do serviço concedido ou permitido;
- III - o poder de fiscalização sobre a exploração do serviço delegado; e
- IV - o pedido de rescisão do contrato por parte da Concessionária.

Art. 4º As controvérsias só poderão ser submetidas à arbitragem após decisão definitiva da ANTT. *(Redação dada pela [Resolução 6040/2024/DG/ANTT/MT](#))*

[Redações Anteriores](#)

Parágrafo único. Considera-se definitiva a decisão administrativa quando dela não couber mais recurso.

Art. 5º Os procedimentos de autocomposição e de celebração de compromisso arbitral se iniciam com o protocolo de solicitação escrita dirigida à ANTT, indicando:

- I - as partes envolvidas;
- II - a descrição detalhada dos fatos;
- III - os pedidos;
- IV - os documentos comprobatórios;
- V - quais informações devem ser consideradas sigilosas;
- VI - expressa anuência com os termos desta Resolução;

Art. 6º A parte privada deverá encaminhar à ANTT o requerimento de arbitragem apresentado à Câmara Arbitral.

Art. 7º A submissão às medidas de prevenção e solução de controvérsias, nos termos desta Resolução, não exime o Poder Concedente, tampouco os agentes regulados, da obrigação de dar integral cumprimento ao contrato, nem permite a interrupção das atividades vinculadas necessárias à adequada prestação do serviço público. *(Redação dada pela [Resolução 6040/2024/DG/ANTT/MT](#))*

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CAPÍTULO II

DO PROCESSO DE MEDIAÇÃO

Art. 8º Poderá ser solicitada pela parte interessada a instauração do processo de mediação, que será conduzida pela Advocacia Geral da União, nos termos do [art. 32 da Lei nº 13.140, de 26 de junho de 2015](#).

Parágrafo único. *(Revogado pela [Resolução 5960/2022/DG/ANTT/MI](#))*

[Redações Anteriores](#)

Art. 9º O pedido de mediação será autuado e encaminhado à Superintendência de Processo Organizacional com competência sobre a matéria controversa para manifestação sobre a admissibilidade do pleito.

§ 1º Após instrução da Superintendência de Processo Organizacional sobre o pedido apresentado, os autos serão enviados à Diretoria Colegiada para decisão sobre a admissibilidade, a conveniência e a oportunidade de a ANTT participar da mediação.

§ 2º O processo se torna público nas hipóteses de inadmissão do pedido ou de não participação da ANTT.

Art. 10. Decidida a participação da ANTT, a Diretoria Colegiada indicará servidor como representante na mediação e delimitará seus poderes negociais.

§ 1º Eventual acordo negociado somente adquirirá validade com sua aprovação pela Diretoria Colegiada.

§ 2º Encerrada a mediação, as informações processuais serão públicas, com exceção dos parâmetros negociais e de outros sigilos legais ou definidos pela ANTT.

Art. 11. Não havendo acordo sobre a questão, as partes podem definir no termo final a celebração de compromisso arbitral.

CAPÍTULO III

DO COMPROMISSO ARBITRAL

Art. 12. Não havendo cláusula compromissória de arbitragem, a ANTT poderá celebrar compromisso arbitral para dirimir os litígios de que trata o art. 2º e seu parágrafo único.

§ 1º Para celebrar compromisso arbitral, a ANTT avaliará previamente as vantagens e desvantagens da arbitragem no caso concreto quanto ao prazo para a solução do litígio, ao custo do procedimento e à natureza da questão litigiosa.

§ 2º A análise dos efeitos a serem alcançados no caso concreto será instruída com manifestação técnica da Superintendência de Processo Organizacional envolvida e parecer jurídico.

§ 3º A celebração de compromisso arbitral será decidida pela Diretoria Colegiada.

Art. 13. A proposta de estabelecimento do compromisso arbitral preferencialmente incluirá o aditivo contratual para a inclusão da cláusula compromissória prevista no art. 27.

Art. 14. Caso já tenha sido proposta ação judicial por qualquer das partes, além das condições estabelecidas no art. 12, a celebração de compromisso arbitral para dirimir a questão dependerá do cumprimento dos seguintes requisitos adicionais:

I - relatório sobre as possibilidades de decisão favorável à ANTT e a perspectiva de tempo necessário para o encerramento do litígio perante o Poder Judiciário; e

II - a homologação de acordo judicial em que as partes se comprometam a levar a questão ao juízo arbitral.

CAPÍTULO IV

DA ARBITRAGEM

SEÇÃO I

DA CÂMARA ARBITRAL

Art. 15. Os contratos de outorga de serviço público e os compromissos arbitrais firmados pela ANTT definirão expressamente uma ou mais câmaras arbitrais dentre as credenciadas, nos termos do [§ 5º do art. 31 da Lei nº 13.448, de 05 de junho de 2017](#).

Parágrafo único. Na hipótese de não ter sido definida a câmara arbitral previamente, a ANTT indicará três câmaras cadastradas em conformidade com decreto regulamentador do [§5º do art. 31 da Lei nº 13.448, de 05 de junho de 2017](#), e a parte privada escolherá uma câmara entre as indicadas.

Art. 16. Por consenso entre as partes envolvidas e a ANTT, poderá ser definida Câmara diversa da estabelecida em contrato.

SEÇÃO II

DAS TUTELAS DE URGÊNCIA E DE NATUREZA CAUTELAR

Art. 17. Antes da constituição do tribunal arbitral, as medidas cautelares ou de urgência poderão ser requeridas ao Poder Judiciário ou ao Árbitro de Emergência, nos termos do regulamento da respectiva câmara arbitral. *(Redação dada pela [Resolução 6009/2023/DG/ANTT/MT](#))*

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§ 1º Cessa a eficácia da medida cautelar ou de urgência deferida se a arbitragem não for requerida no prazo de 30 (trinta) dias da data de efetivação da decisão. *(Redação dada pela [Resolução 6009/2023/DG/ANTT/MT](#))*

[Redações Anteriores](#)

§ 2º Constituído o tribunal arbitral, caberá aos árbitros manter, modificar ou revogar a medida cautelar ou de urgência concedida.

Art. 18. Após a constituição do tribunal arbitral, as tutelas necessárias deverão ser requeridas e apreciadas pelo tribunal que, por sua vez, poderá solicitar ao órgão competente do Poder Judiciário a execução das medidas, se entender necessário.

SEÇÃO III

DOS CUSTOS

Art. 19. Toda e qualquer despesa necessária à instalação e desenvolvimento da arbitragem, abrangendo, inclusive, as custas de laudos, pareceres e perícias, bem como os honorários dos árbitros, serão suportadas exclusivamente pela Concessionária.

§ 1º A ANTT somente ressarcirá tais valores em caso de condenação final.

§ 2º No caso de sucumbência recíproca, as partes arcarão proporcionalmente com os custos da arbitragem.

§ 3º Quaisquer valores porventura devidos pela ANTT em razão de condenação serão quitados através de precatório judicial.

SEÇÃO IV

DA FORMAÇÃO DO TRIBUNAL ARBITRAL

Art. 20. São requisitos para o exercício da função de árbitro:

I - estar no gozo de plena capacidade civil;

II - deter conhecimento técnico compatível com a natureza do litígio;

III - não ter, com as partes ou com o litígio que lhe for submetido, relações que caracterizem os casos de impedimento ou suspeição de juízes, conforme previsto no Código de Processo Civil.

Art. 21. O tribunal arbitral será composto por 3 (três) árbitros, cabendo a cada parte indicar um árbitro.

§ 1º O terceiro árbitro, o qual será o presidente do tribunal arbitral, será escolhido de comum acordo pelos árbitros indicados pelas partes.

§ 2º Não havendo consenso entre os árbitros escolhidos por cada parte, o terceiro árbitro será indicado pela câmara de arbitragem selecionada, observados os termos e condições aplicáveis previstos no seu regulamento de arbitragem.

§ 3º No caso de a arbitragem envolver mais de 2 (duas) partes, seja no polo ativo, seja no polo passivo, a escolha dos árbitros deverá seguir o previsto no regulamento de arbitragem da câmara arbitral selecionada.

§ 4º Só serão adotados procedimentos expeditos ou de árbitro único em caso de acordo expresso entre as partes.

SEÇÃO V

DO PROCEDIMENTO ARBITRAL

Art. 22. As informações no processo arbitral serão públicas, ressalvadas aquelas necessárias à preservação de segredo industrial ou comercial e aquelas consideradas sigilosas pela legislação brasileira, sendo os seguintes documentos disponibilizados no sítio eletrônico da ANTT: *(Redação dada pela [Resolução 5960/2022/DG/ANTT/MI](#))*

[Redações Anteriores](#)

I - termo de arbitragem; e *(Redação dada pela [Resolução 5960/2022/DG/ANTT/MI](#))*

[Redações Anteriores](#)

II - decisões e sentenças do tribunal arbitral. *(Redação dada pela [Resolução 5960/2022/DG/ANTT/MI](#))*

[Redações Anteriores](#)

III - *(Suprimido pela [Resolução 5960/2022/DG/ANTT/MI](#))*

[Redações Anteriores](#)

IV - *(Suprimido pela [Resolução 5960/2022/DG/ANTT/MI](#))*

[Redações Anteriores](#)

§ 1º Nas arbitragens institucionais caberá à Câmara Arbitral disponibilizar o acesso às informações sobre o processo de arbitragem, inclusive a resposta ao requerimento, as defesas, a réplica, a tréplica e outras manifestações das partes relativas ao mérito, as provas produzidas e as decisões do tribunal arbitral, ressalvadas aquelas cujo sigilo tenha sido decretado pelo Tribunal Arbitral. *(Redação dada pela [Resolução 5960/2022/DG/ANTT/MI](#))*

[Redações Anteriores](#)

§ 2º O disposto nos incisos do caput não veda a ANTT de disponibilizar em seu sítio eletrônico as informações de que trata o § 1º. *(Redação dada pela [Resolução 5960/2022/DG/ANTT/MI](#))*

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§ 3º A audiência arbitral respeitará o princípio da privacidade, sendo reservada aos árbitros, secretários do tribunal arbitral, partes, respectivos procuradores, testemunhas, assistentes técnicos, peritos, funcionários da instituição de arbitragem e demais pessoas previamente autorizadas pelo tribunal arbitral. *(Redação dada pela [Resolução 5960/2022/DG/ANTT/MI](#))*

[Redações Anteriores](#)

§ 4º *(Suprimido pela [Resolução 5960/2022/DG/ANTT/MI](#))*

[Redações Anteriores](#)

Art. 23. A arbitragem será realizada em Brasília, Distrito Federal, Brasil, utilizando-se a língua portuguesa como idioma oficial para a prática de todo e qualquer ato.

§ 1º Os documentos produzidos em língua estrangeira poderão ser juntados desde que tenham tradução para a língua portuguesa.

Art. 24. A necessidade de realização pericial permitirá às partes indicar assistentes técnicos para acompanhar a atividade.

SEÇÃO VI

DA DECISÃO ARBITRAL

Art. 25. A sentença arbitral deve ser baseada nas leis brasileiras, incluindo as normas expedidas pela ANTT.

Parágrafo único. Não se aplicará leis estrangeiras ou equidade, independente da parte.

Art. 26. As decisões e a sentença do tribunal arbitral serão definitivas e vincularão as partes e seus sucessores.

CAPÍTULO IV-A *(Acrescentado pela [Resolução 6040/2024/DG/ANTT/MT](#))*

DO COMITÊ DE PREVENÇÃO E SOLUÇÃO DE DISPUTAS *(Acrescentado pela [Resolução 6040/2024/DG/ANTT/MT](#))*

Seção I *(Acrescentado pela [Resolução 6040/2024/DG/ANTT/MT](#))*

Da competência *(Acrescentado pela [Resolução 6040/2024/DG/ANTT/MT](#))*

Art. 26-A A ANTT e a concessionária poderão constituir comitê de prevenção e solução de disputas para prevenir e solucionar divergências de natureza eminentemente técnica, que envolvam direitos patrimoniais disponíveis, relacionadas às seguintes matérias: *(Acrescentado pela [Resolução 6040/2024/DG/ANTT/MT](#))*

I - execução de serviços e obras, inclusive soluções de engenharia mais adequadas às finalidades do contrato, e respectivo orçamento; *(Acrescentado pela [Resolução 6040/2024/DG/ANTT/MT](#))*

II - adequação de obras e serviços aos parâmetros exigidos pela regulação e pelo contrato, e respectivo orçamento; *(Acrescentado pela [Resolução 6040/2024/DG/ANTT/MT](#))*

III - avaliação de ativos e cálculo de indenizações; e *(Acrescentado pela [Resolução 6040/2024/DG/ANTT/MT](#))*

IV - ocorrência de eventos que impactem o cumprimento das obrigações nos termos assumidos no contrato, incluindo o cálculo dos impactos financeiros decorrentes desses eventos. *(Acrescentado pela [Resolução 6040/2024/DG/ANTT/MT](#))*

§ 1º A constituição do comitê de prevenção e solução de disputas poderá ser estipulada no contrato para dirimir controvérsias futuras, ou convencionado pelas partes, em instrumento autônomo, para dirimir controvérsias específicas e já existentes, devendo-se observar as disposições desta Resolução. *(Acrescentado pela [Resolução 6040/2024/DG/ANTT/MT](#))*

§ 2º A ANTT e a concessionária poderão, em comum acordo e mediante aditivo contratual, ampliar o escopo de atuação dos comitês de prevenção e solução de disputas, observado o disposto no § 3º do presente artigo. *(Acrescentado pela [Resolução 6040/2024/DG/ANTT/MT](#))*

§ 3º Além do disposto no art. 3º desta Resolução, não serão objeto de deliberação pelo comitê de prevenção e solução de disputas: *(Acrescentado pela [Resolução 6040/2024/DG/ANTT/MT](#))*

I - divergências que envolvam questões de cunho estritamente jurídico, a exemplo da matriz de riscos e do equilíbrio econômico-financeiro do contrato de concessão, admitida a submissão de conflitos relativos aos aspectos factuais subjacentes a essas questões; *(Acrescentado pela [Resolução 6040/2024/DG/ANTT/MT](#))*

II - divergências relacionadas à validade e à legitimidade dos atos praticados pela ANTT no exercício de sua atividade fiscalizatória e regulatória; e *(Acrescentado pela [Resolução 6040/2024/DG/ANTT/MT](#))*

III - divergências relacionadas à legalidade de normas regulatórias produzidas pela ANTT. *(Acrescentado pela [Resolução 6040/2024/DG/ANTT/MT](#))*

Seção II *(Acrescentado pela [Resolução 6040/2024/DG/ANTT/MT](#))*

Do grau de vinculação das decisões *(Acrescentado pela [Resolução 6040/2024/DG/ANTT/MT](#))*

Art. 26-B O comitê de prevenção e solução de disputas poderá proferir decisões de natureza vinculante ou recomendatória, devendo ser observado o disposto no contrato ou em compromisso firmado entre as partes. *(Acrescentado pela [Resolução 6040/2024/DG/ANTT/MT](#))*

§ 1º As decisões vinculantes proferidas por comitê adjudicatório têm cumprimento obrigatório e imediato, desde que observadas as diretrizes estabelecidas no art. 26-A, independente de manifestação de discordância ou insatisfação das partes. *(Acrescentado pela [Resolução 6040/2024/DG/ANTT/MT](#))*

§ 2º As decisões recomendatórias proferidas por comitê recomendatório podem subsidiar a tomada de decisão da ANTT e devem ser proferidas previamente à decisão administrativa sobre a matéria e, ainda que não sejam objeto de manifestação de discordância ou rejeição, não se tornam vinculantes. *(Acrescentado pela [Resolução 6040/2024/DG/ANTT/MT](#))*

§ 3º As decisões emitidas por comitê híbrido poderão ter caráter recomendatório ou vinculante, devendo o contrato ou as partes, em caso de inexistência de previsão contratual a respeito do comitê, previamente definir as matérias que estarão sujeitas a cada tipo de decisão. *(Acrescentado pela [Resolução 6040/2024/DG/ANTT/MT](#))*

Seção III (Acrescentado pela [Resolução 6040/2024/DG/ANTT/MT](#))

Dos tipos de comitês (Acrescentado pela [Resolução 6040/2024/DG/ANTT/MT](#))

Art. 26-C O contrato de concessão, considerando a natureza e o prazo de execução das obrigações contratuais, definirá o momento da constituição e a duração do comitê de prevenção e solução de disputas, nos seguintes termos: (Acrescentado pela [Resolução 6040/2024/DG/ANTT/MT](#))

I - comitê permanente: constituído no início do contrato, permanecendo vigente em toda a extensão temporal do contrato ou até a emissão de decisão ou recomendação sobre matéria submetida durante a vigência do contrato; (Acrescentado pela [Resolução 6040/2024/DG/ANTT/MT](#))

II - comitê temporário: constituído com prazo limitado a um período da vigência do contrato, relacionando-se a um grupo específico de obrigações ou a uma fase predeterminada de investimentos, extinguindo-se após o esgotamento dos procedimentos aplicáveis às decisões emitidas; (Acrescentado pela [Resolução 6040/2024/DG/ANTT/MT](#))

III - comitê ad hoc: constituído para tratar controvérsias específicas, extinguindo-se após o esgotamento dos procedimentos aplicáveis à decisão que gerou a sua constituição, podendo ser instaurado: (Acrescentado pela [Resolução 6040/2024/DG/ANTT/MT](#))

a) na ausência do comitê permanente ou do comitê temporário; ou (Acrescentado pela [Resolução 6040/2024/DG/ANTT/MT](#))

b) após a extinção do comitê temporário, desde que as controvérsias envolvam obras ou serviços de engenharia considerados de alta complexidade ou de grande vulto, não previstos inicialmente no contrato. (Acrescentado pela [Resolução 6040/2024/DG/ANTT/MT](#))

Seção IV (Acrescentado pela [Resolução 6040/2024/DG/ANTT/MT](#))

Da formação do comitê (Acrescentado pela [Resolução 6040/2024/DG/ANTT/MT](#))

Art.26-D Salvo acordo em contrário entre as partes, o comitê de prevenção e solução de disputas será composto por 3 (três) membros, designados da seguinte forma: (Acrescentado pela [Resolução 6040/2024/DG/ANTT/MT](#))

I - um membro indicado pela ANTT; (Acrescentado pela [Resolução 6040/2024/DG/ANTT/MT](#))

II - um membro indicado pela concessionária; e (Acrescentado pela [Resolução 6040/2024/DG/ANTT/MT](#))

III - um membro escolhido em comum acordo pelos membros designados pelas Partes, que exercerá a função de presidente. (Acrescentado pela [Resolução 6040/2024/DG/ANTT/MT](#))

§ 1º Os membros que compõem o comitê de prevenção e solução de disputas deverão observar os seguintes requisitos: (Acrescentado pela [Resolução 6040/2024/DG/ANTT/MT](#))

I - estar no gozo de plena capacidade civil; (Acrescentado pela [Resolução 6040/2024/DG/ANTT/MT](#))

II - ter formação técnica e experiência profissional reconhecidas e compatíveis com a natureza do contrato e com o objeto do comitê; e (Acrescentado pela [Resolução 6040/2024/DG/ANTT/MT](#))

III - ausência de impedimento, suspeição e conflito de interesses, conforme disposto no § 5º deste artigo. (Acrescentado pela [Resolução 6040/2024/DG/ANTT/MT](#))

§ 2º A indicação de um membro será comunicada de uma parte à outra, que disporá do prazo de 15 (quinze) dias para impugnar a indicação, sob o fundamento da inobservância dos requisitos previstos no § 1º deste artigo, salvo quando o regulamento da câmara especializada escolhida tiver prazo diverso. (Acrescentado pela [Resolução 6040/2024/DG/ANTT/MT](#))

§ 3º O membro indicado para o comitê de prevenção e solução de disputas deverá revelar qualquer fato ou circunstância que denote dúvida justificada quanto a sua imparcialidade e independência, a ensejar seu impedimento, suspeição ou configurar conflito de interesses. (Acrescentado pela [Resolução 6040/2024/DG/ANTT/MT](#))

§ 4º Todo membro do comitê de prevenção e solução de disputas deverá assinar declaração de aceitação, disponibilidade, imparcialidade e independência. *(Acrescentado pela [Resolução 6040/2024/DG/ANTT/MT](#))*

§ 5º Estão impedidos de atuar como membros do comitê de prevenção e solução de disputas as pessoas que tenham, com as partes ou com o litígio que lhes for submetido, alguma das relações que caracterizam os casos de impedimento ou suspeição de juízes, assim como qualquer situação que configure conflito de interesses, que possa influenciar de maneira imprópria e comprometer a função a ser desempenhada, aplicando-lhes, no que couber, os mesmos deveres e responsabilidades, conforme previsão contida no Código de Processo Civil ([Lei Federal nº 13.105, de 16 de março de 2015](#)). *(Acrescentado pela [Resolução 6040/2024/DG/ANTT/MT](#))*

§ 6º No desempenho de suas funções, os membros do comitê deverão proceder com imparcialidade, independência, competência e diligência. *(Acrescentado pela [Resolução 6040/2024/DG/ANTT/MT](#))*

§ 7º Os honorários dos membros indicados para o comitê de prevenção e solução de disputas deverão tomar como referência os valores sugeridos pelas câmaras especializadas, evitando-se que a execução contratual seja excessivamente onerada. *(Acrescentado pela [Resolução 6040/2024/DG/ANTT/MT](#))*

Seção V *(Acrescentado pela [Resolução 6040/2024/DG/ANTT/MT](#))*

Dos procedimentos *(Acrescentado pela [Resolução 6040/2024/DG/ANTT/MT](#))*

Art. 26-E Os atos destinados ao processamento das divergências submetidas ao comitê deverão observar os princípios da legalidade e da publicidade, ressalvadas as hipóteses legais de sigilo, primando pela oralidade e informalidade na prevenção de divergências, sem prejuízo da apresentação de pleitos por escrito. *(Acrescentado pela [Resolução 6040/2024/DG/ANTT/MT](#))*

Parágrafo único. A parte que solicitar o pronunciamento do comitê de prevenção e solução de disputas deverá notificar, por escrito, a outra parte, fornecendo descrição do evento ensejador da divergência, cópia de todos os documentos relacionados ao objeto da divergência apontada e demais elementos que julgar necessários para compreensão do fato. *(Acrescentado pela [Resolução 6040/2024/DG/ANTT/MT](#))*

Art. 26-F O contrato de concessão indicará uma ou mais câmaras especializadas de prevenção e resolução de controvérsias, preferencialmente credenciadas pela Advocacia Geral da União - AGU, nos termos do [§ 5º do art. 31 da Lei nº 13.448, de 05 de junho de 2017](#), e desde que tenha regulamento para comitês de prevenção e solução de disputas. *(Acrescentado pela [Resolução 6040/2024/DG/ANTT/MT](#))*

Parágrafo único. Caso o contrato não indique uma ou mais câmaras especializadas de prevenção e resolução de controvérsias, deverá ser indicada câmara credenciada pela Advocacia Geral da União - AGU, nos termos do [§ 5º do art. 31 da Lei nº 13.448, de 05 de junho de 2017](#), e desde que tenha regulamento para comitês de prevenção e solução de disputas. *(Acrescentado pela [Resolução 6040/2024/DG/ANTT/MT](#))*

Art. 26-G As reuniões do comitê de prevenção e solução de disputas poderão ser reservadas aos membros, partes, respectivos procuradores, testemunhas, assistentes técnicos e pessoas previamente autorizadas pelo comitê. *(Acrescentado pela [Resolução 6040/2024/DG/ANTT/MT](#))*

Art. 26-H A Manifestação fundamentada do comitê de prevenção e solução de disputas será emitida no prazo de 20 (vinte) dias úteis, salvo quando o regulamento da câmara especializada escolhida estabelecer prazo diverso, a contar da data de apresentação do documento necessário à avaliação da divergência ou da última manifestação, conforme determinação do comitê de prevenção e solução de disputas. *(Acrescentado pela [Resolução 6040/2024/DG/ANTT/MT](#))*

§ 1º O prazo a que alude o caput poderá ser estendido de comum acordo entre as partes, mantendo-se o marco inicial de contagem. *(Acrescentado pela [Resolução 6040/2024/DG/ANTT/MT](#))*

§ 2º As partes poderão pedir esclarecimentos, que se limitam a apontar e corrigir erro material, omissão, obscuridade e/ou contradição eventualmente constantes da decisão proferida pelo comitê de prevenção e solução de disputas, observado o prazo disposto no regulamento da câmara especializada ou aquele estabelecido em comum acordo entre as partes. *(Acrescentado pela [Resolução 6040/2024/DG/ANTT/MT](#))*

§ 3º As partes poderão pedir reconsideração, no prazo de 20 (vinte) dias úteis, oportunizada a manifestação da outra parte em igual prazo, ao comitê de prevenção e solução de disputas, que terá 15 (quinze) dias úteis para proferir decisão final. *(Acrescentado pela [Resolução 6040/2024/DG/ANTT/MT](#))*

§ 4º A ANTT poderá manifestar oposição ao cumprimento de decisão proferida por comitê adjudicatório no prazo de 15 (quinze) dias úteis, caso violadas as diretrizes estabelecidas nesta Resolução ou regras procedimentais contidas no regulamento da câmara escolhida. *(Acrescentado pela [Resolução 6040/2024/DG/ANTT/MT](#))*

Seção VI *(Acrescentado pela [Resolução 6040/2024/DG/ANTT/MT](#))*

Dos custos *(Acrescentado pela [Resolução 6040/2024/DG/ANTT/MT](#))*

Art. 26-I As despesas relativas ao comitê de prevenção e solução de disputas serão sempre antecipadas pela concessionária e compensadas em valor correspondente a 50% (cinquenta por cento) do dispendido, na Revisão Ordinária subsequente ao encerramento dos trabalhos do comitê e à comprovação do desembolso. *(Acrescentado pela [Resolução 6040/2024/DG/ANTT/MT](#))*

Parágrafo único. O valor referente às despesas para o funcionamento dos comitês será definido de acordo com o regulamento da câmara especializada escolhida, salvo o disposto no § 7º do artigo 26-D. *(Acrescentado pela [Resolução 6040/2024/DG/ANTT/MT](#))*

CAPÍTULO V *(Redação dada pela [Resolução 6040/2024/DG/ANTT/MT](#))*

DISPOSIÇÕES FINAIS E TRANSITÓRIAS

[Redações Anteriores](#)

Art. 27. Os contratos que não contenham a cláusula compromissória de arbitragem ou cláusula que preveja a adoção do comitê de prevenção e solução de disputas poderão ser aditados, nos termos do [art. 31, § 1º da Lei nº 13.448, de 5 de junho de 2017](#), [art. 153, da Lei nº 14.133, de 1º de abril de 2021](#), e [art. 23-A da Lei nº 8.987, de 13 de fevereiro de 1995](#), desde que observadas as regras desta Resolução. *(Redação dada pela [Resolução 6040/2024/DG/ANTT/MT](#))*

[Redações Anteriores](#)

Parágrafo único. No caso de controvérsia específica e já existente, independente de celebração de aditivo, poderá ser firmado compromisso para constituição de comitê de prevenção e solução de disputas, observados os limites previstos no caput e no § 3º do art. 26-A. *(Acrescentado pela [Resolução 6040/2024/DG/ANTT/MT](#))*

Art. 27-A. A ANTT deverá realizar a Avaliação do Resultado Regulatório da aplicação do Dispute Board constante desta Resolução. *(Acrescentado pela [Resolução 6040/2024/DG/ANTT/MT](#))*

Parágrafo único. A avaliação do Resultado Regulatório de que trata o caput deverá ser iniciada no ano de 2030 e o seu resultado deverá indicar os possíveis pontos para revisão da norma. *(Acrescentado pela [Resolução 6040/2024/DG/ANTT/MT](#))*

Art. 28. A disputa ou controvérsia que envolver exclusivamente entes integrantes da Administração Pública Federal estão excluídas do procedimento de arbitragem previsto nesta Resolução.

Art. 29. A aplicação desta Resolução respeitará as cláusulas compromissórias e as cláusulas de constituição de comitês de prevenção e solução de disputas celebradas, bem como os termos de compromisso arbitral ou de constituição de comitê firmados antes de sua vigência. *(Redação dada pela [Resolução 6040/2024/DG/ANTT/MT](#))*

[Redações Anteriores](#)

Art. 30. Esta Resolução entra em vigor na data de sua publicação.

MARIO RODRIGUES JUNIOR
Diretor-Geral

D.O.U., 17/05/2019 - Seção 1

**THE
DICKSON
POON
SCHOOL
OF LAW**

**CENTRE OF
CONSTRUCTION
LAW & DISPUTE
RESOLUTION**

KING'S
College
LONDON

2024 Dispute Boards International Survey:

**A Study on the Worldwide Use of
Dispute Boards over the Past Six Years**

Professor Renato Nazzini & Raquel Macedo Moreira

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Professor Renato Nazzini and Raquel Macedo Moreira of the Centre of Construction Law & Dispute Resolution at King's College London assert the moral right to be identified as the authors of this work.

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Foreword

by Sir Vivian Ramsey

The development of dispute boards reflects the need to have an independent and impartial panel to deal with disputes which inevitably arise on projects. In some areas, the development represented a change in the role of the Engineer who traditionally performed this task. This was because there was a perception that the Engineer might no longer be independent and impartial. In other areas, the development arose because of there being an unfulfilled dispute resolution role. Whilst the final determination of disputes falls to courts or arbitrators, a need was identified for a prior step to try to resolve disputes at an early stage and avoid the cost and time of that final determination. A dispute board has now become embedded in many standard forms of contract and on many major infrastructure projects.

The role of the dispute board varies. Some make decisions which are binding and can become final. Some make recommendations which may be adopted. More recently, the benefit of the dispute board in avoiding disputes has led to it having a dual role. Some dispute boards are standing boards, with regular visits and meetings during the project. Other dispute boards are ad hoc, only being appointed when a dispute arises, frequently just at the end of the project.

At most infrastructure, construction law or dispute board conferences there is always discussion on dispute boards based on anecdotal evidence drawn from the experience of eminent individuals.

This evidence touches on such matters as the number of dispute boards formed, their type, whether they work, whether they should be standing or ad hoc, whether dispute avoidance avoids disputes, how much they cost, whether there should be one or three members, whether there is perceived bias in members of dispute boards, how they are appointed, whether there is diversity among members and whether dispute board decisions are complied with. The list of issues goes on. The main problem, though, is that there has never been a comprehensive set of data to inform the discussions on those matters. This report changes that.

This report by two distinguished authors, supported by a steering committee and experts, provides a rigorous analysis of the responses from over 200 individuals, entities, institutions and funders covering thousands of dispute boards. This has allowed reliable data to be collected on all the topics on which there was until now, with a few exceptions, only anecdotal evidence.

The authors of the report are to be congratulated on producing such a comprehensive analysis of dispute boards. I am sure that this report will now become the most cited source of data by all those involved in dispute boards whenever the subject is discussed.

Sir Vivian Ramsey

London and Singapore

November 2024

Foreword

by Professor Renato Nazzini PhD FCIArb
Director of the Centre of Construction Law & Dispute Resolution

This report is the product of a year-long research project at the Centre of Construction Law and Dispute Resolution at King's College London. Four questionnaires were sent to individuals, entities, institutions and funders. They reported 4,019 dispute boards over a period of six years. We were supported by a steering committee of world-leading experts (Aisha Nadar, Charles Blamire-Brown, Cristina Mastrobuono, Evgeny Smirnov, Jean-Marc Coulon and Jeremy Glover), as well as by Nicholas Alexander Brown, Nicholas Gould and Murray Armes as consultants. I am grateful for their time and insights that contributed to stress-testing the questions and the results and ensuring that all different perspectives were duly taken into account. My research team at King's, and particularly my co-author Raquel Macedo Moreira, have been, as always, exceptionally professional and dedicated.

We acknowledge the limitations of the data in the methodology. Notwithstanding those limitations, this is one of the most comprehensive surveys of dispute board practice world-wide to have been published in recent years. Our hope and objective are that this study will enhance the understanding of dispute boards as a dispute avoidance and resolution method and help parties in their decision as to whether to include dispute boards in their dispute resolution clauses, choosing, if they do so, the type of dispute board that best suits the project. At the same time, the findings in this report will inform the development of best practices and guide legal reforms, when needed.

The picture that emerges from this report is, broadly, positive. Dispute boards appear to be widely used. Their cost, whilst not negligible in a sector where margins may be quite low, appears justified by their effectiveness in avoiding or reducing the scope of disputes or resolving them altogether without the need for a much more costly arbitration. Costs are a concern to users and may lead to the decision not to adopt a dispute board in the contract. However, costs should not be looked at in absolute terms but as part of a risk mitigation exercise: an increase in upfront costs may lead to significant savings later. This report provides the key empirical elements for users to carry out this balancing exercise.

Dispute avoidance measures are still not universally implemented but are gaining traction and, when deployed, appear to be reasonably successful. The enforcement of dispute board decisions continues to be quite burdensome from a legal perspective. In the absence of specific legislation, enforcement requires either an arbitration procedure under the arbitration clause in the contract or a claim for breach of contract in a national court. This is not ideal. However, the rate of compliance with dispute board decisions is reasonably high and, interestingly, does not appear to vary significantly depending on whether the dispute board determination is advisory or binding. On the other hand, problems with enforceability feature in the second place, after costs, in decisions not to adopt dispute boards in contracts. This is, therefore, certainly an issue that deserves further attention. Not surprisingly, there was support for the idea of an international convention facilitating the enforcement of dispute board decisions. Again, a topic that will require further discussion but is, potentially, promising in the medium- to long-term.

I hope that this report will add to the body of evidence on dispute boards in a meaningful way and make a positive impact on the understanding and practice of dispute boards globally. Our success will be measured, in no small part, by the debate that will be spurred by the publication of this report and I look forward to continuing to engage with practitioners and institutions world-wide on how we can make this important dispute resolution method work even better than it does today.

Professor Renato Nazzini PhD FCIArb

Director of the Centre of Construction Law & Dispute Resolution
King's College London

Introduction

The world of dispute boards

Construction projects are notoriously prone to disagreements and disputes that can hinder progress and sour relationships. In an environment where the stakes are constantly high, the need for effective dispute avoidance and resolution mechanisms cannot be overstated. Enter dispute boards: a proactive approach to managing conflicts and avoiding and resolving disputes in construction projects.

Dispute boards are said to have gained international traction after their use in the El Cajon hydroelectric power project in Honduras in 1980, funded by the World Bank.¹ Following this project, the World Bank's official documentation began to incorporate provisions related to dispute resolution mechanisms similar to dispute boards.² Between 1995 and 1996, the International Federation of Consulting Engineers (FIDIC) included provisions for appointing dispute resolution boards in its contract conditions.³ All subsequent versions of FIDIC's major standard forms of contract featured dispute resolution board provisions, establishing FIDIC as a pioneer in the regulation of dispute boards on the international stage.

Many years later, the use of dispute boards has evolved and expanded in various ways. In addition to FIDIC, other institutions and standard forms of contract have adopted dispute board rules that have contributed to the development of best practices.

Since 2000, the American Arbitration Association (AAA) has provided dispute resolution board services through the 'AAA Dispute Resolution Board Guide Specifications'.⁴ Likewise, the International Chamber of Commerce (ICC) Dispute Board Rules have been in force since 2004, with a comprehensive review of the rules having been carried out in 2015.⁵

Recent versions of the New Engineering Contract (NEC) and the Joint Contracts Tribunal (JCT) also contain references to the adoption of dispute board mechanisms.⁶

Other examples of dispute board rules and provisions can be found in initiatives from the Chartered Institute of Arbitrators (CIArb),⁷ the Dispute Board Federation (DBF),⁸ and the Institution of Civil Engineers (ICE).⁹

Initially used in large construction and infrastructure projects, dispute boards are now being used in a broader range of industries, including energy, transportation, Public-Private Partnerships (PPPs), software, digital and information technology. Widespread educational courses and practice guides provide tools allowing dispute board members to tailor procedures to a project's needs. Different practices and approaches can be seen through the different forms of dispute boards (standing or ad hoc), their operation (visits to the site, online meetings, specific procedures for submissions), their emphasis on dispute avoidance and management, and many other features.

The latest version of the FIDIC Rainbow Suite of contracts has consolidated a broader scope of the dispute board's role. In the 2017 FIDIC Rainbow Suite, composed of the Red, Yellow and Silver FIDIC Books, the Dispute Adjudication Board (DAB) became the Dispute Avoidance and Adjudication Board (DAAB). The change highlights that the key functions of the dispute board include not only solving the dispute but also avoiding its escalation altogether.

The beneficial effects of these developments are clear: parties can focus on the project instead of spending time and money disputing their claims.

Despite their crucial and effective role in dispute resolution, the study of dispute boards is relatively new. Statistical data on the use of dispute boards, for instance, is rare. Amongst the few existing studies, we point to the Inter American Development Bank (IDB) survey on dispute avoidance and resolution,¹⁰ data from the Dispute Resolution Board Foundation (DRBF) on the effectiveness of dispute avoidance/adjudication boards,¹¹ dispute review board surveys conducted by Dr Kathleen M.J. Harmon,¹² and the analysis of Brazilian court decisions on dispute boards in infrastructure contracts.¹³

- 1 Richard Appuhn, 'History and Overview of Dispute Boards Around the World', in Filip De Ly and Paul-A Gélinas (eds), *Dispute Prevention and Settlement through Expert Determination and Dispute Boards* (ICC 2017) 65; Cyril Chern, *Chern on Dispute Boards Practice and Procedure* (4th edn, Routledge 2020) 14; Peter H. J. Chapman, 'Dispute Boards on Major Infrastructure Projects' (2009) 162 *Management, Procurement and Law* 7 <<https://www.icevirtuallibrary.com/doi/epdf/10.1680/mpal.2009.162.17>> accessed 28 May 2024.
- 2 An example can be found in Clause 36 of the 1995 Standard Bidding Documents for the Procurement of Works in Smaller Contracts where the figure of the adjudicator is mentioned. *Standard Bidding Documents: Procurement of Works - Smaller Contracts (English)* (World Bank Group 1995) <<https://documents1.worldbank.org/curated/en/413491468740718861/text/multi-page.txt>> accessed 28 May 2024. See also Dispute Resolution Board Federation, 'History of the Dispute Board process and the DRBF' <<https://www.drbf.org/history>> accessed 21 November 2024.
- 3 FIDIC, *Conditions of Contract for Design-Build and Turnkey (Orange Book)* (1st edn, FIDIC 1995); FIDIC, *Works of Civil Engineering Construction (1987 Red Book) Supplement* (1st edn, FIDIC 1996)
- 4 American Arbitration Association, *AAA Dispute Resolution Board Guide Specifications Effective December 1, 2000* (AAA 2000). The latest version of that document, now co-authored with the AAA's international division, the International Centre for Dispute Resolution (ICDR), is entitled 'AAA-ICDR® Dispute Avoidance and Resolution Board – Specifications, Operating Procedures, and Hearing Rules and Procedures'.
- 5 International Chamber of Commerce, *Dispute Board Rules in force as from 1 October 2015, with Appendices in force as from 1 October 2018* (ICC 2018).
- 6 NEC4 contains the Dispute Resolution Option W3, which consists of the adoption of a 'Dispute Avoidance Board'. Likewise, in 2021, the JCT published the 'Dispute Adjudication Board Documentation 2021' (DAB 2021), designed to be used in conjunction with the 2016 JCT contracts for Design and Build (DB) and Major Projects (MP).
- 7 Chartered Institute of Arbitrators, *Dispute Board Rules* (CIArb 2014).
- 8 Dispute Board Federation, *Ad Hoc Dispute Adjudication Board Rules* (DBF 2011).
- 9 Institution of Civil Engineers, *ICE Dispute Resolution Board Procedure* (1st edn, ICE 2005). The book contains two alternative sets of procedural rules, a model dispute resolution board tripartite agreement, an application form for the appointment of a dispute board member, and the requirements for application of dispute board members to be considered on the institution's list.
- 10 Preliminary results of the IDB survey were presented in June 2023 at the DRBF Annual International Conference in Sao Paulo. As of this report's publication, the IDB has not yet published an official report on its survey.
- 11 The most recent DRBF research data relates to 2018 and addresses only a handful of issues, namely: active vs. passive dispute avoidance, number of non-binding opinions, number of binding decisions, number of contested decisions, number of decisions taken to arbitration, number of decisions overturned, and degree of user satisfaction.
- 12 In 2001, 63 attendees of the DRBF Annual Meeting were invited to complete a survey on the effectiveness of dispute review boards. Kathleen MJ Harmon, 'Effectiveness of Dispute Review Boards' (2003) 129(6) *Journal of Construction Engineering & Management* 674-79. Later, in 2002, another questionnaire was sent by the DRBF to Americans with the aim of collecting information on dispute review boards and their effect on bid prices. Kathleen MJ Harmon, 'Dispute Review Boards Effects on Bid Prices' (2004) 46(6) *Cost Engineering* 30. See also Kathleen MJ Harmon, 'Case Study as to the Effectiveness of Dispute Review Boards on the Central Artery/Tunnel Project' (2009) 1 *Journal of Legal Affairs & Dispute Resolution in Engineering & Construction* 18.
- 13 'Dispute Boards in Infrastructure Contracts', presented in July 2024, identifies and analyses judicial decisions in Brazilian higher courts that deal with dispute boards in infrastructure contracts.

Introduction

Some generic data on the use of dispute boards can also be found within comprehensive dispute resolution reports, such as the ones released yearly by dispute resolution institutions like the International Chamber of Commerce (ICC)¹⁴ and the Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada (CAM-CCBC).¹⁵

The data provided by the above-mentioned studies is valuable, and this report acknowledges the importance of previous research. However, it is noted that much of this research is now either outdated or focuses on specific aspects or geographies. This report aims to bridge that gap.

The production of this report is guided by the belief that obtaining and analysing data on the worldwide use and practices of dispute boards is crucial to understanding their functioning, the perceptions of their users, and the potential areas for their improvement and development in the future.

The research behind this report

This research was led by the Centre of Construction Law and Dispute Resolution of the Dickson Poon School of Law, King's College London ('Centre') and specifically by Professor Renato Nazzini, Director of the Centre, and Raquel Macedo Moreira, Research Associate at the Centre ('Research Team').

The Centre was founded in 1987 by Professor John Uff KC CBE, who was its first Director (1987–99) and Nash Professor of Engineering Law (1993–2002). The current Director of the Centre is Professor Renato Nazzini.

The Centre's main activities are:

- The MSc programme, taught since 1988 in London
- Conferences and public lectures on all aspects of Construction Law
- Research and publications on all aspects of Construction Law

The Centre is part of The Dickson Poon School of Law at King's College London, which is consistently ranked among the top law schools internationally.

The Research's main goal was to obtain and analyse empirical data in relation to the worldwide use of dispute boards as a dispute avoidance and resolution mechanism in projects that took place between January 2018 and December 2023 (inclusive).

This report in numbers

6

years of dispute board practice

12

months of research

173

graphs of information collected

213

respondents

307

questions asked

4,019

dispute boards reported

¹⁴ International Chamber of Commerce, *ICC Dispute Resolution 2023 Statistics* (ICC 2024) 20.

¹⁵ Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada, *2023 Facts and Figures* (CAM-CCBC 2024) 26.

Methodology

The first phase of this project consisted of extensive desktop-based research concerning the various types and uses of dispute boards. That research formed the basis of the questionnaires distributed to potential respondents.

Dispute boards can appear in many different forms and be given many different names. Common industry labels include dispute adjudication boards, dispute avoidance boards, combined dispute boards, dispute review boards, dispute advisory boards, dispute mediation boards, dispute review panels, independent dispute avoidance panels, and conflict avoidance boards. Mindful of the diversity in terminology, the Research Team has decided to adopt a broad definition of a dispute board to avoid any exclusions based on industry terminology.

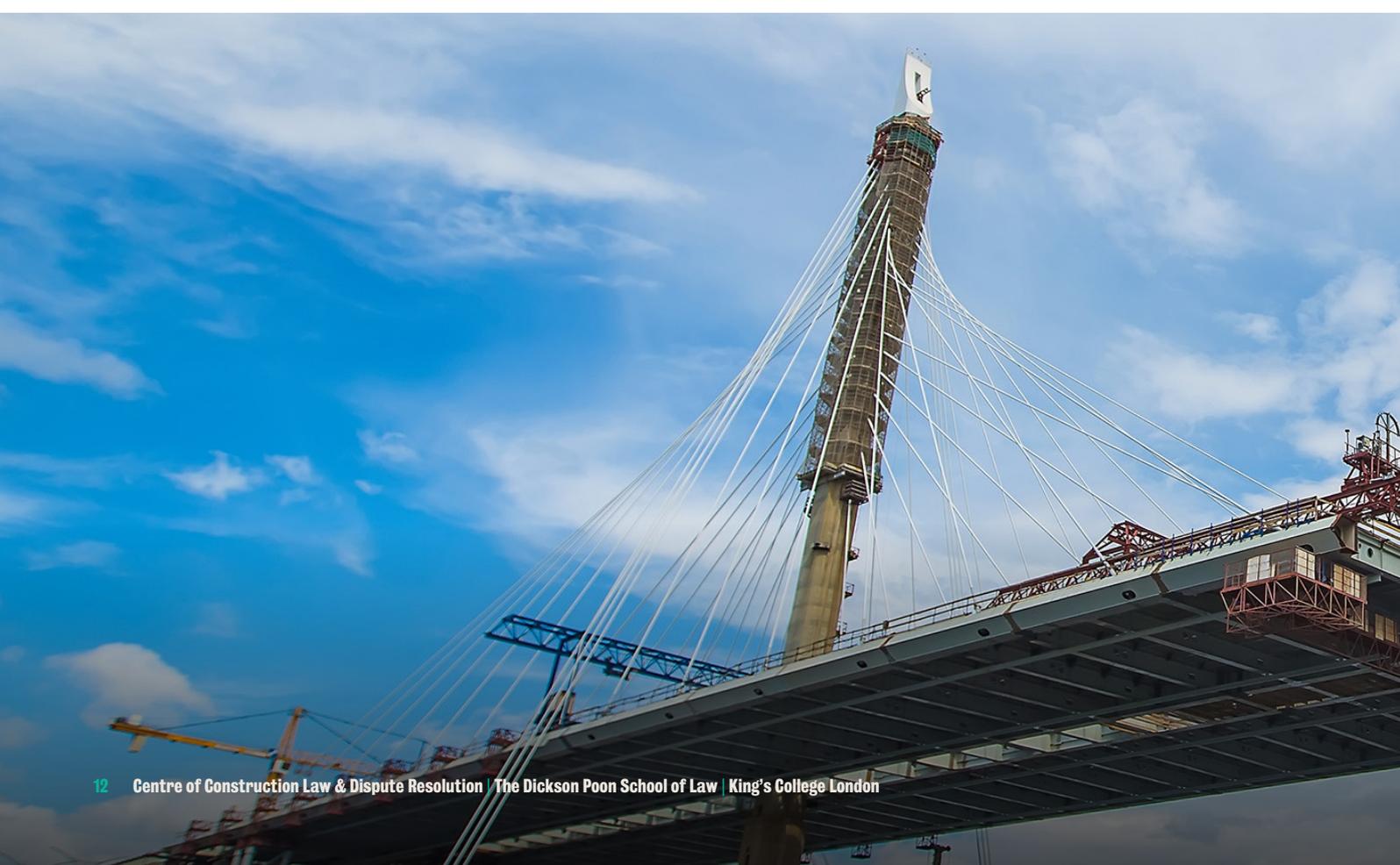
For the purposes of the surveys, a Dispute Board was defined as any *'job site dispute avoidance or resolution mechanism, constituted by individual(s) that should operate independently from the parties to the contract(s) and with the purpose of addressing the disputes of a specific Project'*. A Project was defined as any *'planned endeavour involving the systematic organisation and coordination of resources, labour, materials, and/or tasks to create, renovate, and/or enhance physical or non-physical structures. These structures may include physical constructions such as buildings or infrastructure, as well as intangible constructs such as software systems, digital platforms, or information technology solutions'*.

Survey questions were drafted broadly to capture the experience of as many respondents as possible. Respondents were also given the opportunity to provide further information whenever their experience did not reflect the options presented. This approach was taken, for instance, on survey questions concerning commonly adopted measures by the Dispute Board members in relation to efficiency, technology, or avoidance of disputes.

In terms of geographical scope, the research aimed at obtaining data that reflected the international practice of Dispute Boards. To that end, the Research Team decided not to impose any geographical restriction on the participants answering the survey.

To achieve the Research's goals, the Research Team relied on the principle of statistical inference. Accordingly, the Research Team focused on obtaining contributions from a subset of participants that reflected the diversity of the current worldwide use and practice of Dispute Boards. Lawyers, Dispute Board members, in-house counsel, engineers, architects, and policy makers from a variety of countries in all continents were invited to contribute with the aim of capturing the diversity of individuals and institutions currently involved in the practice of Dispute Boards.

For transparency, this report includes an annex detailing the profile of the research's respondents, including information on their geographical and professional characteristics.



Methodology

Data was gathered from four different types of respondents, namely:

- **Individuals:** a physical persons whose practice involves Dispute Boards.
- **Entities:** commercial or financial entities (eg companies, joint ventures, associations, etc.) whose activity involves Dispute Boards.
- **Institutions:** institutions, or their respective nominating bodies, which have (or could have) been requested to intervene in the constitution or functioning of a Dispute Board.
- **Funders:** persons or organisations that funded or financed a Project for which a Dispute Board was considered or adopted.

A separate survey was developed for each of the above-mentioned categories. In preparing the survey questionnaires, the Research Team consulted a steering committee of experts and individual consultants to test the quality, representation, and accuracy of the questions developed.

The steering committee was composed of the following experts:

- Aisha Nadar
- Charles Blamire-Brown
- Cristina Mastrobuono
- Evgeny Smirnov
- Jean-Marc Coulon
- Jeremy Glover

In addition, the following experts were invited as consultants:

- Nicholas Alexander Brown
- Nicholas Gould
- Murray Armes

The surveys were conducted from March 2024 until July 2024.

The collection of data from Individuals, Entities, and Funders was completely anonymous. Institutions, however, were asked to identify themselves and agree to be identified in the research outputs. Accordingly, this Report includes a list of all Institutions that responded to the survey.

Number of responses obtained

A total of 213 respondents provided input in response to our surveys. Below is a breakdown of the number of responses by category of respondents:

- 156 Individuals
- 34 Entities
- 18 Institutions
- 5 Funders

Since respondents could skip any given question, the number of responses to each question is specified in this report.

This report relies on the input provided by the respondents. Accordingly, the Research Team cannot account for any inaccuracies in the responses provided.

The Research Team acknowledges the possibility that the same Dispute Board may have been reported by multiple participants. However, as responses were provided anonymously, it was not possible to identify or eliminate potential overlaps in the data presented in this report.

Ethical Guidelines and Data Protection

This research complies with King's College London research ethics requirements and the processing of personal information will be handled under the terms of UK data protection law, including the UK General Data Protection Regulation (UK GDPR) and the Data Protection Act 2018.





Executive Summary

This report is divided into the following parts:

- Part I** addresses the answers given by Dispute Board users, meaning individuals whose practice involved Dispute Boards ('Individuals') and entities (eg companies, joint ventures, associations, etc) whose activity involved Dispute Boards ('Entities').
- Part II** addresses the answers given by institutions administering, or assisting in, Dispute Board procedures ('Institutions').
- Part III** addresses the answers given by organisations that funded projects for which Dispute Boards were considered or adopted ('Funders').
- Part IV** compiles all respondents' answers relating to issues of miscellaneous nature.

The Annexes to this report include the profile of all respondents, a summary of the key findings of this research and acknowledgements.

Number of Dispute Boards over the past five years (2018–2023). Apart from a high record number in 2018, the number of reported Dispute Boards has not varied significantly during the past five years, including the years that were most affected by COVID-19 restrictions, meaning 2020 and 2021.

For the period between January 2018 and December 2023, Individuals reported 3,323 Projects, 50.9% of which included Dispute Boards. 31.1% of those were ad hoc Dispute Boards, whereas the remaining 69.9% were standing Dispute Boards. Entities reported 530 Projects, 40.9% of which included Dispute Boards. 59.4% of those were ad hoc Dispute Boards, whereas the remaining 40.6% were standing Dispute Boards. Institutions reported 219 Dispute Boards, out of which 8.7% were ad hoc Dispute Boards and 91.3% were standing Dispute Boards. Funders reported 2,464 Projects, 76.7% of which included Dispute Boards. Out of those, 26.1% were ad hoc Dispute Boards, whereas the remaining 73.9% were standing Dispute Boards.

Policies and rules for the adoption of Dispute Boards. 41% of Entities and 100% of Funders indicated that they had a rule or policy for including a Dispute Board in all or certain Projects in which they were involved. 26% of Entities and 75% of Funders, however, reported having discussed the inclusion of a Dispute Board in the contract but then decided not to include it. Amongst the main reasons behind that decision were the costs of the Dispute Board, as indicated by 85% of Entities and 67% of Funders.

The basis for the constitution of the Dispute Board. Most of the Dispute Boards reported were based on provisions contained in standard forms of contract. This was the case for 65% of the Dispute Boards reported by Individuals. Of the Dispute Boards reported by Entities, 62% were constituted based on provisions contained in standard forms of contract. In the case of Funders, 90% of the reported Dispute Boards were constituted based on provisions contained in standard forms of contract.

Composition of the Dispute Boards. Individuals reported that 49% of Dispute Boards were composed of three members, whilst in 15% of cases, the Dispute Board had only one member. Entities reported that 25% of Dispute Boards were composed of one member, whilst in 23% of cases, the Dispute Board had three members. Institutions reported that 26% of Dispute Boards were composed of three members, whilst in 13% of cases, the Dispute Board had only one member. For many of the Dispute Boards reported, there was no information provided concerning the composition of the Dispute Board.

Parties' involvement in the nomination of the Dispute Board members. In most cases, parties were involved in the nomination of the Dispute Board members. Individuals reported that in 88% of the Dispute Boards in which they were involved, the parties took part in the nomination of the Dispute Board members, either alone or with the participation of an Institution in the nomination process. In the case of Entities, that rate decreased to 66%.

Qualifications and attributes of the Dispute Board members. Individuals reported that in 49% of the Dispute Boards in which they were involved, there was an express requirement for the Dispute Board members to have specific qualifications or attributes. In the case of Institutions, the rate was also 49%, whereas in Entities' experience, the rate was 28%. The most required qualifications or attributes reported by Individuals and Entities were experience in the interpretation of construction and/or engineering contract documentation, experience in the sector relevant to the Project, and impartiality and independence, in that order. Institutions also added that it was important that Dispute Board members were available to perform their duties.

User preferences. Survey respondents preferred Dispute Boards, which are standing rather than ad hoc (83% of Individuals, 72% of Entities, and 75% of Funders), are composed of three members (64% of Individuals, 67% of Entities, and 75% of Funders), and produce findings that are binding (36% of Individuals, 46% of Entities, and 50% of Funders).

Dispute Board functioning and procedures. Individuals reported that it was most common for site visits and meetings with the Dispute Board to have to occur at least once every 91 to 120 days. Entities reported an equal frequency of provisions establishing that regular meetings should occur at least once every 31 to 60 days, 61 to 90 days, and 91 to 120 days. The most frequently adopted measures to improve efficiency were meetings (either in person or remotely), submission guidelines and time limits, and deciding cases on a 'documents only' basis. In addition, the electronic exchange of correspondence was reported as the most common technological measure implemented by Dispute Boards.

Values, causes and categories of claims. The most common value disputed reported by Individuals was between \$2,000,001 and \$5,000,000. For Entities, equally common reported values were between \$1,000,001 and \$2,000,000 and \$5,000,001 and \$10,000,000. In the experience of Individuals, the most frequent causes of disputes brought before the Dispute Board were changes by clients (42%), client's lack of information or decisiveness (30%), and inadequate contract administration (27%). For Entities, the causes indicated were changes by the client (36%), inaccurate design information (36%), and client's lack of information or decisiveness (28%). The most frequent categories of claims brought before Dispute Boards were extension of time, loss and expense and/or damages for delay and/or disruption, and hardship, force majeure, or unexpected events.

Duration of Dispute Board process. The entire Dispute Board process commonly lasted between 76 and 90 days. Individuals and Entities have indicated that the complexity of the case was the most common factor affecting the length of the process.

Dispute Board effectiveness. 50% of Individuals and 32% of Entities reported that, in their experience, the Dispute Board adopted dispute avoidance measures very often or always. In Individuals' experience, the most common result of those measures was the dispute being completely avoided, whereas Entities reported that the most common scenario was that the dispute was relatively reduced. Most adopted dispute avoidance measures included conducting regular project meetings to discuss progress, challenges, and potential issues.

Binding nature of Dispute Board findings. 30% of Individuals indicated that the Dispute Boards in which they were involved issued binding decisions while 27% of Individuals indicated Dispute Board's recommendations as their most common experience. Entities, instead, reported that 32% of the Dispute Boards in which they were involved issued binding decisions while 15% issued recommendations. For the remaining cases, the nature of the findings was either not reported or unknown.

Parties' compliance with Dispute Board findings. In cases in which the Dispute Board's findings were recommendations, the most common scenario reported by Individuals was that the parties complied with those findings 'most of the time', whereas Entities indicated that their most common experience was that parties only 'sometimes' complied with recommendations. In cases in which the Dispute Board's findings were binding decisions, the most common scenario in the Individuals' and Entities' experiences was that the parties complied with those findings 'most of the time'.

Subsequent litigation or arbitration. The most common experience amongst Individuals and Entities was that the Dispute Board process was a mandatory condition for commencing subsequent proceedings. Still, most respondents indicated that subsequent proceedings, such as litigation or arbitration, were only commenced between 0% and 10% of the time. In cases in which subsequent procedures were commenced, the most common experience reported was that the decision reached in subsequent proceedings was never substantially different from the decision of the Dispute Board.

Enforcement of a Dispute Board decision. Very few respondents have been involved in the enforcement of a Dispute Board decision. In most of the cases reported, enforcement took place by means of an arbitral tribunal's decision, meaning either an interim measure, interim award, or a final award. For most of those respondents, the enforcement of a Dispute Board decision was granted between 91% and 100% of the time.

Costs of the Dispute Board. Respondents indicated that, most commonly, there was no provision in the contract establishing the Dispute Board's fees. In the respondents' experience, the most common scenario was agreeing on a provision establishing a monthly retainer fee. The most common aggregated value of the retainer fee paid to the Dispute Board was indicated as less than \$25,000 per year. The most common value of a Dispute Board members' hourly fee reported was between \$201 and \$300. The most common value of a Dispute Board's daily fee reported was between \$1,001 and \$3,000.

Most Institutions that offer to set the fees of the Dispute Board said that they did not commonly do so. When they did, however, the most commonly established amount was between \$50,001 and \$75,000 per year. Institutions also reported to prefer to establish a daily fee instead of an hourly fee. The most common value of the Dispute Board members' daily fee reportedly established by Institutions was between \$0 and \$2,000.

In terms of the total costs of the Dispute Board, Individuals reported that the most common range of costs in their experience was between \$100,001 and \$200,000. Entities, instead, reported that the most common range of costs in their experience was between \$200,001 and \$300,000. In both cases, respondents confirmed that the amounts reported tended to represent between 0% and 0.5% of the total costs of the Projects.

Involvement of external specialists in the Dispute Board process. The respondents' experiences were varied. 45% of Individuals and 48% of Entities indicated that they never or rarely saw the involvement of external lawyers in the Dispute Board process, whereas 39% of Individuals and 32% of Entities indicated that they always or most of the time saw the involvement of external lawyers in the Dispute Board process. Likewise, 39% of Individuals and 56% of Entities indicated that they never or rarely saw the involvement of external experts in the Dispute Board process, whereas 33% of Individuals and 36% of Entities reported that they always or most of the time saw the involvement of external experts in the Dispute Board process.

The perception of Dispute Board users. Most Individuals (50%) found the Dispute Board extremely useful in avoiding disputes, whereas most Funders (75%) found it very useful, and most Entities (38%) found the Dispute Board only somewhat useful in avoiding disputes. Most Individuals were satisfied with the average duration (45%) and cost (50%) of the Dispute Board process. In the case of Entities, most were satisfied with the average duration of the Dispute Board process (32%) but neither satisfied nor dissatisfied with the average costs of the Dispute Board process (40%). As to Funders, most indicated that they were neither satisfied nor dissatisfied with the average length (75%) and cost (50%) of the Dispute Board process.

Suspicion of bias of Dispute Board member. 83% of Individuals have only 'very rarely' (ie between 0% and 10% of the time) suspected a Dispute Board chair of bias. The rate decreased slightly when Individuals were asked about members of the Dispute Board other than the chair or the sole member of a single-member Dispute Board. 74% of Individuals reported 'very rarely' suspecting those other members to be biased. Entities suspected bias more often than Individuals. Only 48% of Entities reported 'very rarely' suspecting the chair member was biased. Interestingly, the same percentage of Entities only 'very rarely' suspected that the other members of a non-single-member Dispute Board were biased. For both Entities and Individuals, the leading reason for any suspicions of bias they had was the relationship between the Dispute Board member in question and the other party or its representatives.

Diversity. Most Individuals (42%) found that the average composition of the Dispute Board was only a 'little diverse'. Entities, instead, were divided between the belief that the composition of the Dispute Board was 'diverse' (36%) or a 'little diverse' (36%). While most Individuals reported believing that diversity has improved in the past five years (41%), most Entities indicated that they were not sure (50%).

Institutional lists. 62% of Institutions had a panel or list of Dispute Board members. Out of those, 10% of Institutions had a rule or policy requiring that appointments made by Institutions be limited to the Institution's panel or list of Dispute Board members. Institutions reported that the most important criteria for individuals to join their panel or list of Dispute Board members were the technical background of the Dispute Board member and the experience of the Dispute Board member in the interpretation of construction and/or engineering contract documentation. 75% of Institutions with a panel or a list of Dispute Board members do not have any Continuing Professional Development (CPD) requirements with which a Dispute Board member must comply to join (or be kept on) the panel or list. 67% of Institutions made their panel or list available to the public. Only half of Institutions considered their list or panel diverse or had implemented measures to improve the diversity of their panel/list of Dispute Board members in the last five years. 58% of Institutions reported that they did not keep diversity data related to their appointment of Dispute Board members.

Institutional services. Most Institutions offered the services of appointing a Dispute Board member or deciding on a challenge against a Dispute Board member. Still, only four challenges were reported against the nomination or continuation of services of a Dispute Board member over the course of the six-year survey period (2018-23), with one against the chair or single member of the Dispute Board, and the other three against other Dispute Board members. None of the four challenges was granted by the relevant Institution. 46% of Institutions indicated that they offered the services of administering the Dispute Board process and fixing the fees of Dispute Board members. Only a minority of Institutions reported that they offered the service of reviewing a decision rendered by the Dispute Board, and only one request for a review of a Dispute Board decision was reported by an Institution over the 2018–23 survey period.

Funders' practices. All Funders indicated that they were not commonly involved in the negotiation of the agreement between the parties and the Dispute Board. 50% of Funders indicated that they were only sometimes involved in the Dispute Board process, while the other 50% indicated that they were only rarely involved in the Dispute Board process. Aspects of the Dispute Board process in which Funders were most involved included, at an equal rate, their participation in the negotiations related to the dispute, their sustaining of the costs for hiring external counsel or party's experts, and their involvement in the appointment of Dispute Board members.

International Dispute Board convention. 58% of Individuals, 63% of Entities, 92% of Institutions, and 50% of Funders confirmed that they believe that the construction industry would benefit from the existence of an international convention facilitating circulation and enforcement of Dispute Board decisions.

Part I

Dispute Board Users



Chapter 1: Use of Dispute Boards

1. Annual use of Dispute Boards

Individuals and Entities were asked to indicate the number of Dispute Boards in which they were involved between January 2018 and December 2023 (inclusive). For each of those calendar years, respondents indicated (i) the number of new Projects in which they were involved, (ii) how many of those Projects provided for the constitution of a Dispute Board, and (iii) how many of those Dispute Boards were of an ad hoc nature (as opposed to standing Dispute Boards).

Figure 1 compiles the responses given by Individuals, reporting 3,323 Projects over the course of six years. 50.9% of those Projects (ie 1,692) included Dispute Boards, out of which 31.1% were ad hoc Dispute Boards (ie 527) and 69.9% of Dispute Boards of standing nature (ie 1,165).

A breakdown of the numbers reported for each of the years considered is displayed below.

Figure 1: Number of Dispute Boards in which Individuals were involved

Based on 134 responses received

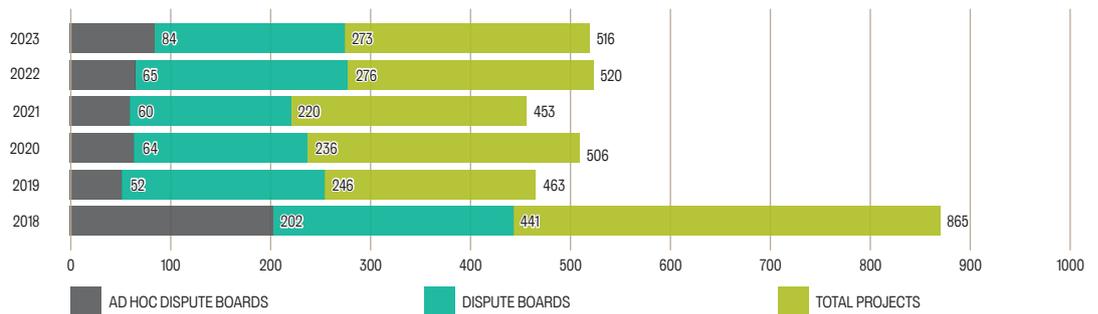
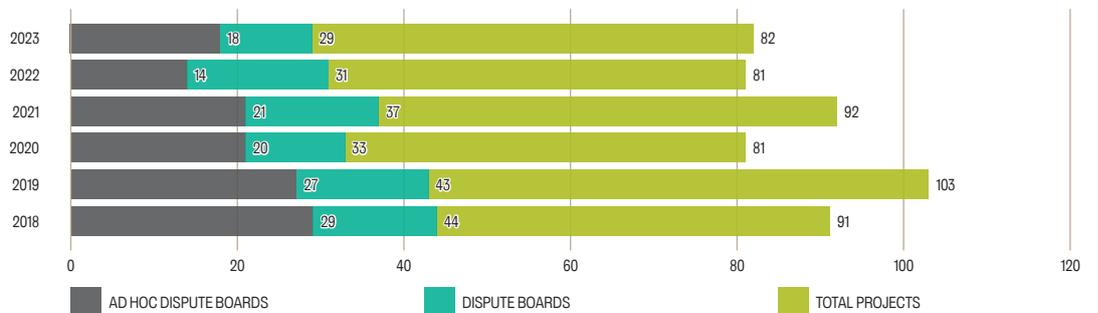


Figure 2 compiles the responses given by Entities, reporting 530 Projects over the course of six years. 40.9% of those Projects (ie 217) included Dispute Boards, out of which 59.4% were ad hoc Dispute Boards (ie 129) and 40.6% were standing Dispute Boards (ie 88).

A breakdown of the numbers reported for each of the years considered is displayed below.

Figure 2: Number of Dispute Boards in which Entities were involved

Based on 27 responses received



The charts above indicate a significant use of Dispute Boards in the context of different Projects initiated between 2018 and 2023. Apart from the year 2018 in the case of Individuals' responses, the data collected indicates a stable number of Projects and a nearly constant rate of standing Dispute Boards versus ad hoc Dispute Boards.

The data does not indicate a significant increase or decrease in the number of Projects during the years that were most affected by COVID-19 restrictions, meaning 2020 and 2021. In the same period, there was no significant rise or reduction in the proportion of Projects that included a Dispute Board.

2. Dispute Board usage policies

Entities were asked whether they had any rule or policy for including a Dispute Board in all or certain Projects in which they were involved. Figure 3 indicates that 59% of the respondents did not have a policy of this sort.

Figure 3: Do you have a policy to include Dispute Boards in your Projects? (Entities' responses)

Based on 27 responses received



We asked Entities who had a policy to adopt Dispute Boards for certain Projects what that policy was. The responses obtained are reported below.

- | *If the project is large and complicated*
- | *JICA ODA Loan Project Policy*
- | *All underground projects must have a DRB [sic]*

3. Discussions on including Dispute Boards

Entities were also asked whether the inclusion of a Dispute Board in the contract was ever discussed, but then a decision was made not to include it.

Figure 4 indicates that only 26% of Entities considered the inclusion of a Dispute Board in their project but ended up deciding not to implement it.

Figure 4: Have you ever discussed including a Dispute Board in the contract, but then the decision was taken not to include it? (Entities' responses)

Based on 27 responses received

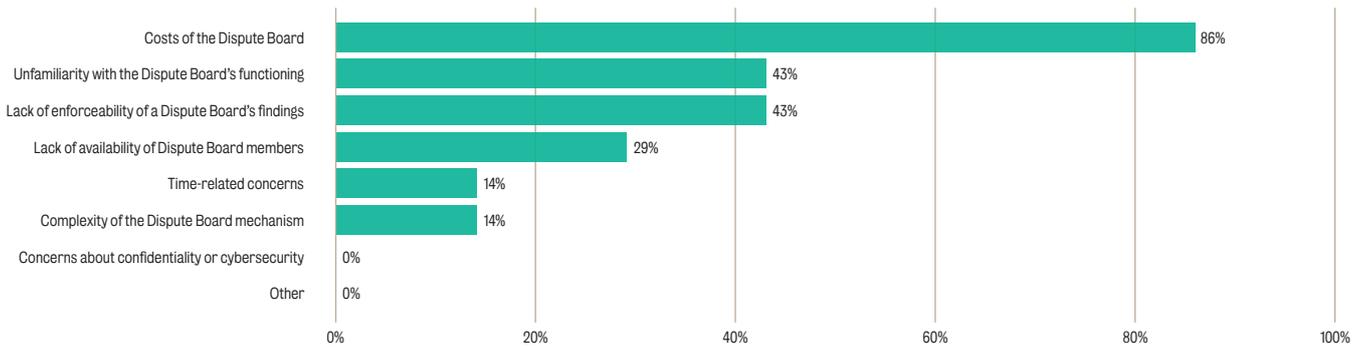


4. Reasons for not using Dispute Boards

To Entities who replied 'yes' to having decided not to include a Dispute Board in their contract after having considered it, were asked for the reasons behind that decision.

Figure 5 shows that the most common reason reported was the cost of the Dispute Board. Second place is a tie between Entities' unfamiliarity with the Dispute Boards' functioning and the lack of enforceability of a Dispute Boards findings.

Figure 5: Entities' reasons for deciding against the inclusion of a Dispute Board in the contract
Based on 7 responses received. Respondents were able to select more than one option if applicable



The Entities' concerns regarding the costs of Dispute Boards must be read in context. Chapter 5 of this report deals with the costs involved in the constitution and operation of a Dispute Board.

Chapter 2: Dispute Board characteristics

5. Use of standard forms of contract

The constitution of a Dispute Board in a Project may arise from the parties' initiative or from the use of standard forms of contract which contain the Dispute Board provisions.

With that in mind, Individuals and Entities were asked to consider all the new Projects in which they were involved in between January 2018 and December 2023 that provided for the constitution of a Dispute Board and to indicate the number of Projects in which the underlying contract(s) was a standard or model form of contract (as opposed to a bespoke contract).

Figure 6 and Figure 7 indicate that, out of 1,692 Dispute Boards reported by Individuals, 65% were constituted based on provisions contained in standard forms of contract.

Figure 6: Number of Dispute Boards based on standard forms of contract (Individuals' responses)
Based on 136 responses received

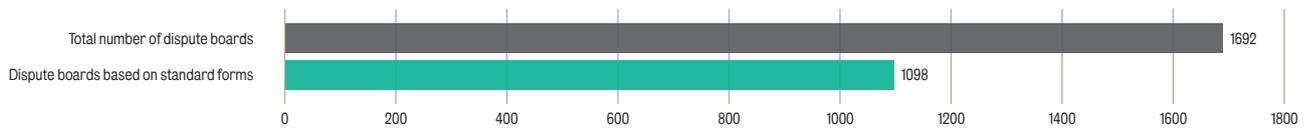


Figure 7: Percentage of Dispute Boards based on standard forms of contract (Individuals' responses)
Based on 136 responses received

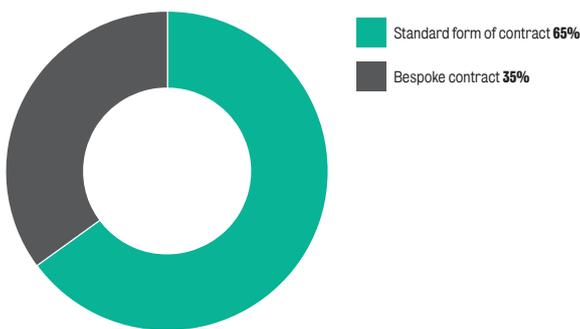


Figure 8 and Figure 9 show that, out of 217 Dispute Boards reported by Entities, 62% were constituted based on provisions contained in standard forms of contract.

Figure 8: Number of Dispute Boards based on standard forms of contract (Entities' responses)
Based on 27 responses received

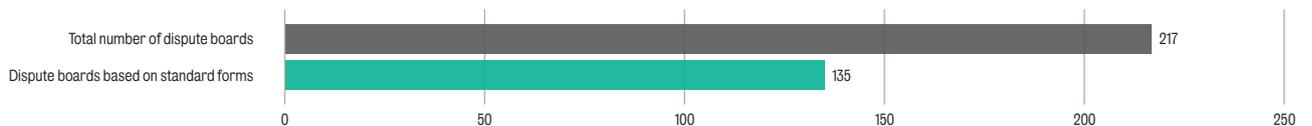
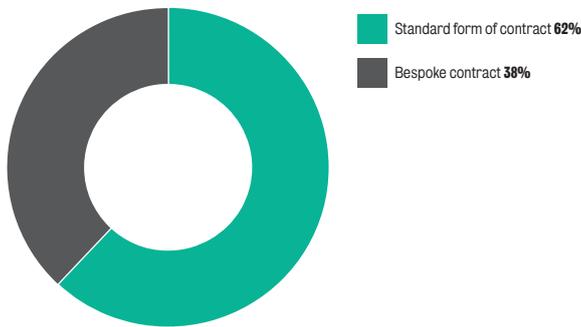


Figure 9: Percentage of Dispute Boards based on standard forms of contract (Entities' responses)
Based on 27 responses received



The data indicates a connection between the adoption of Dispute Boards and standard forms of contract, even though a significant number of bespoke contracts also provide for Dispute Boards.

6. Most frequently used standard forms of contract

Still on the topic of standard forms of contract, Individuals and Entities were asked to rank common standard or model forms of contract from most to least frequently used.

Figure 10 indicates that the top three results in the Individuals' ranking of the most common standard forms of contract were FIDIC, the American Institute of Architects (AIA), and ConsensusDOCS, in that order.

Figure 10: Individuals' ranking of most frequently used forms of standard contracts
Based on 97 responses received

1st Ranked	FIDIC
2nd Ranked	American Institute of Architects (AIA)
3rd Ranked	ConsensusDOCS

Other frequently used standard or model forms of contract mentioned by Individuals are listed below in alphabetical order.

Australian Department of Transport and Main Roads Infrastructure (DTMR) contracts	Joint Contracts Tribunal (JCT)
Australian Standards AS4000	Massachusetts Bay Transportation Authority (MBTA) contract
Cahier des Clauses Administratives Générales (CCAG TRAVAUX) – France	Namibia Central Procurement Board's General Conditions of Contract
Construction Industry Development Authority (CIDA) contracts – Sri Lanka	New Engineering Contract (NEC)
Detroit Department of Transportation (DDOT) contract	North Carolina Department of Transportation (NCDOT) contract
DRBF Model Documents	Ohio Department of Transportation (OHIO DOT) contract
Engineering Advancement Association of Japan (ENAA) model forms	Oman Standard Conditions for building and civil engineering works
Engineers Joint Contract Documents Committee (ECJD)	Public Procurement and Disposal of Public Assets Authority (PPDA) Uganda form of Contract
EPC model contract – Chile	Queensland Government Department of Main Roads TIC-CO
Florida Department of Transportation Standard Contract for Bridge and Road Construction	Standard rules of the Peruvian Law N. 30255 for State Procurement
GC21 Construction Contract – Australia	Standard rules of the Vietnamese Decree 37/2015/Vietnam on Construction contracts
General Conditions of Contract (GCC) – South Africa	State of California, Department of Transportation contract
Infrastructure Ontario model contracts	Transport for New South Wales Standard Contract – Australia
Institution of Chemical Engineers (IChemE) Forms of Contract	US Department of Transportation, City and Government Standard Specifications
Institution of Civil Engineers (ICE) Conditions of Contract	World Bank EPC Standard Form of Contract
Joint Built Contracts Committee (JBCC) – South Africa	

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Figure 11 indicates that the top three results in Entities' ranking of most common standard forms of contract were FIDIC, ConsensusDOCS, and Engineer's Joint Contract Documents Committee (EJCD), in that order.

Figure 11: Entities' ranking of most frequently used forms of standard contracts
 Based on 20 responses received

1st Ranked	FIDIC
2nd Ranked	ConsensusDOCS
3rd Ranked	Engineer's Joint Contract Documents Committee (EJCD)

Other frequently used standard or model forms of contract mentioned by Entities are listed below in alphabetical order.

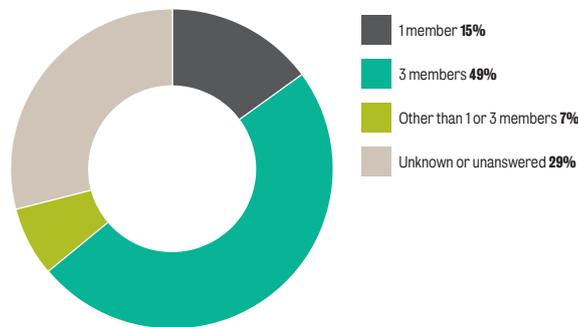
Agency standard form: LA Metro, DC Water	Joint Contracts Tribunal (JCT)
American Institute of Architects (AIA)	Korean Standard Contract Format (from Companies)
General Conditions of Contract for Construction Works July 2016 (JICA)	New Engineering Contract (NEC)
ICC Model Turnkey Contract for Major Projects	Standard rules of the Peruvian Law N. 30255 for State Procurement
Institution of Chemical Engineers (IChemE) Forms of Contract	Standards Contract requirement per Florida Department of Transportation
Institution of Civil Engineers (ICE) Conditions of Contract	

7. Composition of the Dispute Boards

Individuals and Entities were asked about the use of Dispute Boards in new Projects between January 2018 and December 2023 and whether those Dispute Boards were constituted by a single member, three members, or a different number of members.

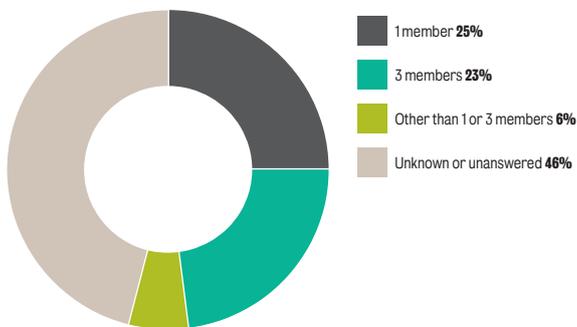
Figure 12 illustrates the responses given by Individuals, indicating that 49% of the Dispute Boards were composed of three members.

Figure 12: Composition of the Dispute Board (Individuals' responses)
 Based on 137 responses received



Entities reported that more of the Dispute Boards with which they were involved were composed of one member than three members. However, Entities answered this question only in relation to 54% of the Dispute Boards they reported; for the remaining 46% of reported cases, the composition of the Dispute Board was unknown.

Figure 13: Composition of the Dispute Board (Entities' responses)
Based on 27 responses received



8. Form of appointment of the Dispute Board

Individuals and Entities were asked how the Dispute Boards were appointed. Specifically, they were asked to indicate the number of occasions in which the Dispute Board was appointed (i) solely by the parties, (ii) solely by an Institution, or (iii) by a combination of both methods.

Figure 14 indicates that in 88% of the Dispute Boards reported by Individuals, the parties were involved in the nomination of the Dispute Board members, either alone (50%) or with the participation of an Institution in the nomination process (38%).

Figure 14: Appointment of the Dispute Board (Individuals' responses)
Based on 136 responses received

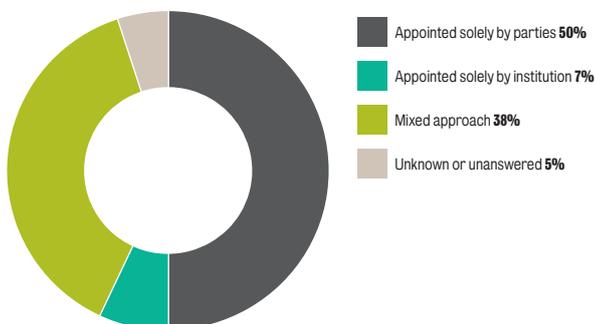
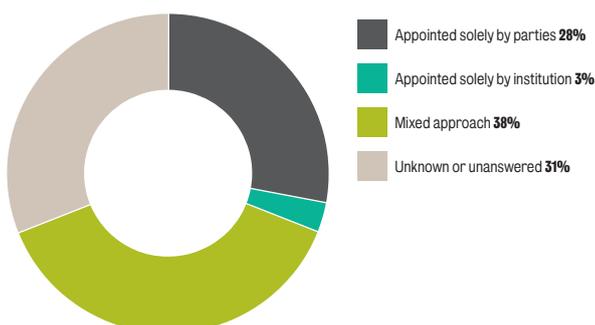


Figure 15 shows that in 66% of the Dispute Boards reported by Entities, the parties were involved in the nomination of the Dispute Board members, either alone (28%) or with the participation of an Institution in the nomination process (38%). In relation to 31% of the Dispute Boards reported by Entities, no information was provided as to how the members of those Dispute Boards were appointed.

Figure 15: Appointment of the Dispute Board (Entities' responses)
Based on 26 responses received



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Individuals and Entities were also asked to rank Institutions commonly designated or requested to intervene in the constitution or operation of a Dispute Board.

Figure 16 indicates that the top three results in Individuals' ranking of most frequently designated Institutions were CIArb, FIDIC, and AAA, in that order.

9. Most frequently designated Institutions

Figure 16: Individuals' ranking of most frequently designated Institutions

Based on 86 responses received

1st Ranked	CIArb
2nd Ranked	FIDIC
3rd Ranked	American Arbitration Association (AAA)

All other Institutions mentioned by Individuals are listed below in alphabetical order.

(Local) Construction Industry Arbitration Commission	DBF
ACES	DRBF
ACICA	DRCN NEPAL
Arbitral Foundation of Southern Africa	DTMR prequal panel
Association of Arbitrators (South Africa)	FGV CMA (Brazil)
Association of Arbitrators of Southern Africa	HKIAC
Australian state government infrastructure contracts	ICC
BADAPSKI (THE BOARD OF ADR & ARBITRATION)	ICDR
CAM Santiago	ICE
CAM-CCBC (Brazil)	Infrastructure Ontario
CBMA	Institute of Arbitrators of Botswana
Centro de Análisis y Resolución de Conflictos de la Pontificia Universidad Católica del Perú	National Construction Council of Tanzania
Centro de Arbitraje de la Cámara de Comercio de Lima	PADSK (Institute of Dispute Board for Construction Indonesia)
CIDA – Construction Industry development Authority – Sri Lanka	RICS
CIESP CMA (Brazil)	SIAC
COLEGIO INGENIEROS DEL PERÚ-MEMBER OF THE CENTER FOR ARBITRATION AND DISPUTE RESOLUTION (CARD)-CD LIMA.	South Africa Institution of Civil Engineers
CONSENSUS	Transport for New South Wales
CREA-MG & CAMARA FGV	Uganda Institution of Professional Engineers (UIPE)

Figure 17 indicates that the top three results in Entities' ranking of most frequently designated Institutions were AAA, CIArb, and FIDIC, in that order.

Figure 17: Entities' ranking of most frequently designated Institutions

Based on 19 responses received

1st Ranked	American Arbitration Association (AAA)
2nd Ranked	CIArb
3rd Ranked	FIDIC

All other Institutions mentioned by Entities are listed below in alphabetical order.

British Court Law	ICC
CONSENSUS	ICDR
DRF	ICE
DRBF	

10. Pathological scenarios in the constitution of the Dispute Board

A poorly written dispute resolution clause may create obstacles to the constitution of a Dispute Board. For instance, it may refer to an inexistent, incapable, or misnamed appointing authority. Individuals and Entities were asked if they had encountered these so-called pathological scenarios.

Figure 18 shows that Individuals most often do not encounter such pathological scenarios. When they do, they tended to involve a scenario in which the designated institution does not exist.

Figure 18: Individuals' ranking of most common pathological scenarios regarding the constitution of the Dispute Board

Based on 87 responses received

1st Ranked	There was no pathological scenario
2nd Ranked	The designated appointing authority did not exist
3rd Ranked	The designated appointing authority existed but was misnamed
4th Ranked	The designated appointing authority existed but was factually incapacitated to act as appointing authority
5th Ranked	The designated appointing authority appointed from a closed list that was unsatisfactory (eg, undisclosed, lacking in diversity, too short or lacking manifestly suitable candidates)

Figure 19 shows that the most common pathological scenario regarding the constitution of the Dispute Board reported by Entities was the situation in which the designated Institution did not exist.

Figure 19: Entities' ranking of most common pathological scenarios regarding the constitution of the Dispute Board

Based on 16 responses received

1st Ranked	The designated appointing authority did not exist
2nd Ranked	There was no pathological scenario
3rd Ranked	The designated appointing authority existed but was misnamed
4th Ranked	The designated appointing authority existed but was factually incapacitated to act as appointing authority
5th Ranked	The designated appointing authority appointed from a closed list that was unsatisfactory (eg, undisclosed, lacking in diversity, too short or lacking manifestly suitable candidates)

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Entities and Individuals also had the option of indicating 'Other' pathological scenarios commonly encountered in their practice. The responses received are reported below.

- No 'other' party could be involved.
- No institution was designated to intervene.
- One party avoided to appoint a DB [sic] Member and went directly to arbitration.
- One person board appointed by Principal (Employer).
- The appointing authority is named as President FIDIC but the nominee is not accepted by the Employer.
- The appointing authority was nonresponsive.
- The designated appointing authority was not trusted to provide a competent candidate.
- The Dispute Board didn't exist while the Particular Condition mention it.
- The EPC contractor selected a known individual with disputed experience.

11. Required qualifications or attributes of Dispute Board members

Another point addressed in the survey concerned the adoption of contractual provisions requiring that the Dispute Board members possess specific qualifications or attributes.

Figure 20 indicates that 50% of the Projects reported by Individuals did not contain an express requirement for the Dispute Board members to have a specific qualification or attribute. In 49% of the Projects reported, however, specific qualifications or attributes were required. For the remaining 1% of the cases, no information was provided.

Figure 20: Requirements for specific qualifications or attributes (Individuals' responses)
Based on 131 responses received

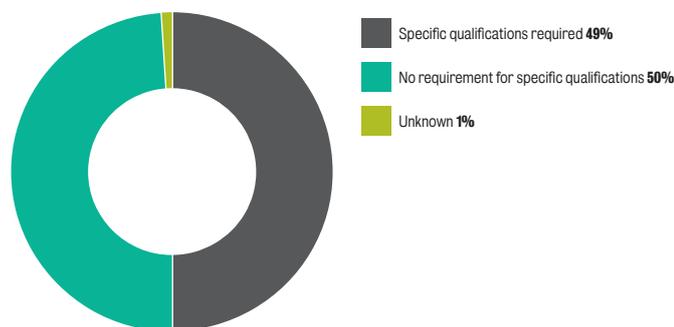
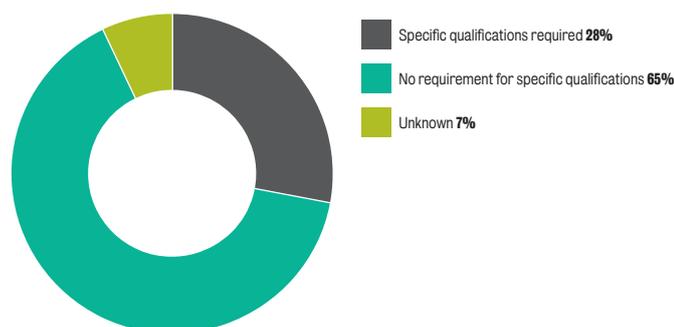


Figure 21 shows that 65% of the Projects reported by Entities did not contain an express requirement for the Dispute Board members to have a specific qualification or attribute. In 28% of the Projects reported, specific qualifications or attributes were required. For the remaining 7% of the cases, no information was provided.

Figure 21: Requirements for specific qualifications or attributes (Entities' responses)
Based on 24 responses received



For the cases in which Dispute Board members were required to have specific qualifications or attributes, respondents were asked to indicate what those were.

12. Most requested qualifications and attributes

Figure 22 indicates that, in the cases reported by Individuals, the most requested qualifications or attributes were experience in the interpretation of construction and/or engineering contract documentation, experience in the sector relevant to the Project, and impartiality and independence.

Figure 22: Most requested qualifications or attributes (Individuals' responses)
Based on 114 responses received. Respondents were able to select more than one option if applicable

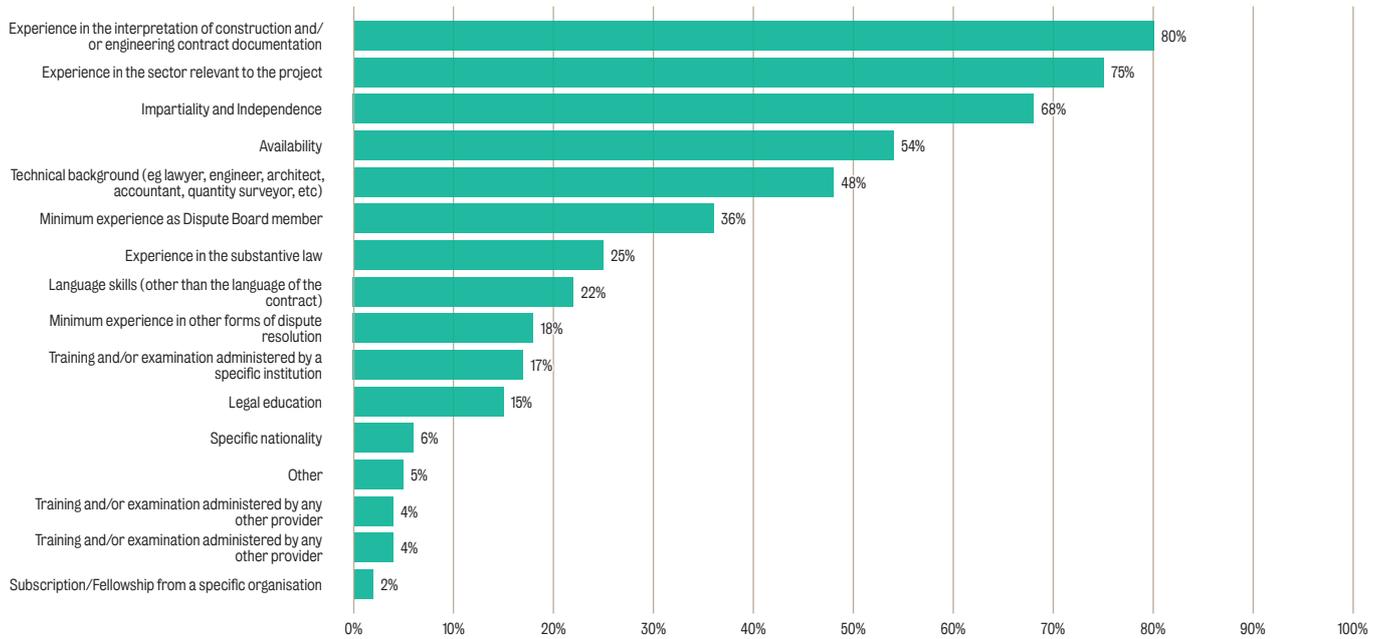
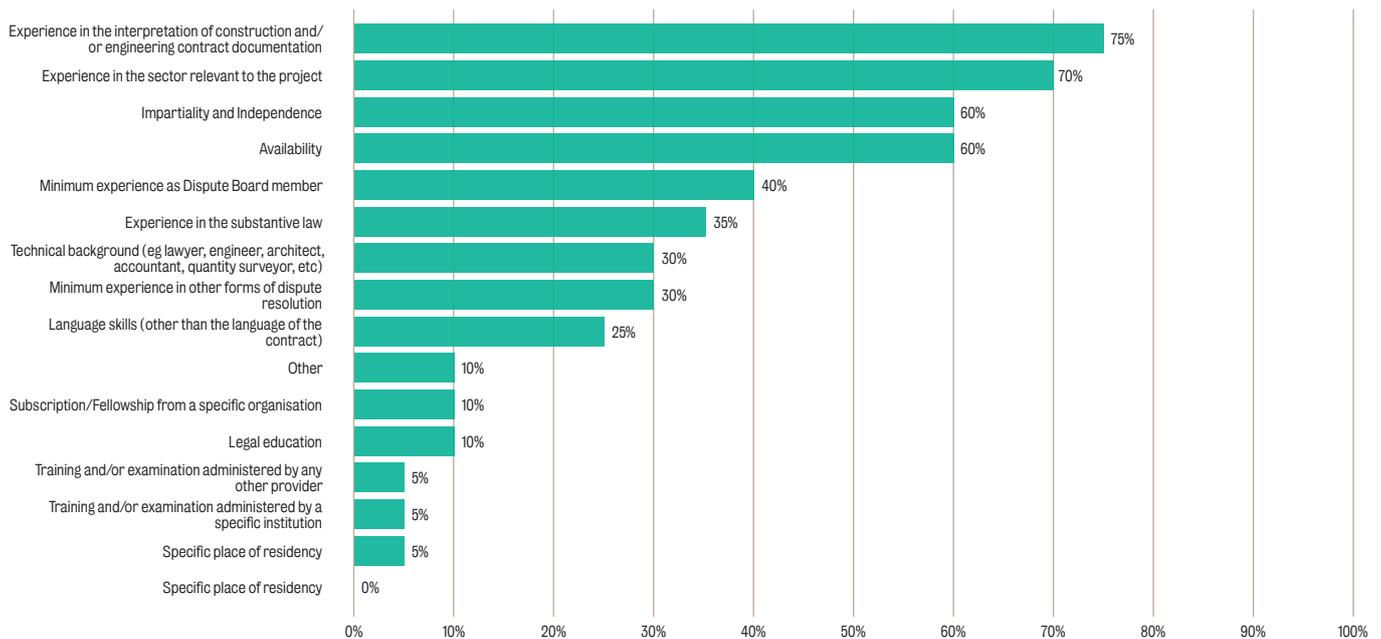


Figure 23 shows that the most frequently required qualifications of Dispute Board members in the Entities' experience were also the interpretation of construction and/or engineering contract documentation, experience in the sector relevant to the Project, and impartiality and independence.

Figure 23: Most requested qualifications or attributes (Entities' responses)
Based on 20 responses received. Respondents were able to select more than one option if applicable



13. Preferred qualifications and attributes

In addition to contractually provided qualifications and attributes, Individuals and Entities were asked what they thought were the most important qualifications or attributes for a Dispute Board member to have.

Figure 24 indicates that, for Individuals, experience in the interpretation of construction and/or engineering contract documentation, impartiality and independence, and experience in the sector relevant to the Project were the three most important qualifications a Dispute Board member should have.

Figure 24: Preferred qualifications and attributes of Dispute Board members (Individuals' responses)
Based on 136 responses received. Respondents were able to select more than one option if applicable

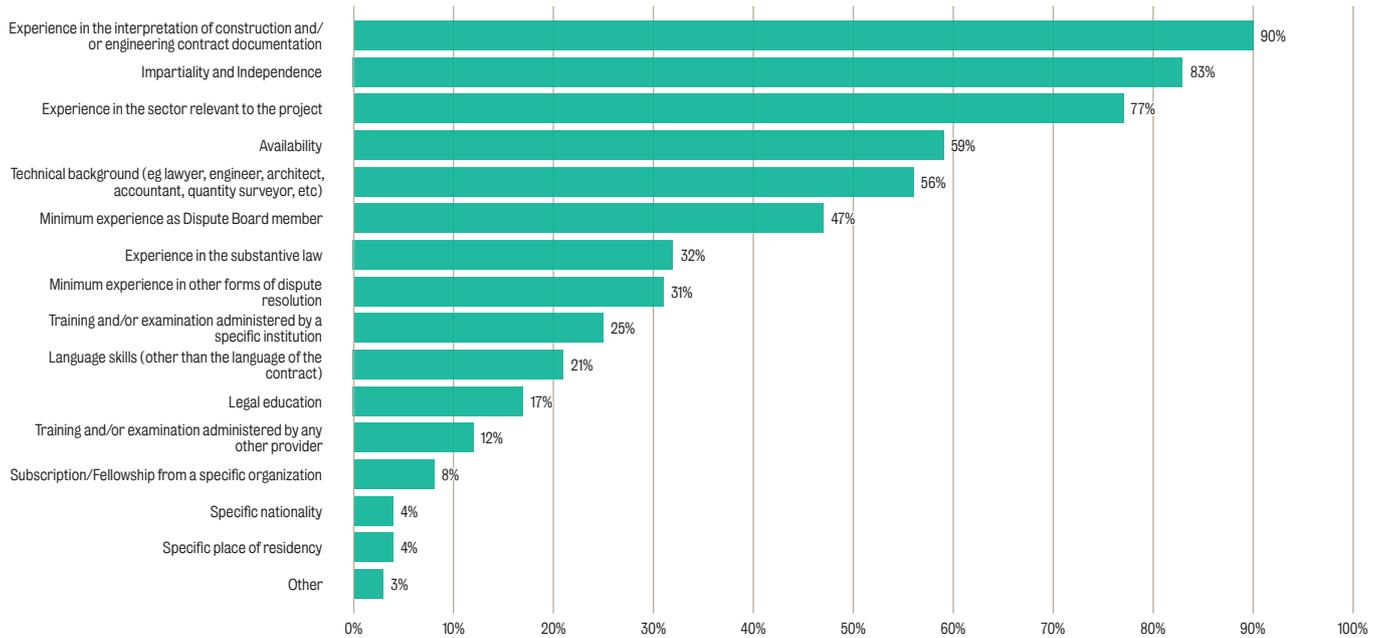
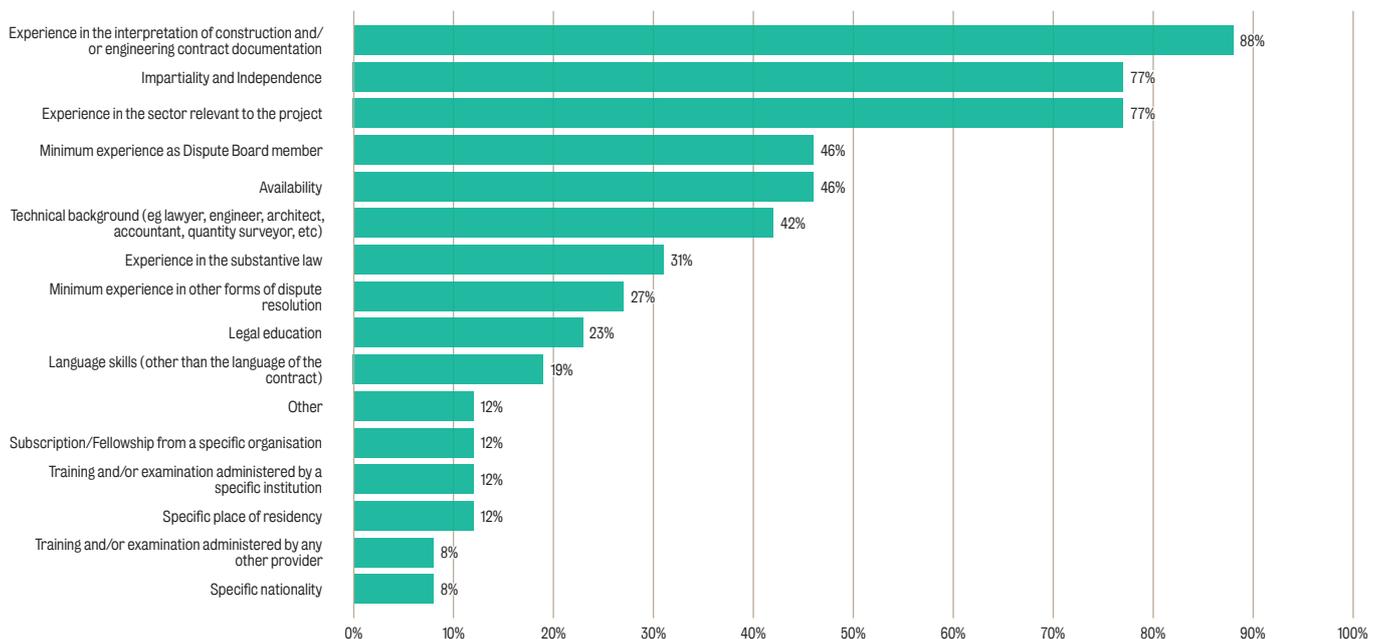


Figure 25 indicates that, also for Entities, experience in the interpretation of construction and/or engineering contract documentation, impartiality and independence, and experience in the sector relevant to the Project were the three most important qualifications a Dispute Board member should have.

Figure 25: Preferred qualifications and attributes of Dispute Board members (Entities' responses)
Based on 26 responses received. Respondents were able to select more than one option if applicable

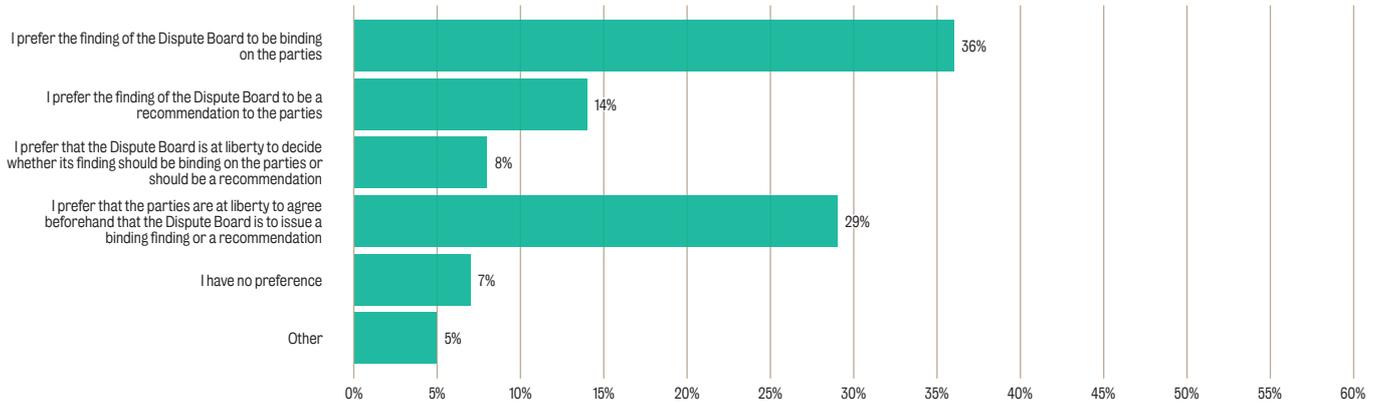


14. Preferred Dispute Board findings

Individuals and Entities were also asked questions regarding their preferences in relation to Dispute Boards.

Figure 26 shows that 36% of Individuals prefer for Dispute Board findings to be binding on the parties.

Figure 26: Individuals' preference regarding the Dispute Board's findings
Based on 137 responses received

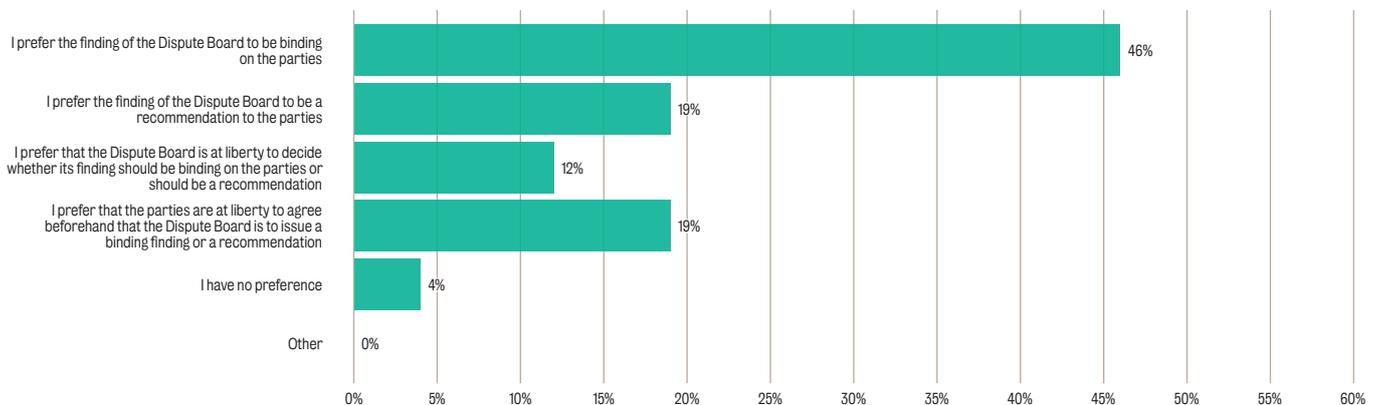


Individuals who indicated 'Other' in their responses could specify their answers. The responses received are reported below.

- *Interim binding (binding unless referred to arbitration or litigation).*
- *It depends on the project and the parties.*
- *None [sic] binding but admissible in following litigation.*
- *Preference left to the parties while agreeing the conditions of contract.*
- *I prefer that the Parties may request a non-binding recommendation with a binding decision as a fallback if parties unable to agree.*
- *Binding but not final.*
- *Depending on the issue, pressing issues binding, other informal assistance to achieve consensus.*

Similarly, 46% of Entities indicated a preference for Dispute Board findings to be binding.

Figure 27: Entities' preference regarding the Dispute Board's findings
Based on 26 responses received

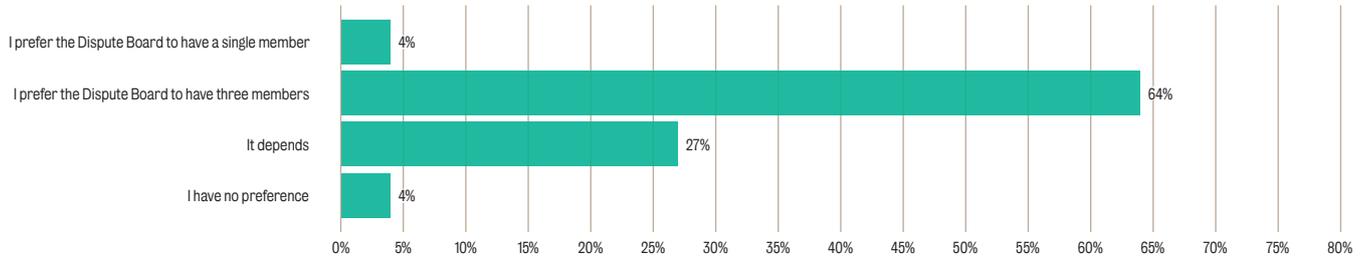


15. Preferred Dispute Board composition

Respondents were also asked about their preferences regarding the composition of the Dispute Board.

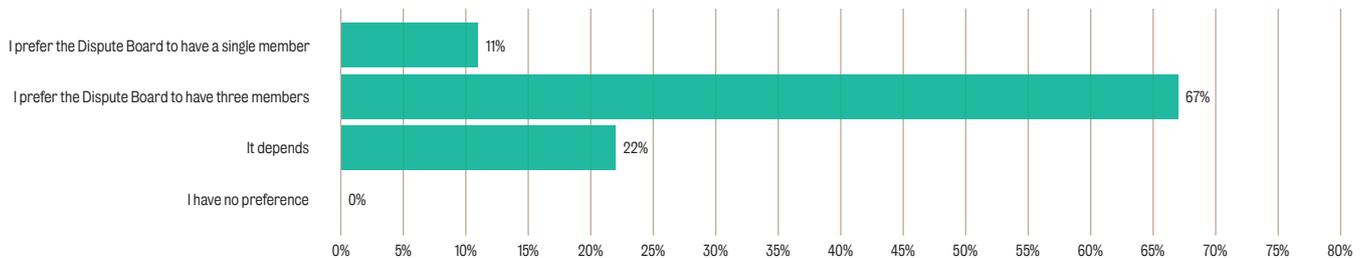
In answer to that question, 64% of Individuals indicated that they prefer Dispute Boards composed of three members.

Figure 28: Individuals' preference regarding the Dispute Board's composition
Based on 138 responses received



Likewise, 67% of Entities indicated that they prefer Dispute Boards composed of three members.

Figure 29: Entities' preference regarding the Dispute Board's composition
Based on 27 responses received



A significant portion of both Individuals (27%) and Entities (22%) indicated that their preference varied depending on the circumstances of the case.

16. Preferred type of Dispute Board

As to the respondents' preference concerning whether the Dispute Board was of a standing or ad hoc nature, most respondents preferred standing Dispute Boards.

Figure 30 shows that 83% of Individuals prefer standing Dispute Boards, either administered by an Institution (22%) or directly by the Dispute Board members (61%). For 22% of Individuals, their preference varied depending on the circumstances of the case.

Figure 30: Individuals' preference regarding the type of Dispute Board
Based on 137 responses received

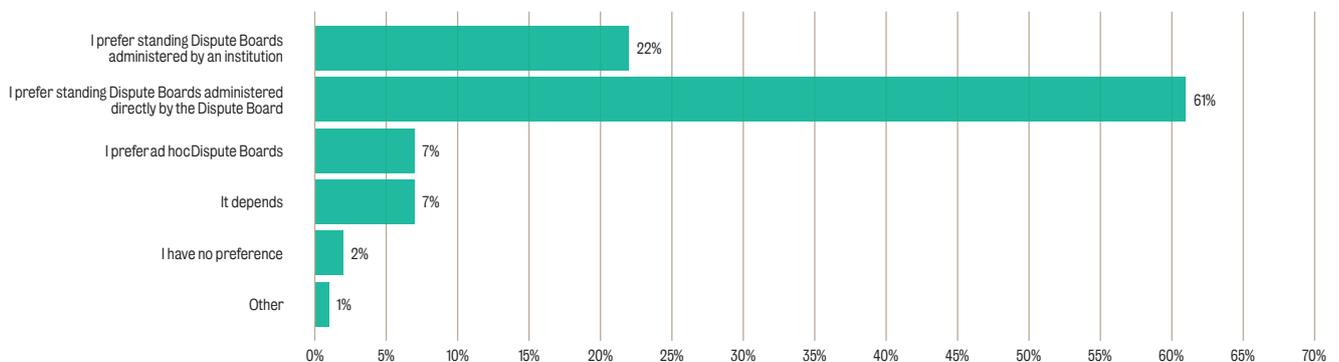
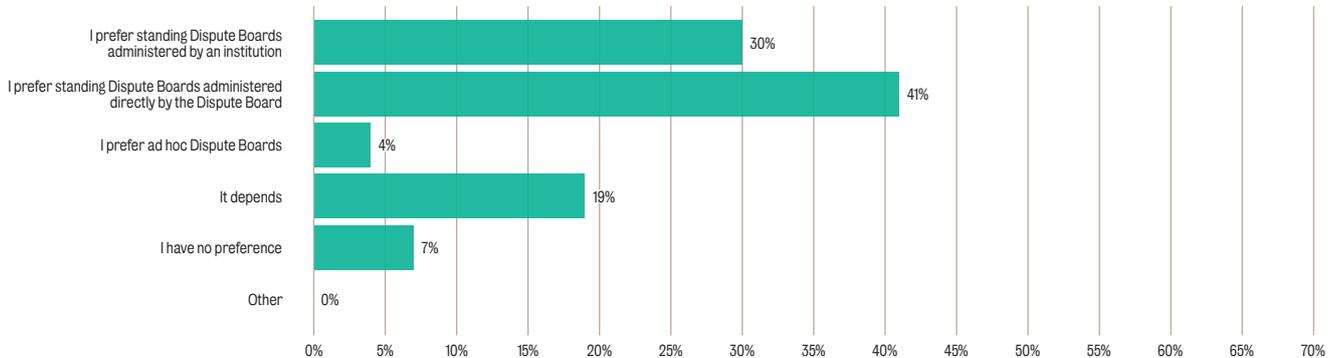


Figure 31 shows that 71% of Entities prefer standing Dispute Boards, either administered by an Institution (30%) or directly by the Dispute Board members (41%). For 30% of Entities, their preference varied depending on the circumstances of the case.

Figure 31: Entities' preference regarding the type of Dispute Board

Based on 27 responses received



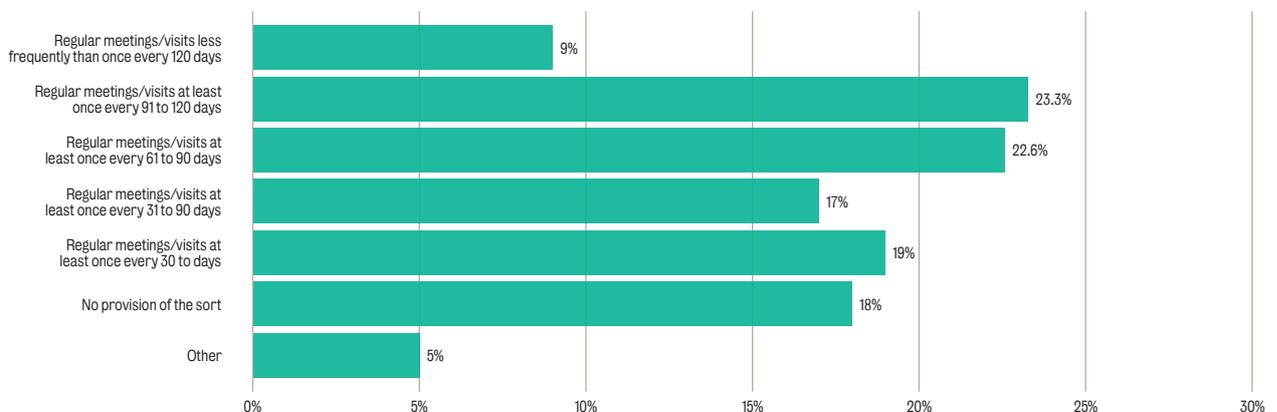
17. Site visits and meetings

It is often useful for the Dispute Board members to carry out site visits during the performance of a contract to familiarise themselves with the Project and the parties. With that in mind, Entities and Individuals were asked to indicate whether the Dispute Board agreements in their Projects normally provided for regular meetings with the parties and/or site visits at specific intervals of time.

Figure 32 shows that the most common experience of Individuals was for the contract to provide that regular meetings or visits take place at least once every 91 to 120 days (23.3%). Notably, 18% of Individuals reported that in their experience, it was most common that no provision of this kind was established.

Figure 32: Regular meetings and/or site visits as per contract (Individuals' responses)

Based on 133 responses received. Respondents were able to select up to two options



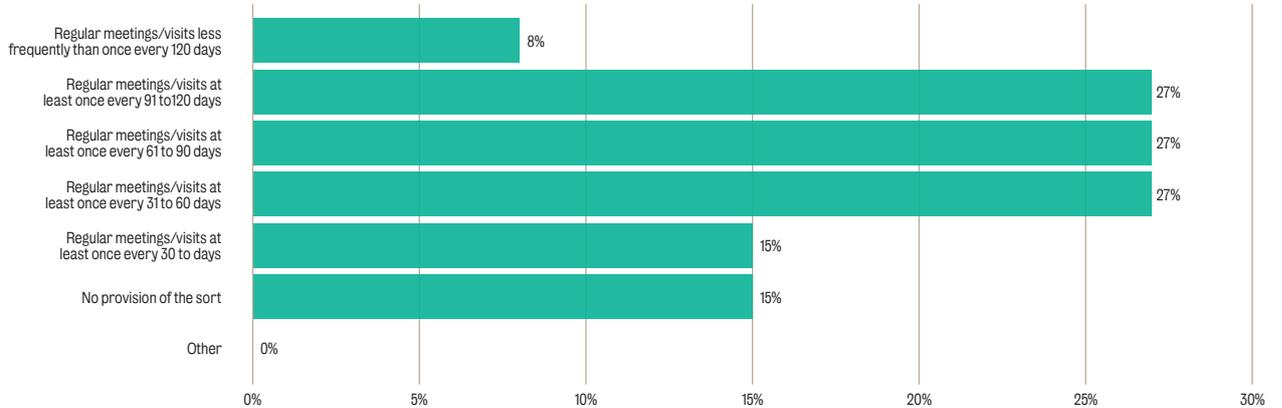
Individuals who indicated 'Other' in their responses could specify their answers. One indicated that site visits or meetings had to occur every 43 and 75 days, whereas the remaining five Individuals stated that site visits or meetings had to occur every 76 to 90 days.

The responses given by Entities were similar.

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As Figure 33 shows, the Entities reported encountering provisions that regular meetings should occur every 31 to 60 days, 61 to 90 days, or 91 to 120 days at an equal rate (27% each). That said, 15% of Entities reported that it was most common in their experience for there to be no provision for regular meetings.

Figure 33: Regular meetings and/or site visits as per contract (Entities' responses)
Based on 26 responses received. Respondents were able to select up to two options



18. Frequency of site visits and meetings

It may happen in practice that, despite the contractual provisions, the Dispute Board does not visit the site or carry out meetings in accordance with the terms agreed.

Figure 34 and Figure 35 show, however, that 58% of Individuals and 58% of Entities reported that regular meetings with the parties and/or site visits took place as provided in the Dispute Board agreement.

Figure 34: Were meetings and/or site visits compliant with the contract? (Individuals' responses)
Based on 118 responses received

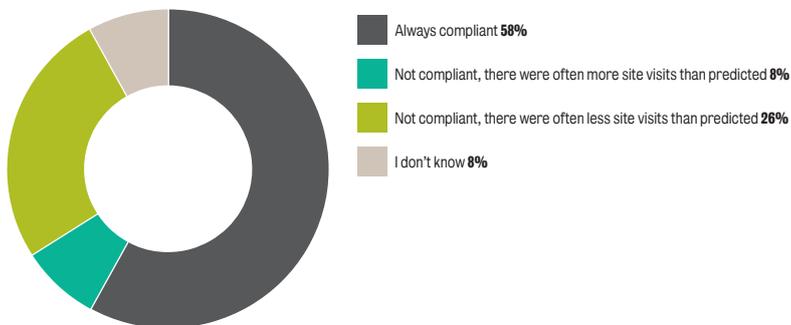
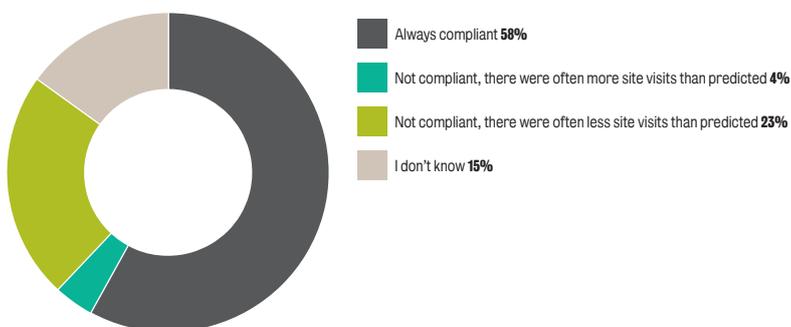


Figure 35: Were meetings and/or site visits compliant with the contract? (Entities' responses)
Based on 26 responses received



Interestingly, 8% of Individuals and 4% of Entities reported that sometimes Dispute Boards conduct more site visits than contractually required. However, 23% of Individuals and 26% of Entities also indicated that site visits and/or meetings took place less frequently than contractually provided.

19. Usefulness of online meetings

In addition to site visits and in-person meetings, respondents were asked to indicate whether they found online meetings between the Dispute Board and the parties useful.

Figure 36 indicates that even though 36% of Individuals answered the question in the affirmative, 50% of Individuals said that their answer depended on the phase of the project.

Figure 36: Individuals' opinion regarding the usefulness of online meetings
Based on 133 responses received

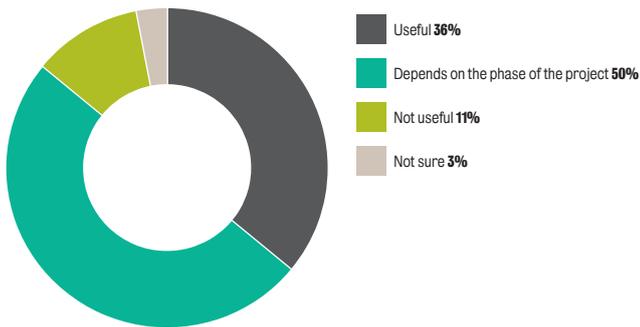
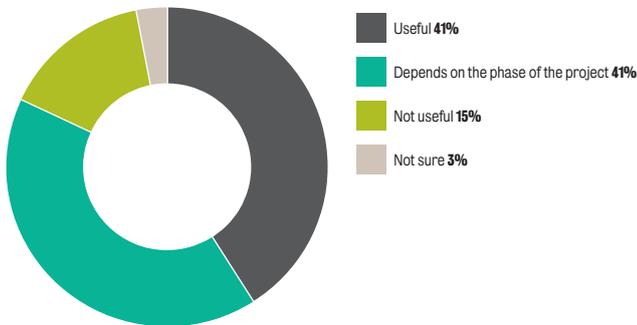


Figure 37 indicates that 41% of Entities considered online meetings useful, whereas another 41% considered that it depended on the phase of the project.

Figure 37: Entities' opinion regarding the usefulness of online meetings
Based on 27 responses received



Chapter 3: Trends related to disputes and claims

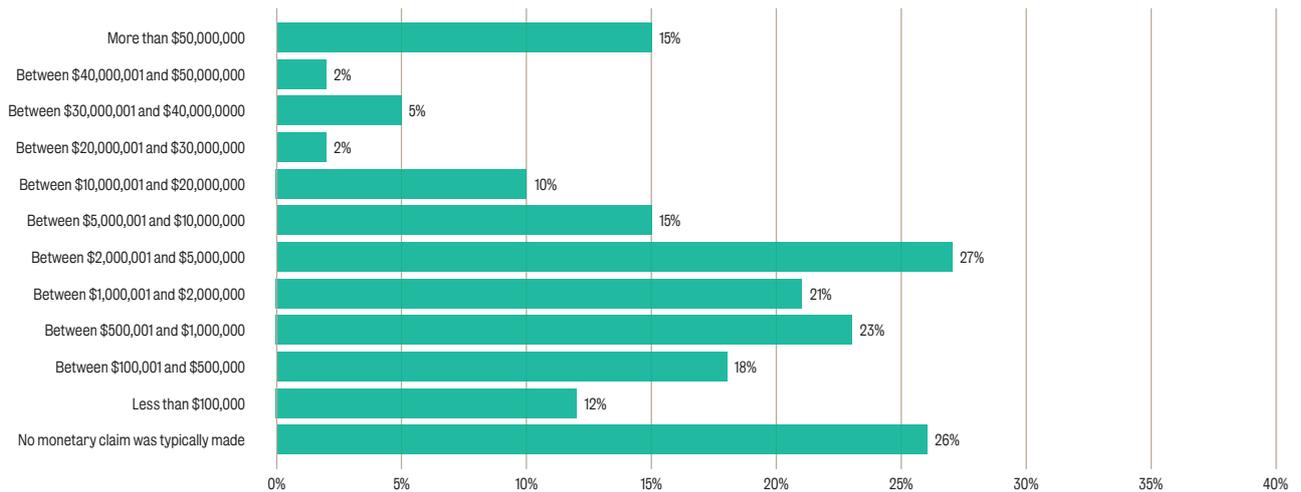
20. Claim value

Individuals and Entities were asked to indicate the most common value of the disputes brought before the Dispute Boards between 2018 and 2023. Figure 38 and Figure 39 compile the responses obtained.

Individuals reported that the most common value was between \$2,000,001 and \$5,000,000, which was identified by 27% of Individuals. Claims of no monetary value were second in the rank, having been selected by 26% of Individuals.

Figure 38: Most frequent value of claims (Individuals' responses)

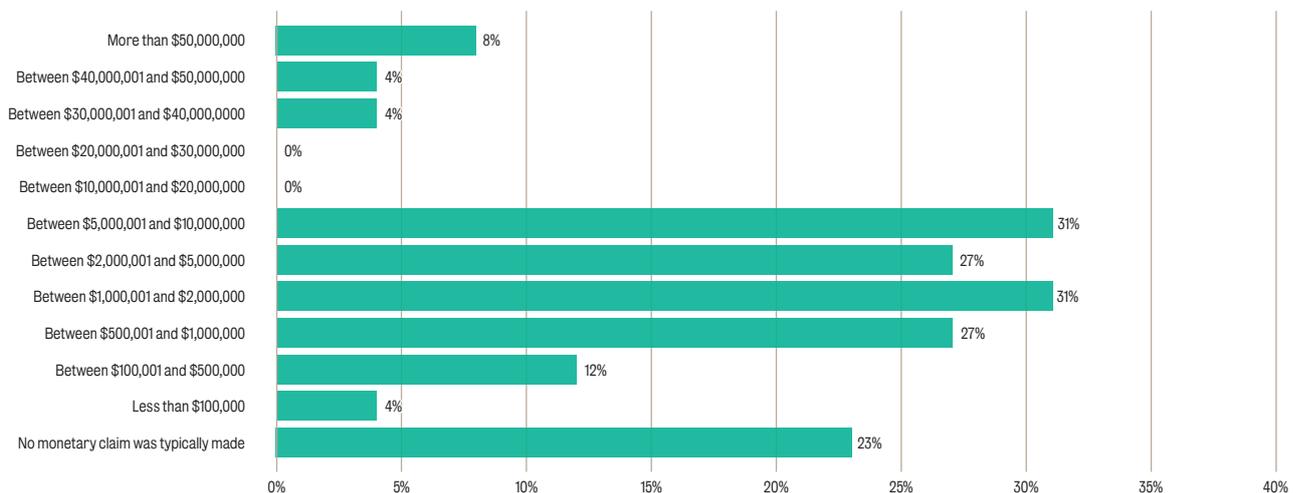
Based on 131 responses received. Respondents were able to select up to three options



Entities reported that the proportion of non-monetary claims was slightly lower (23%). The two most common values were between \$1,000,001 and \$2,000,000 and between \$5,000,001 and \$10,000,000, with each range indicated by 31% of Entities.

Figure 39: Most frequent value of claims (Entities' responses)

Based on 26 responses received. Respondents were able to select up to three options



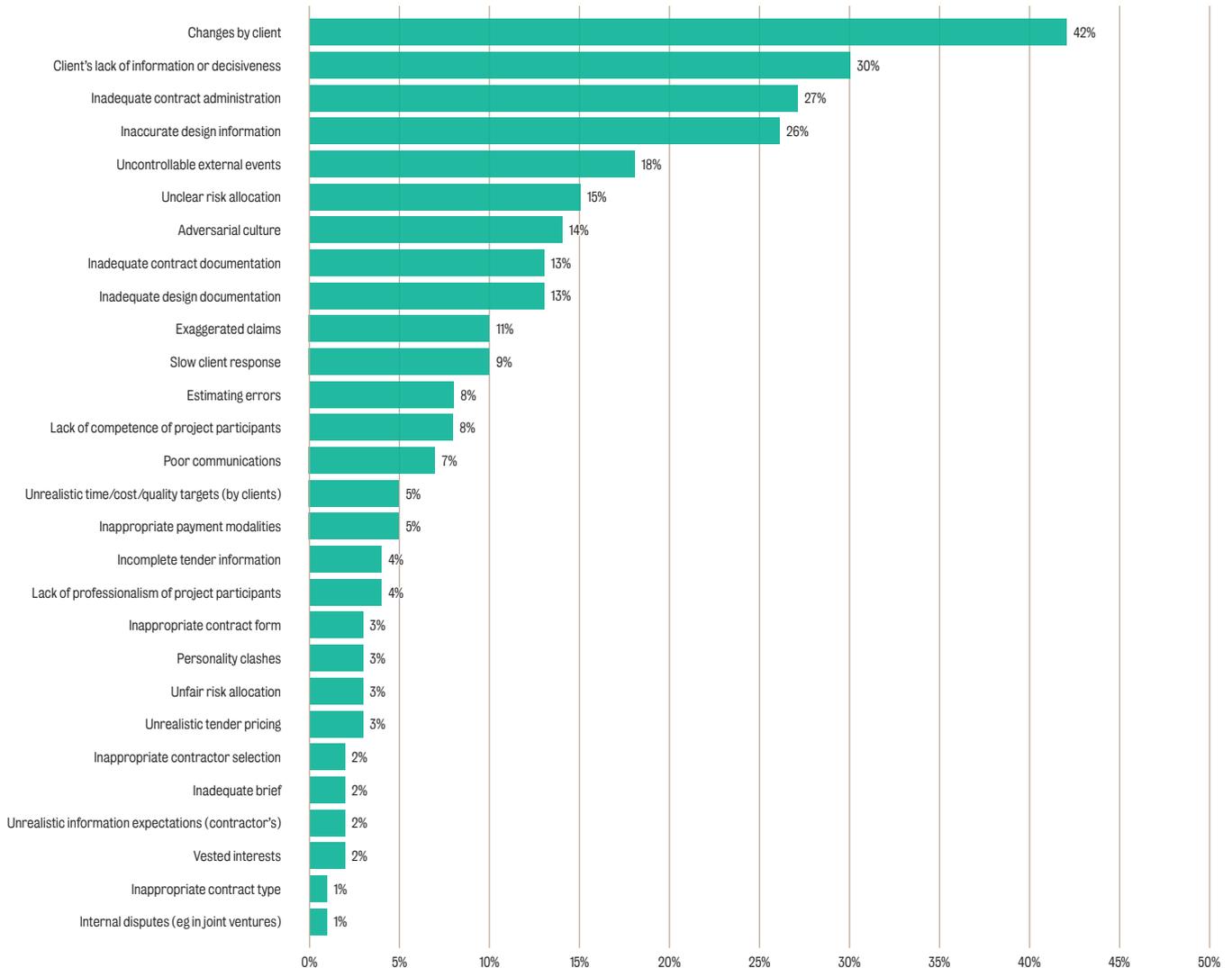
21. Causes of disputes

In addition to the value of the claims, respondents were also asked to indicate the leading causes of disputes brought before the Dispute Boards.

Figure 40 shows that 42% of Individuals signalled that changes by clients were the most common cause of disputes. Individuals also pointed to the client's lack of information or decisiveness (30%), inadequate contract administration (27%) and inaccurate design information (26%) as common causes of disputes.

Figure 40: Most frequent cause of disputes (Individuals' responses)

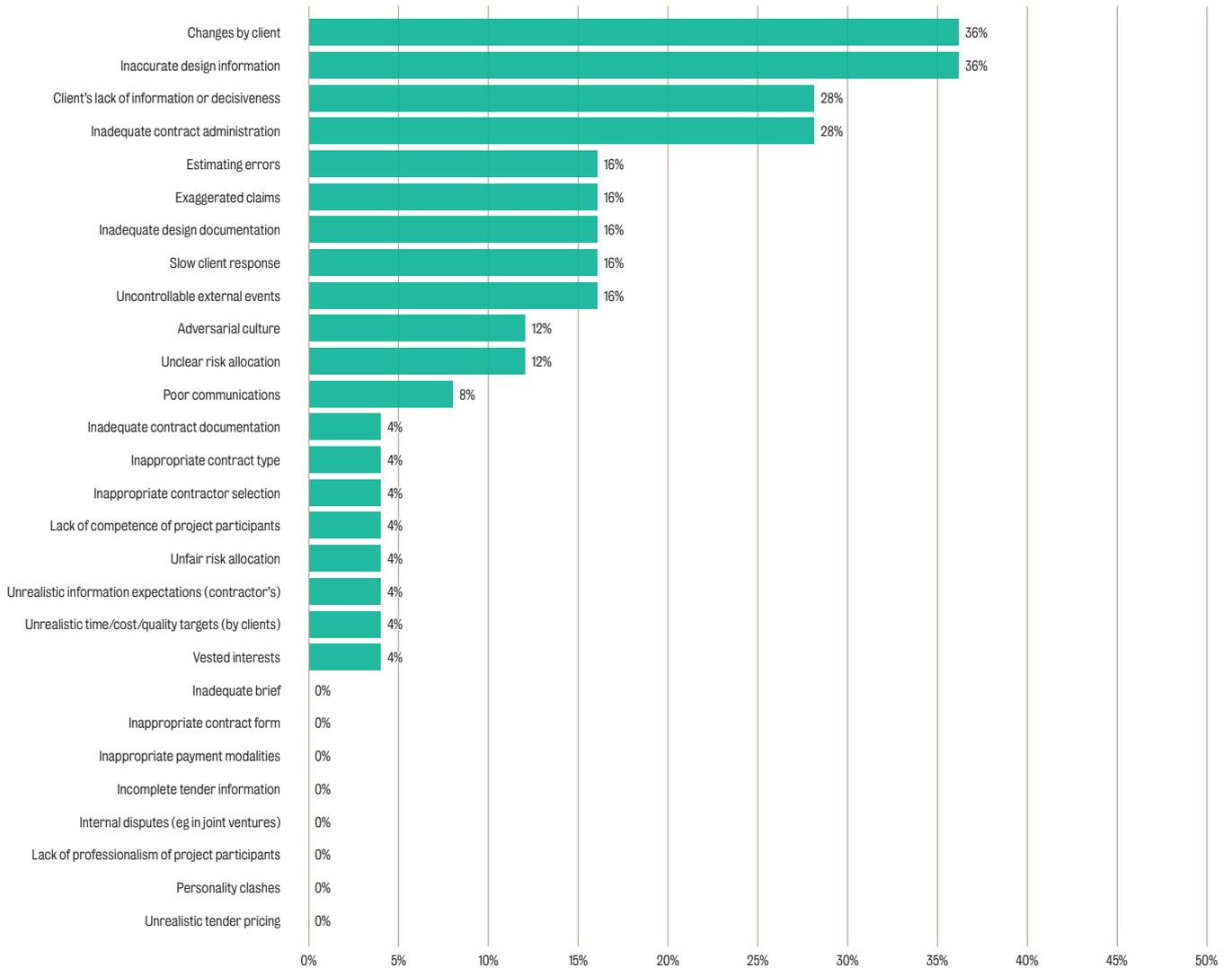
Based on 131 responses received. Respondents were able to select up to three options



Chapter 3:
Trends related to disputes and claims

Figure 41 indicates that for 36% of Entities the most common cause of disputes was changes by clients, whereas for another 36% the most common cause of disputes was inaccurate design information. The client's lack of information or decisiveness and inadequate contract administration were indicated as the most common causes of disputes by 28% of Entities.

Figure 41: Most frequent cause of disputes (Entities' responses)
Based on 23 responses received. Respondents were able to select up to three options



22. Categories of claims

Figure 42 indicates that for 84% of Individuals, extensions of time were the most common category of claims. The second most selected category of claims was loss and expense and/or damages for delay and/or disruption, indicated by 52% of Individuals.

Figure 42: Most frequent category of claims (Individuals' responses)

Based on 123 responses received. Respondents were able to select up to three options

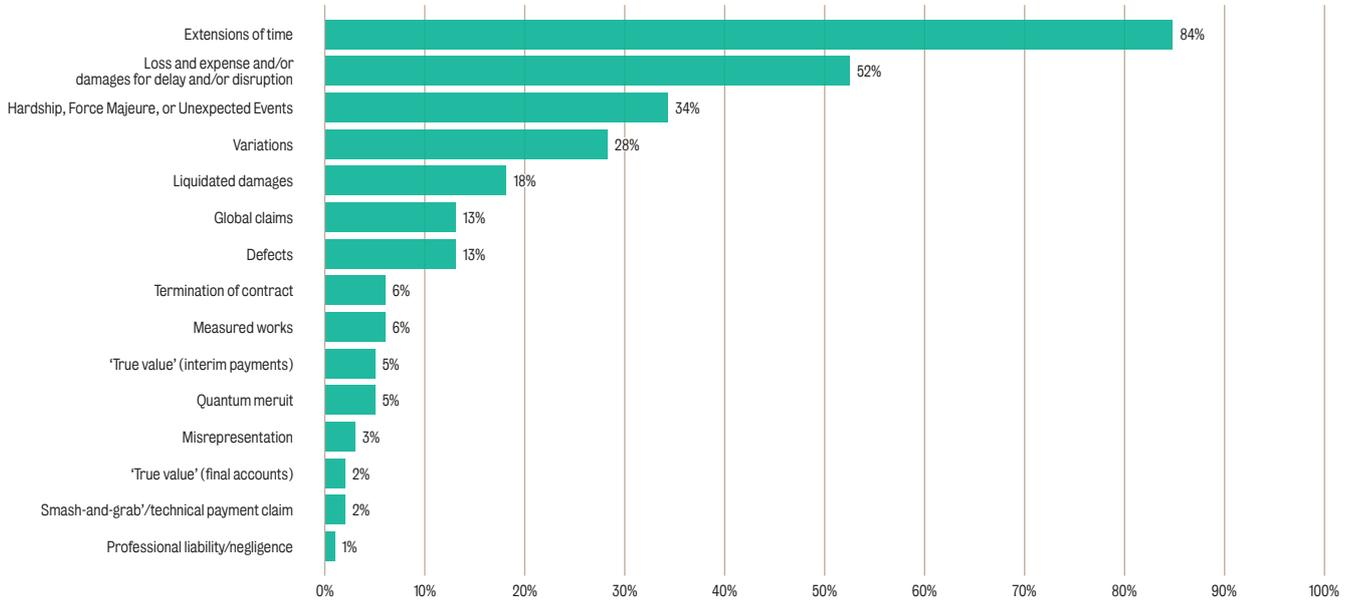
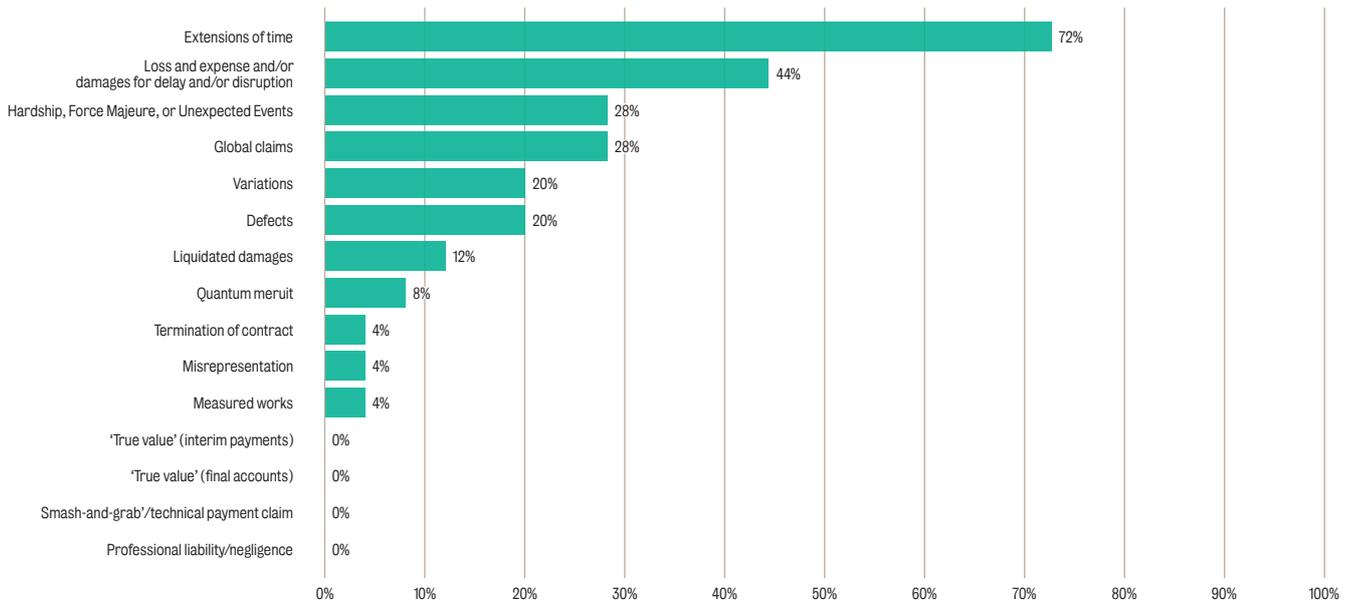


Figure 43 shows that Entities' responses were similar to Individuals' responses. 72% of Entities indicated that extensions of time were the most common category of claims. The second most selected category of claims remains loss and expense and/or damages for delay and/or disruption, selected by 44% of Entities.

Figure 43: Most frequent category of claims (Entities' responses)

Based on 23 responses received. Respondents were able to select up to three options



23. Duration of the dispute

Different Dispute Board agreements provide for different timelines for the entire Dispute Board process. With that in mind, Individuals and Entities were asked to indicate how long the Dispute Board referral and resolution process typically lasted (from the date of the referral notice to the date of the issuance of the Dispute Board's finding).

Figure 44 indicates that Individuals reported that the Dispute Board process most commonly lasted between 76 and 90 days. Interestingly, however, 6% of Individuals reported that the Dispute Board process commonly lasted for more than 240 days.

Figure 44: Typical duration of process (Individuals' responses)

Based on 128 responses received. Respondents were able to select up to two options

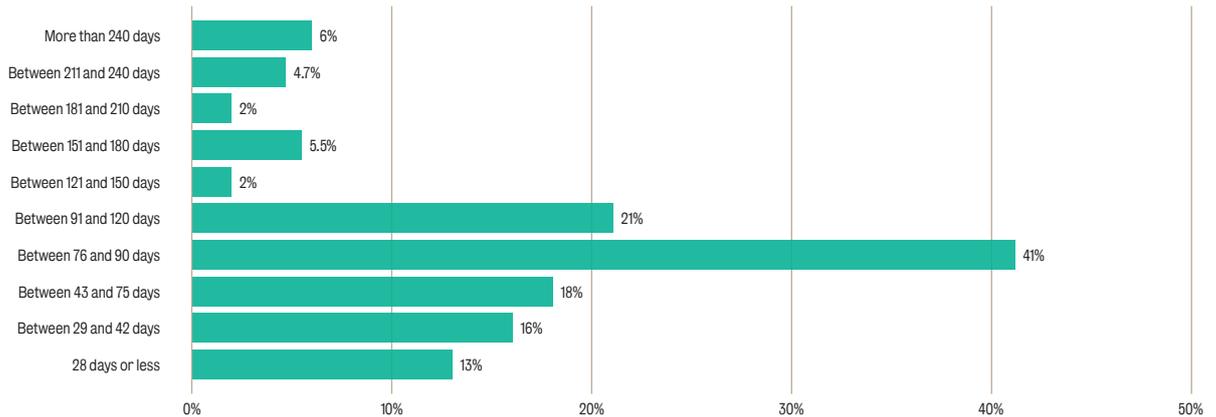
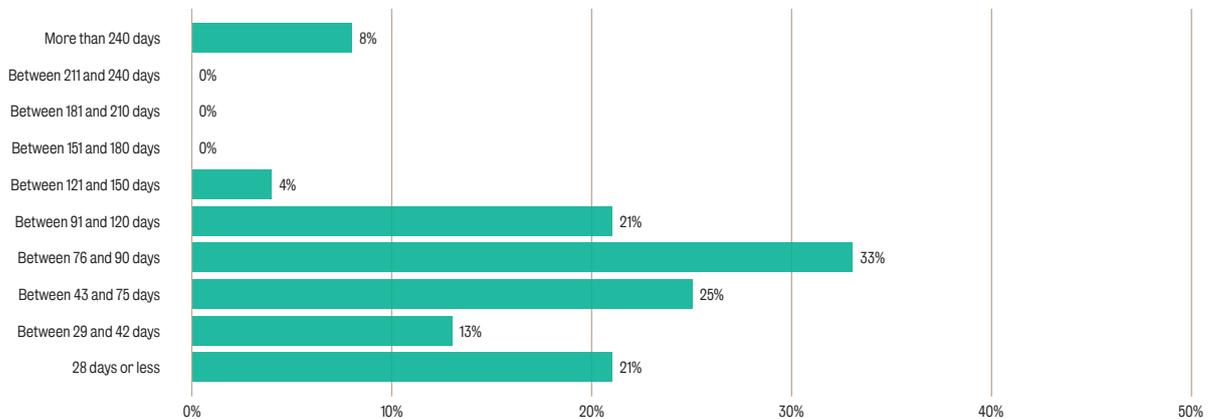


Figure 45 shows that the duration between 76 and 90 days remains the most common scenario in the experience of Entities, as reported by 33% of Entities. 8% of Entities have also reported that Dispute Board process have commonly lasted for more than 240 days.

Figure 45: Typical duration of process (Entities' responses)

Based on 24 responses received. Respondents were able to select up to two options



24. Factors affecting the duration of the Dispute Board process

The duration of the Dispute Board process does not depend solely on contractual provisions. Instead, other factors may impact its length. With that in mind, Individuals and Entities were requested to rank the most common factors affecting the duration of the Dispute Board process.

Figure 46 shows the top nine results in Individuals' rankings of the most common factors affecting the duration of the process.

Figure 46: Factors affecting the duration of the process (Individuals' responses)

Based on 119 responses received

1st Ranked	Complexity of the case
2nd Ranked	Dispute Board's availability
3rd Ranked	Party's behaviour
4th Ranked	Party's request/agreement for extensions of deadlines
5th Ranked	Dispute Board's ability/skill
6th Ranked	Necessity of expert opinion
7th Ranked	Dispute Board's resignation
8th Ranked	Value of the claim
9th Ranked	Court's involvement

Individuals who indicated 'Other' in their responses could specify their answers. The responses received are reported below.

- | *Ability of the parties to jointly agree on their statement of claim.*
- | *Accumulation of topics.*
- | *Availability of funds.*
- | *Availability of Project personnel.*
- | *Complexity of the matter.*
- | *Difficulty of agreeing constitution of DRB [sic].*
- | *Employer's (Government Implementing Agency) bureaucratic constraints effecting delays.*
- | *Expertise of DRB [sic] members.*
- | *Failure of the management to deal with issues as they arise and/or not understanding responsibilities.*
- | *Parties' failure to bring the dispute to the Board early on in the disputes timeframe. Both parties were optimists thinking they can resolve the issue themselves when mostly the Owner has said no and no means no. It should them come directly to the Board for a recommendation, not wait sometimes years before the Board hears the issue and them memories of the circumstances are sometimes vague and the Board doesn't have the ability to view the problem themselves.*
- | *Party's lack of understanding the process and the submission deadlines.*
- | *Proper documentations.*
- | *The information from the other's is like the supplier from abroad.*
- | *Time frame established in Board Operating Procedures.*
- | *Value of money.*
- | *When in a three-member board at least one member is not qualified to be there, but nominated by a Party.*

Figure 47 shows the top nine results in Entities' ranking of the most common factors affecting the duration of the Dispute Board process.

Figure 47: Factors affecting the duration of the process (Entities' responses)
Based on 24 responses received

1st Ranked	Complexity of the case
2nd Ranked	Dispute Board's ability/skill
3rd Ranked	Dispute Board's availability
4th Ranked	Party's behaviour
5th Ranked	Party's request/agreement for extensions of deadlines
6th Ranked	Dispute Board's resignation
7th Ranked	Necessity of expert opinion
8th Ranked	Court's involvement
9th Ranked	Value of the claim

Entities who indicated 'Other' in their response could specify their answer. The responses received are reported below.

- Little communication.
- Not clearly defined procedure by the Dispute Board.
- Personal egos.
- Agreeing on the deadlines and amounts with the contracting part.

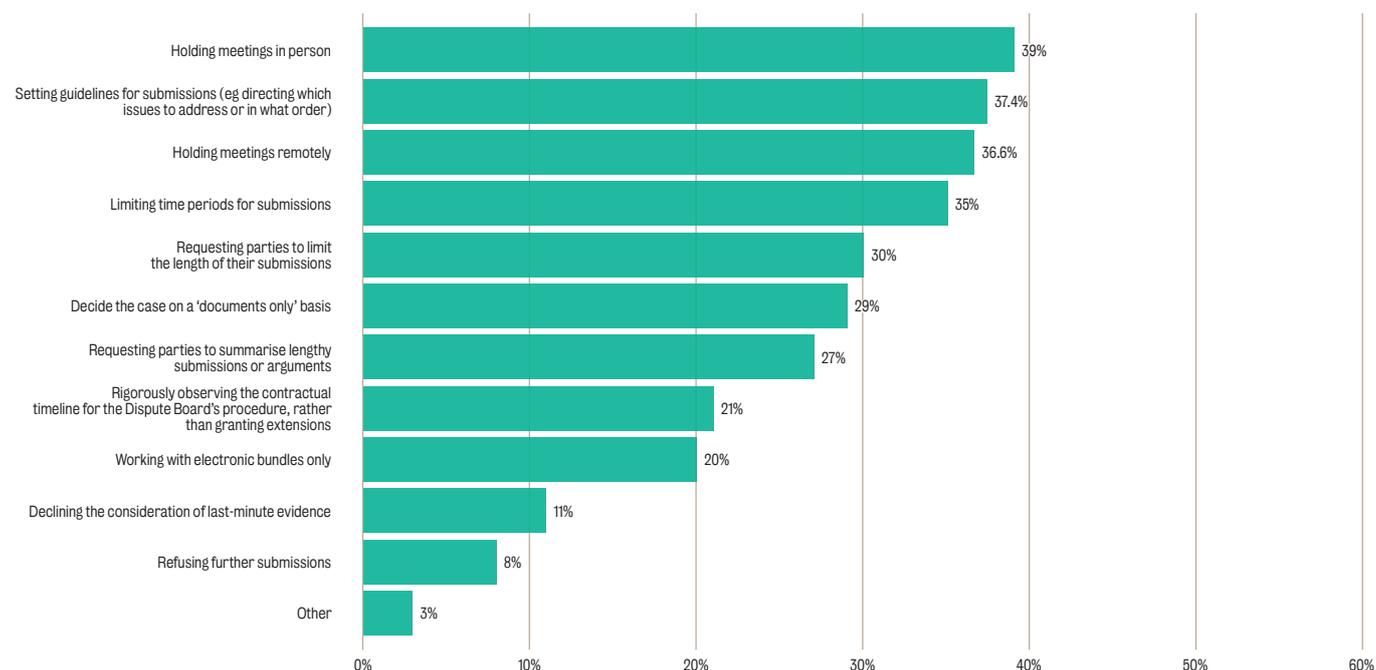
It is worth noting that, in the case of both Individuals and Entities, the most common factor affecting duration of the Dispute Board process was the dispute itself and its complexity. The second most common factor, however, was associated not with the subject matter in dispute but with the Dispute Board members. For Individuals, this was the availability of the Dispute Board members and, for Entities, the ability and skills of the Dispute Board members.

25. Costs-efficiency measures

Respondents were also asked about measures Dispute Boards use to improve cost efficiency.

Figure 48 shows the variety of cost-efficiency measures reported by Individuals. 39% of Individuals indicated that holding meetings in person is the most common cost-efficiency measure adopted by Dispute Boards. Another common cost-efficiency measure reported was the setting of guidelines for submissions, indicated by 37.4% of Individuals.

Figure 48: Cost-efficiency measures commonly implemented by Dispute Boards (Individuals' responses)
Based on 131 responses received. Respondents were able to select more than one option if applicable



Chapter 3:
Trends related to disputes and claims

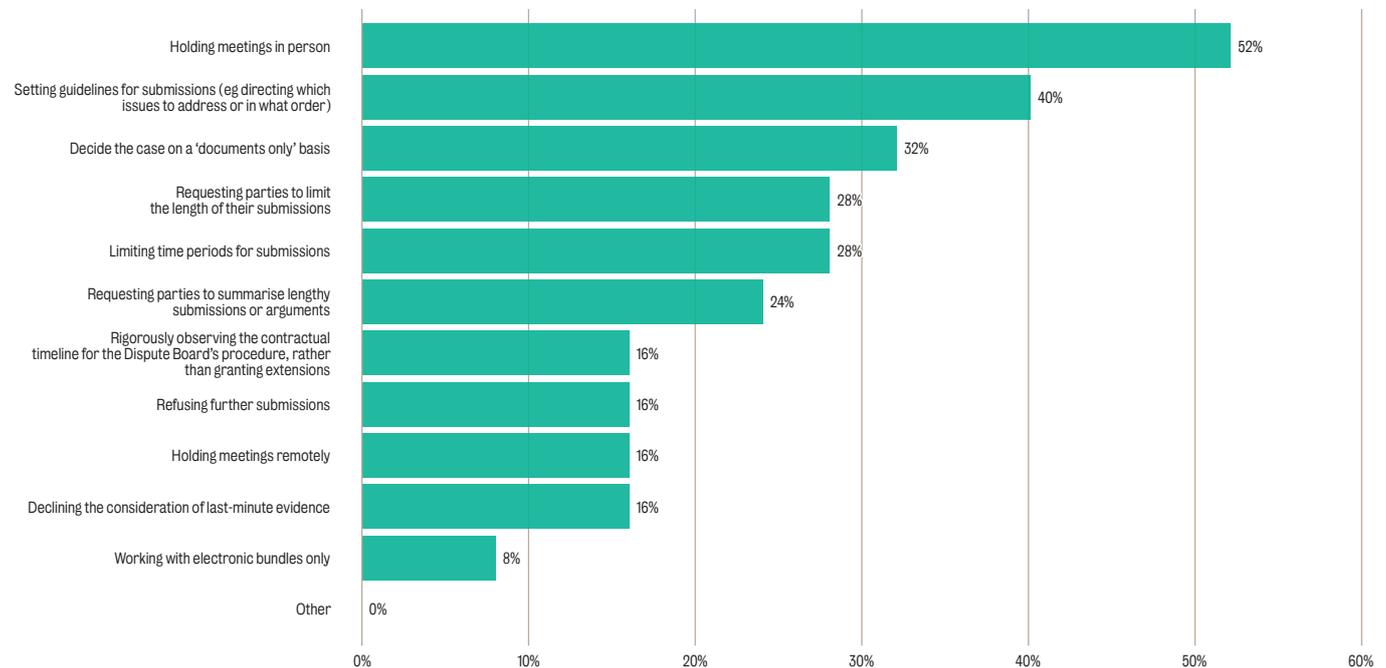
Individuals who indicated ‘Other’ in their responses provided the following comments.

- *The Dispute Board encouraged parties to agree on and provide one set of reference documents.*
- *The Dispute Board focused on dispute avoidance (amicable resolution of emerging issues, before they become the subject of a notice of dispute).*
- *The Dispute Board performed ‘properly’.*
- *The Dispute Board was not interested in cost-efficiency.*

Figure 48 shows that the experience of Entities with cost-efficiency measures was also varied. 52% of Entities indicated that holding meetings in person was the cost-efficiency measure most adopted by Dispute Boards. Like Individuals, 40% of Entities indicated that setting guidelines for submissions was also a commonly adopted cost-efficiency measure.

Figure 49: Cost-efficiency measures commonly implemented by Dispute Boards (Entities’ responses)

Based on 25 responses received. Respondents were able to select more than one option if applicable



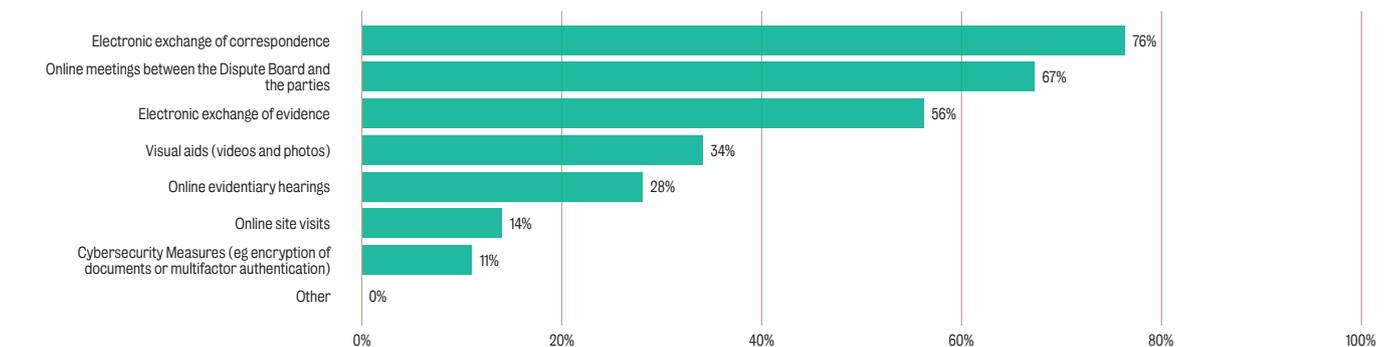
26. Technological measures

Individuals and Entities were asked what technological measures were most adopted by the Dispute Board.

Figure 50 shows that 76% of Individuals responded that the electronic exchange of correspondence was the most common technological measure adopted. Second were online meetings between the Dispute Board and the parties, as reported by 67% of Individuals.

Figure 50: Technological measures commonly implemented by Dispute Boards (Individuals’ responses)

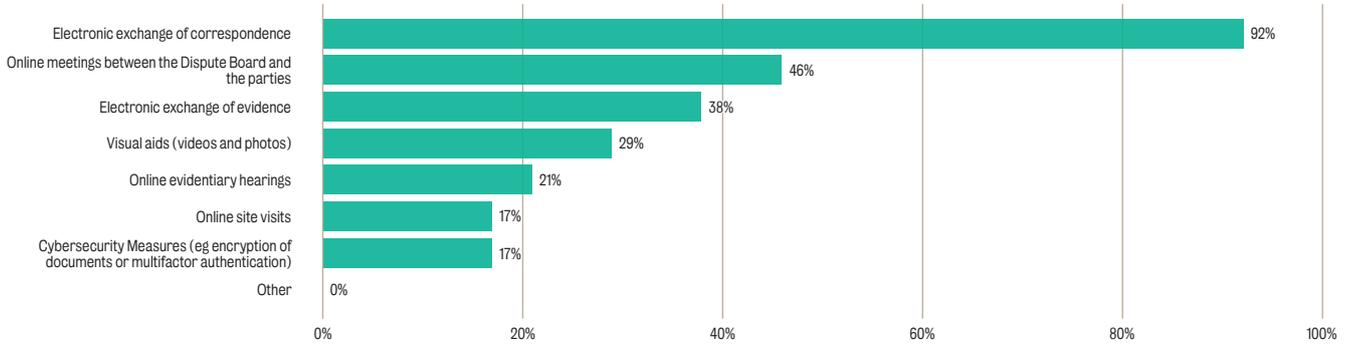
Based on 131 responses received. Respondents were able to select more than one option if applicable



Chapter 3:
Trends related to disputes and claims

Figure 51 shows that 92% of Entities responded that the electronic exchange of correspondence was the most common technological measure adopted. Like Individuals, second were online meetings between the Dispute Board and the parties, as reported by 46% of respondents.

Figure 51: Technological measures commonly implemented by Dispute Boards (Entities' responses)
Based on 24 responses received. Respondents were able to select more than one option if applicable



Chapter 4: Dispute Board effectiveness

27. Dispute avoidance

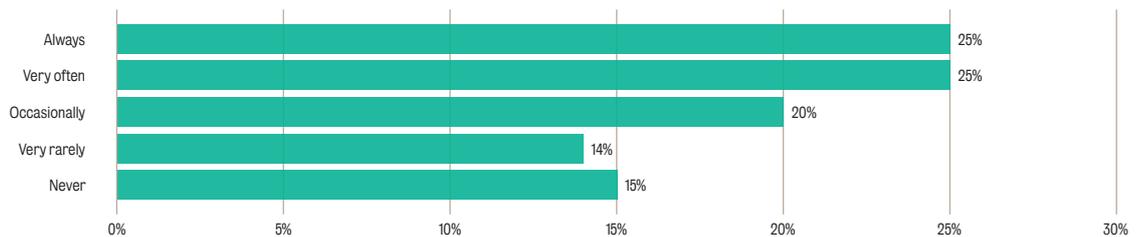
Recently, Dispute Boards have expanded their remit to include dispute avoidance.

To capture this trend, Individuals and Entities were asked whether Dispute Boards ever adopted measures to facilitate the avoidance of disputes.

Figure 52 shows that 85% of Individuals reported the adoption of dispute avoidance measures. As to the frequency of that practice, 25% of Individuals indicated that those measures were always taken by Dispute Boards, whereas another 25% indicated that they were taken very often. 21% of Individuals indicated that such measures were only implemented occasionally, whereas 14% of Individuals responded that dispute avoidance measures were only very rarely adopted.

Figure 52: How often were dispute avoidance measures adopted? (Individuals' responses)

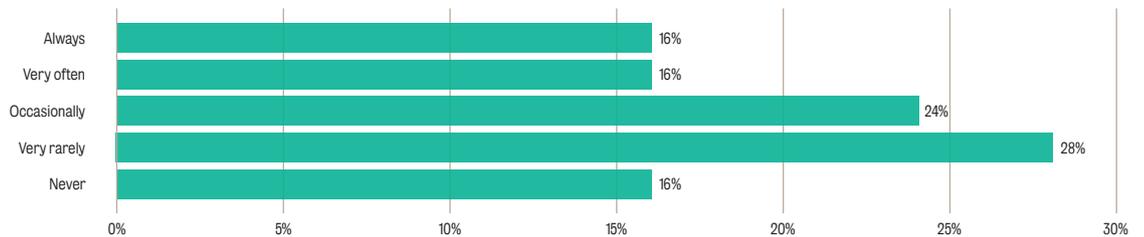
Based on 132 responses received



Likewise, Figure 53 shows that 84% of Entities reported the adoption of dispute avoidance measures. As to the frequency of that practice, 28% of Entities indicated that those measures were very rarely adopted by Dispute Boards, whereas 24% of Entities described the frequency of those measures as occasional. 16% of Entities indicated that such measures were implemented very often, whereas 16% responded that dispute avoidance measures were always implemented.

Figure 53: How often were dispute avoidance measures adopted? (Entities' responses)

Based on 25 responses received



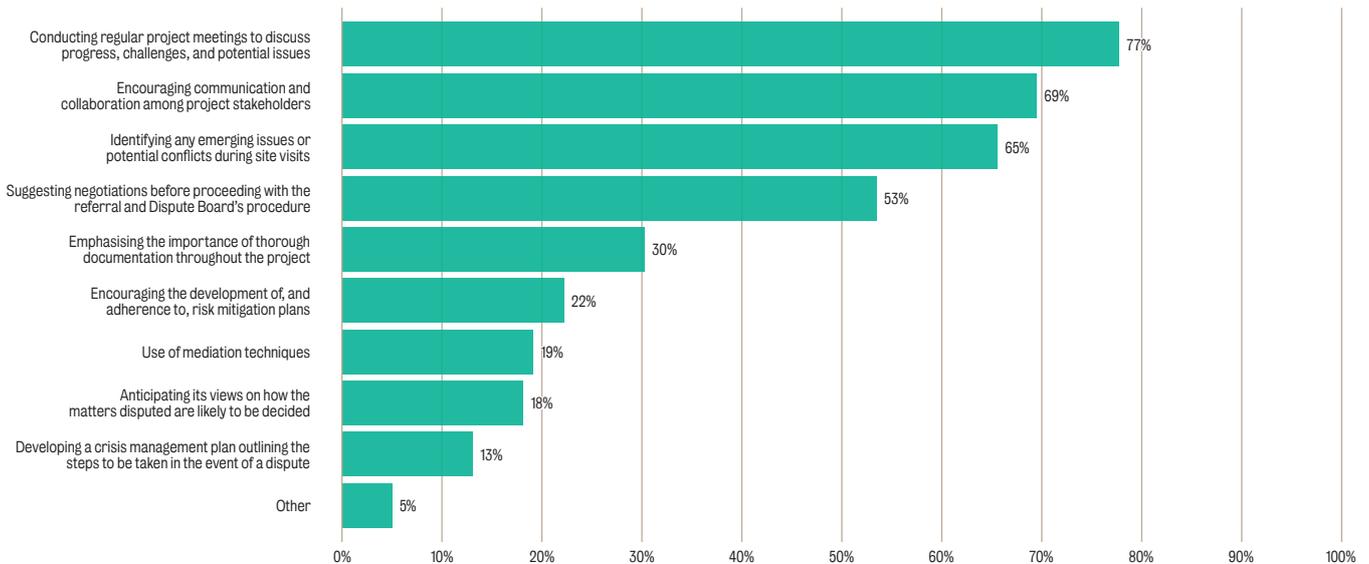
28. Most frequently adopted dispute avoidance measures

Individuals and Entities were also asked what types of dispute avoidance measures were adopted.

Figure 54 shows that 77% of Individuals indicated that Dispute Boards commonly conducted regular project meetings to discuss progress, challenges, and potential issues. Other measures commonly adopted include encouraging communication and collaboration among project stakeholders and identifying any emerging issues or potential conflicts during site visits, as reported by 69% and 65% of Individuals, respectively.

Figure 54: Commonly adopted dispute avoidance measure (Individuals' responses)

Based on 111 responses received. Respondents were able to select more than one option if applicable



Individuals identified the following as 'other' dispute avoidance measures adopted by Dispute Boards.

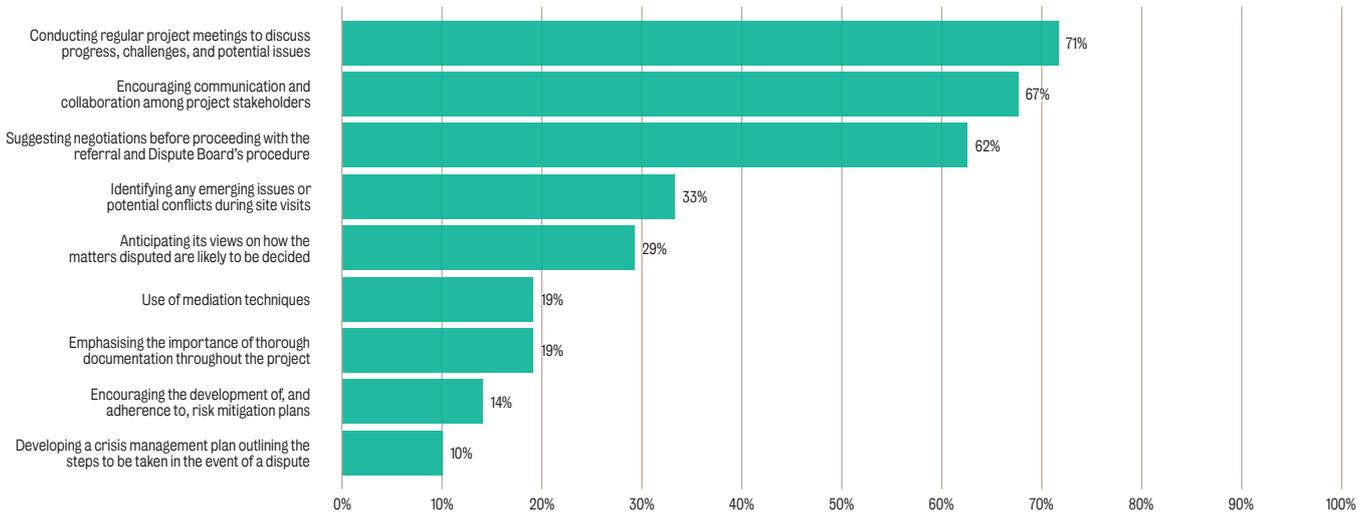
- *At every meeting identify and encourage cooperation and proactive preventative actions.*
- *Advisory/Informal Hearings.*
- *Use of coaching techniques.*
- *Training refresh on FIDIC.*
- *Adversarial attitude and secretive parties' procedures.*
- *Informal Opinions.*

Chapter 4:
Dispute Board effectiveness

Figure 55 shows the responses given by Entities. 71% indicated that Dispute Board commonly conducted regular project meetings to discuss progress, challenges, and potential issues. Other measures commonly adopted include encouraging communication and collaboration among project stakeholders and suggesting negotiations before proceedings with the referral and Dispute Board's procedure, as reported by 67% and 62% of Entities, respectively.

Figure 55: Commonly adopted dispute avoidance measures (Entities' responses)

Based on 21 responses received. Respondents were able to select more than one option if applicable



29. Effects of dispute avoidance measures

Respondents were also asked about the effect of having Dispute Boards implement measures to assist in avoiding disputes.

As Figure 56 illustrates, for 45% of Individuals, the most common result was that the dispute was completely avoided.

Figure 56: Result after the implementation of dispute avoidance measures (Individuals' responses)

Based on 111 responses received. Respondents were able to select up to two options

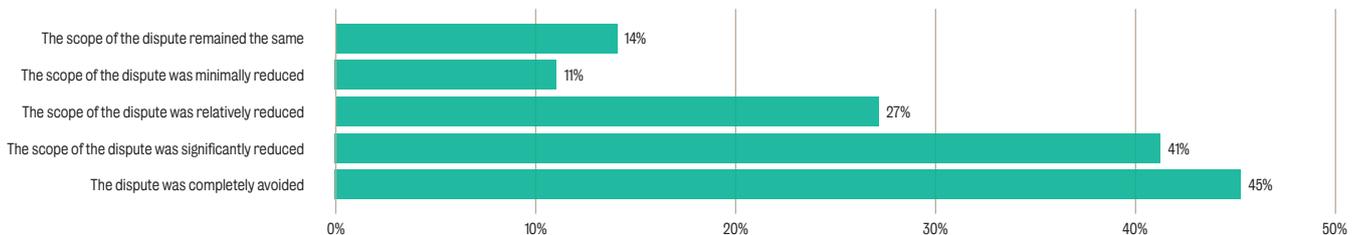
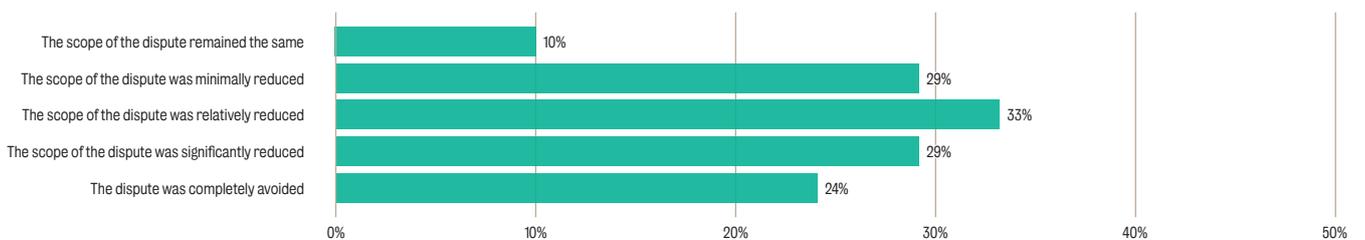


Figure 57 reports the answers to the Entities survey. 33% of Entities reported that, most commonly, the dispute avoidance measures led to the scope of the dispute being relatively reduced.

Figure 57: Result after the implementation of dispute avoidance measures (Entities' responses)

Based on 21 responses received. Respondents were able to select up to two options



30. Nature of Dispute Board findings

Respondents were asked whether the findings of the Dispute Boards with which they had been involved had been binding on the parties.

Figure 58 shows that in 30% of all the Dispute Board reported by Individuals, the Dispute Board had the power to issue a binding decision, whereas in 27% of the cases, the Dispute Board could only issue recommendations. Individuals did not provide information in relation to the nature of the findings of 43% of the Dispute Boards reported.

Figure 58: Nature of the Dispute Board findings (Individuals' responses)
Based on 125 responses received

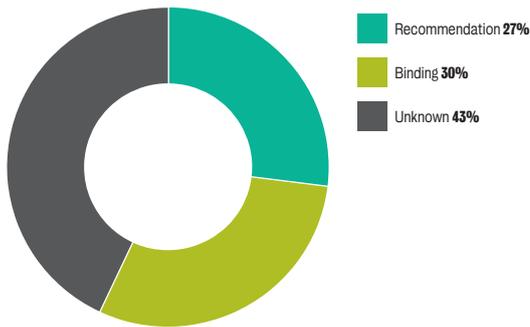
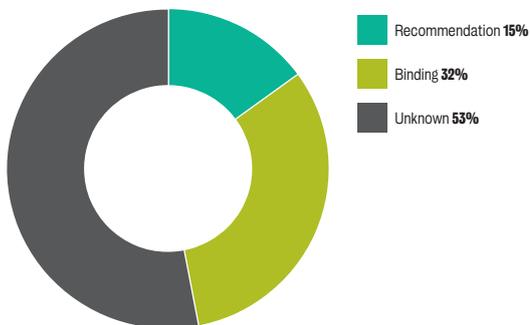


Figure 59 shows that in 32% of all the Dispute Boards reported by Entities, the Dispute Board had the power to issue a binding decision, whereas in 15% of the cases reported, the Dispute Board could only issue recommendations. Entities did not provide information in relation to the nature of the findings of 53% of the Dispute Boards reported.

Figure 59: Nature the Dispute Board findings (Entities' responses)
Based on 25 responses received



31. Compliance with non-binding recommendations

For the cases in which the Dispute Boards' findings were issued in the form of a recommendation, Individuals and Entities were asked to indicate the rate with which the parties complied with said recommendation.

Figure 60 indicates that, in the experience of 40% of Individuals, parties tended to comply with the Dispute Board's recommendations most of the time. For 26% of Individuals, the parties always complied with a Dispute Board's recommendations. Only 13% of Individuals said that parties never comply with Dispute Board recommendations.

Figure 60: How often did parties comply with non-binding recommendations of Dispute Boards? (Individuals' responses)

Based on 117 responses received

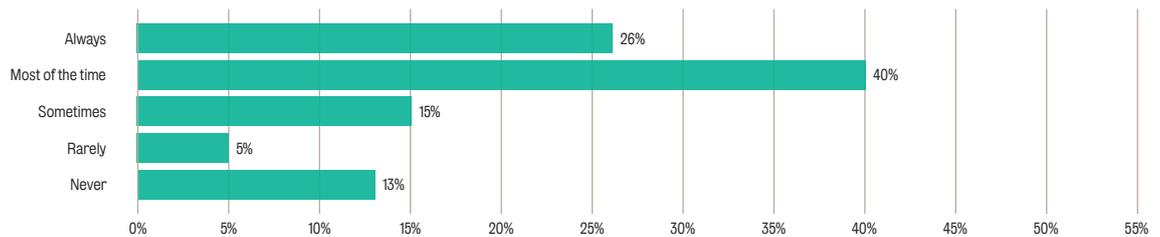
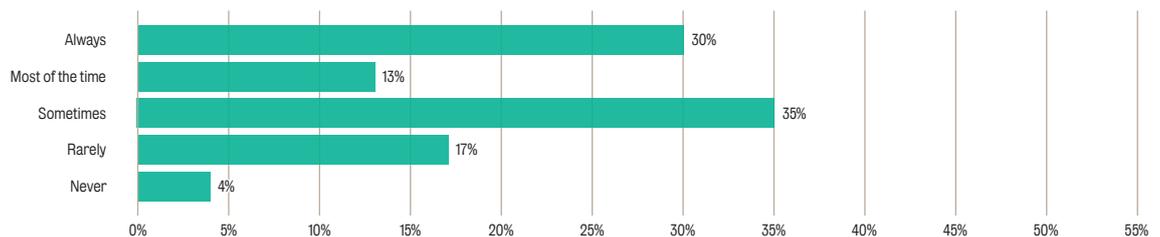


Figure 61 indicates that, in the experience of 35% of Entities, parties tended to comply with the Dispute Board's recommendations only sometimes. For another 30% of Entities, the parties always complied with a Dispute Board's recommendations. Only in the experience of 4% of Entities the parties never complied with the Dispute Board's recommendation.

Figure 61: How often did parties comply with non-binding recommendations of Dispute Boards? (Entities' responses)

Based on 23 responses received



The above charts indicate that parties typically tend to comply with Dispute Boards findings, even when they are merely non-binding recommendations. This suggests that Dispute Board are often an effective method of dispute resolution.

32. Compliance with binding decisions

Individuals and Entities were also asked to indicate the rate with which the parties voluntarily complied with the Dispute Boards' binding decisions.

Figure 62 indicates that in the experience of 38% of Individuals, parties voluntarily comply with binding decisions of Dispute Boards most of the time. 32% indicated that parties always voluntarily comply with binding decisions, and only 8% indicated that parties never voluntarily complied with a binding decision.

Figure 62: How often did parties voluntarily comply with binding decisions of Dispute Boards? (Individuals' responses)

Based on 120 responses received

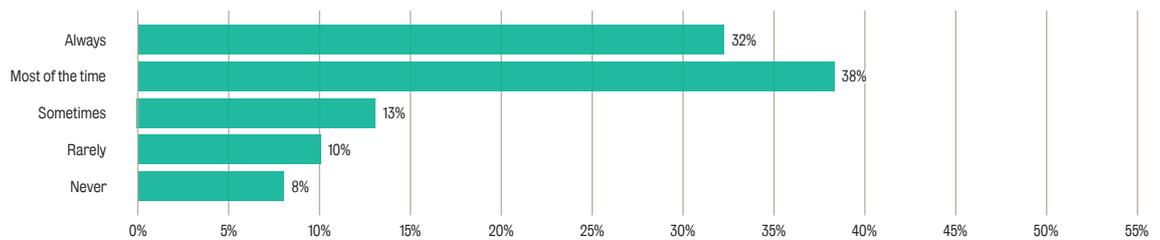
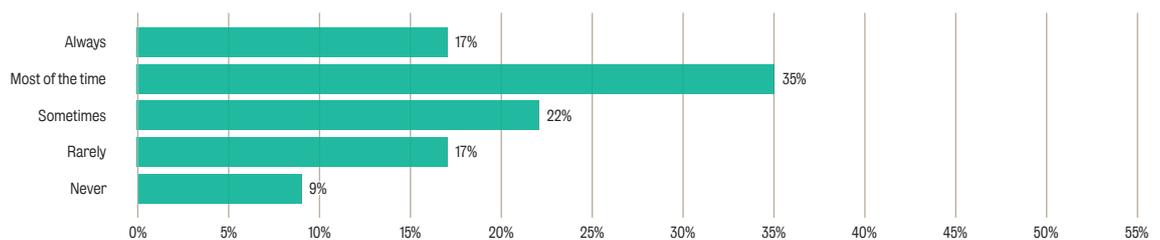


Figure 63 shows that the experience of Entities was similar to that of Individuals. 35% of Entities reported that, based upon their experience, parties voluntarily complied with binding Dispute Board decisions most of the time, 22% stated that parties complied with binding decisions only sometimes, and only 9% indicated that parties never voluntarily complied with a Dispute Board's binding decision.

Figure 63: How often did parties voluntarily comply with binding decisions of Dispute Boards? (Entities' responses)

Based on 23 responses received



The above charts indicate that compliance with binding Dispute Board decisions is not significantly different from compliance with Dispute Board recommendations. This result reinforces that Dispute Boards are an effective method of dispute resolution, regardless of whether their findings are binding or not.

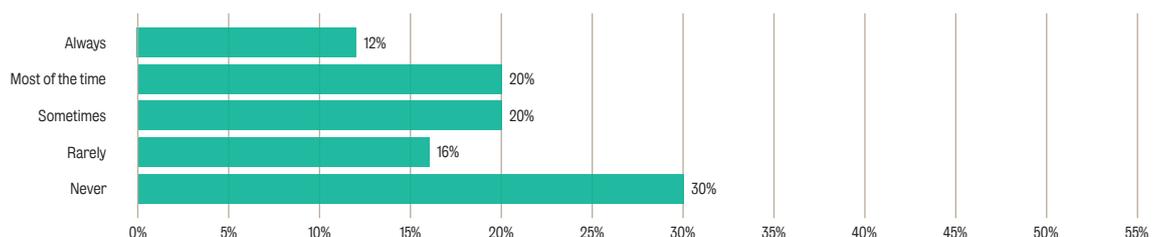
33. Notices of Dissatisfaction

Further in relation to parties' reactions to Dispute Board decisions, Individuals and Entities were asked to identify the frequency with which parties issue a notice of dissatisfaction or equivalent with respect to a Dispute Board's decision.

Figure 64 shows the results of the Individuals' survey. On a positive note, 30% of Individuals indicated that in their experience, the parties never issued a notice of dissatisfaction or equivalent. At the same time, 20% of Individuals indicated that the parties sometimes issue a notice or its equivalent, whereas 20% responded that, most of the time, the parties issue a notice of dissatisfaction or equivalent.

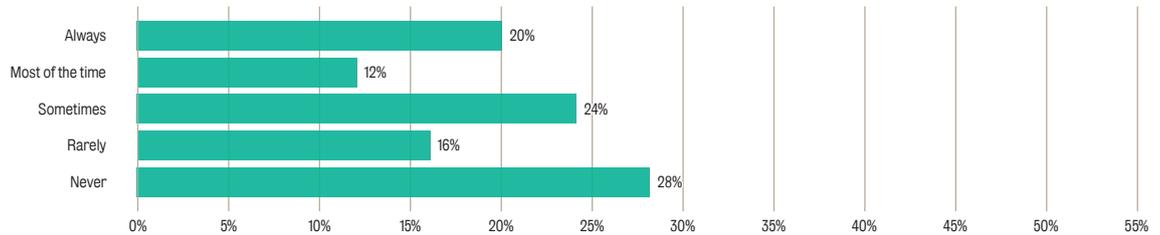
Figure 64: How often did the parties issue a notice of dissatisfaction or equivalent? (Individuals' responses)

Based on 122 responses received



As Figure 65 shows, the feedback received from Entities was somewhat less positive. Only 28% of Entities indicated that parties never issued a notice of dissatisfaction or its equivalent with respect to a decision of a Dispute Board. Moreover, 24% stated that, in their experience, a notice of dissatisfaction or its equivalent was sometimes issued, and 20% indicated that said notice or its equivalent was always issued.

Figure 65: How often did the parties issue a notice of dissatisfaction or equivalent? (Entities' responses)
Based on 25 responses received



Still, the above charts indicate that many Individuals and Entities have never encountered a situation where a notice of dissatisfaction or its equivalent was issued, a result that strengthens the notion that Dispute Boards are often an effective method of dispute resolution.

34. Dispute Board as a mandatory condition

We asked Individuals and Entities how often a Dispute Board submission was a mandatory condition for commencing subsequent procedures.

Figure 66 shows that, in the case of Individuals, 51% of the respondents indicated that the Dispute Board process was always a mandatory condition for escalating the dispute to subsequent proceedings. The remaining half of the respondents had a varied experience, with 15% of Individuals answering that the Dispute Board process was never a contractual precondition for commencing subsequent proceedings such as litigation or arbitration, whereas 15% of Individuals said that the Dispute Board process was a condition for commencing subsequent procedures most of the time.

Figure 66: How often was the Dispute Board process a mandatory condition for commencing subsequent proceedings? (Individuals' responses)
Based on 130 responses received

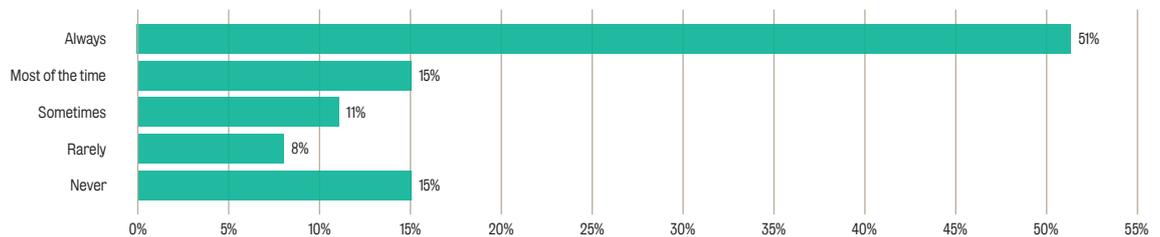
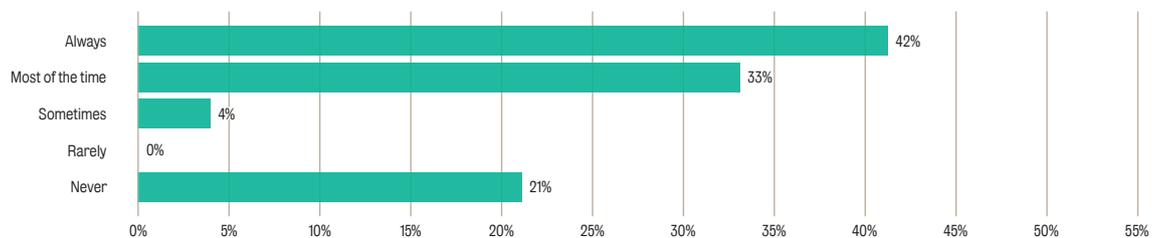


Figure 67 shows that, in the case of Entities, 42% of the respondents said that the Dispute Board process was always a mandatory condition for escalating the dispute to subsequent proceedings. In addition, 33% of Entities indicated that Dispute Boards were a condition most of the time. A significant portion of the respondents, however, namely 21% of Entities, indicated that the Dispute Board process was never a contractual precondition for commencing subsequent proceedings.

Figure 67: How often was the Dispute Board process a mandatory condition for commencing subsequent proceedings? (Entities' responses)
Based on 24 responses received

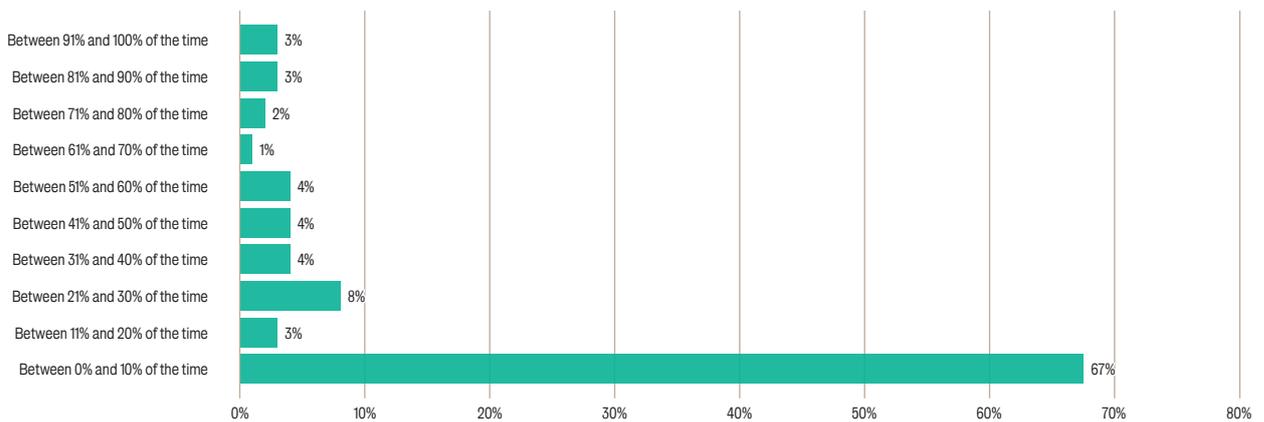


35. Subsequent litigation or arbitration

Respondents were asked how often Dispute Board decisions are referred to litigation or arbitration.

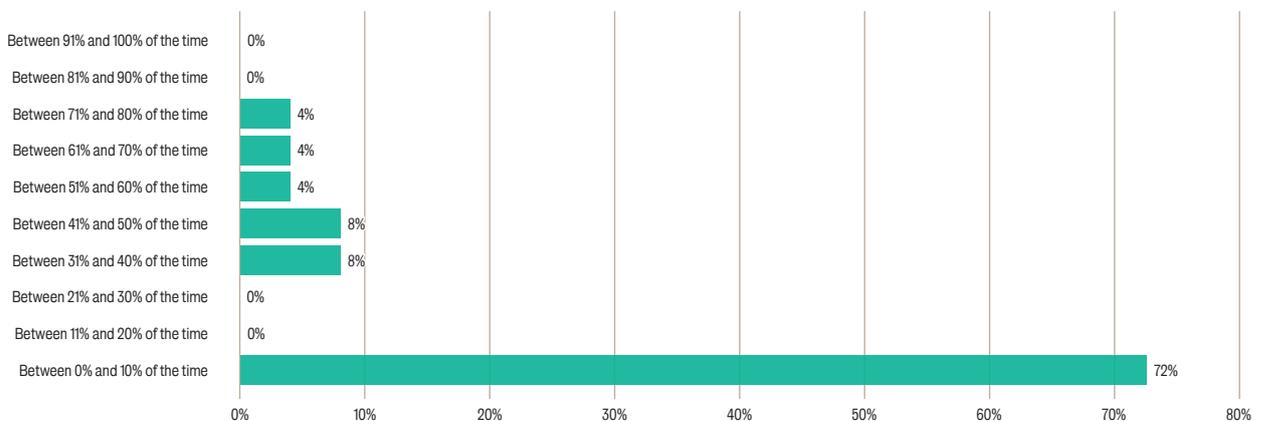
Figure 68 shows that 67% of Individuals said that subsequent proceedings, such as litigation or arbitration, were only commenced between 0% and 10% of the time.

Figure 68: How often was the Dispute Board's decision referred to subsequent litigation or arbitration? (Individuals' responses)
Based on 121 responses received



Likewise, Figure 69 shows that 72% of Entities said that subsequent proceedings, such as litigation or arbitration, were only commenced between 0% and 10% of the time.

Figure 69: How often was the Dispute Board's decision referred to subsequent litigation or arbitration? (Entities' responses)
Based on 25 responses received



The findings above suggest that, in most cases, the Dispute Board process was effective in resolving the dispute or, at least, de-escalated it in a manner that no subsequent proceedings were commenced.

36. Substantial differences between Dispute Board's and subsequent litigation or arbitration's decisions

For the cases in which the dispute was escalated to subsequent proceedings such as litigation or arbitration, respondents were asked to indicate how often the decision reached in those subsequent proceedings was substantially different from the Dispute Board's decision.

Again, on a positive note, most respondents indicated that only rarely or never was the decision reached in subsequent proceedings substantially different from that issued by the Dispute Board.

Figure 70 shows that 44% of Individuals said that the decision reached in subsequent proceedings was never substantially different from the decision of the Dispute Board. 35% of Individuals indicated that it was only rarely that there was a substantial difference between the Dispute Board's decision and the decision reached in subsequent proceedings.

Figure 70: How often was the Dispute Board's decision substantially different from the decision reached in the subsequent litigation or arbitration? (Individuals' responses)

Based on 108 responses received

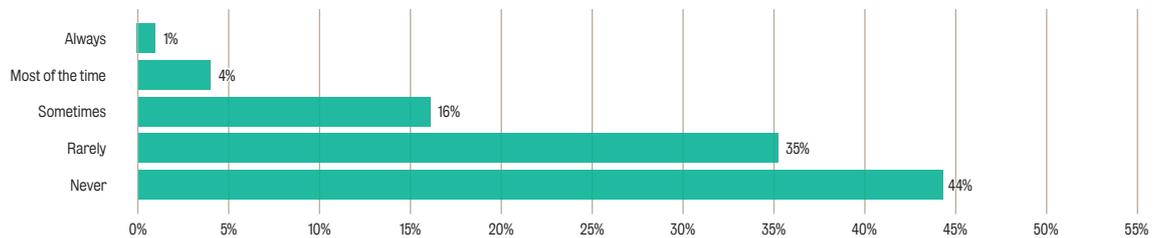
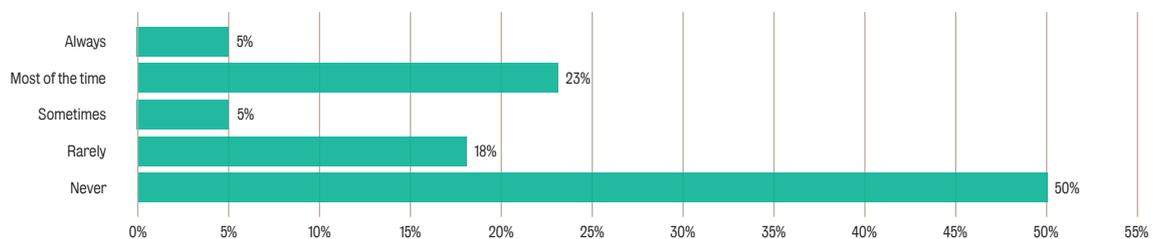


Figure 71 shows that 50% of Entities said that the decision reached in subsequent proceedings was never substantially different from the decision of the Dispute Board. 18% of Entities indicated that it was only rarely that there was a substantial difference between the Dispute Board's decision and the decision reached in subsequent proceedings.

Figure 71: How often was the Dispute Board's decision substantially different from the decision reached in the subsequent litigation or arbitration? (Entities' responses)

Based on 22 responses received



37. Frequency of enforcement proceedings

In terms of enforcement, Individuals and Entities were asked to indicate whether they had taken part in proceedings for the enforcement of a Dispute Board's decision between 2018 and 2023.

Figure 72 shows that 91% of Individuals answered the question in the negative. The remaining 9% of Individuals were asked to submit the number of enforcement proceedings in which they had been involved. Those Individuals indicated that they had been involved in a total of 31 enforcement proceedings.

Figure 72: Have you been involved in the enforcement of a Dispute Board's decision? (Individuals' responses)
Based on 128 responses received

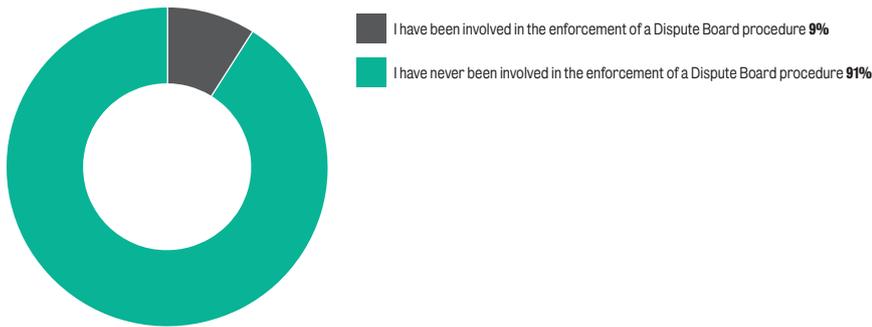
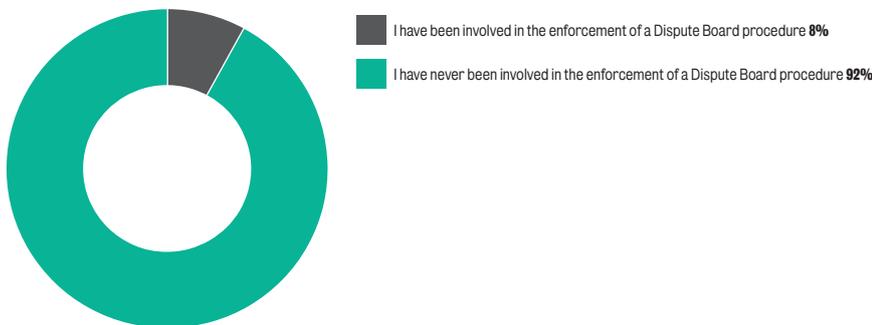


Figure 73 shows that 92% of Entities reported not to have taken part in enforcement proceedings of a Dispute Board's decision between 2018 and 2023. The remaining 8% of Entities were asked to submit the number of enforcement proceedings in which they had been involved. Those Entities had been involved in only three enforcement proceedings in total.

Figure 73: Have you been involved in the enforcement of a Dispute Board's decision? (Entities' responses)
Based on 25 responses received

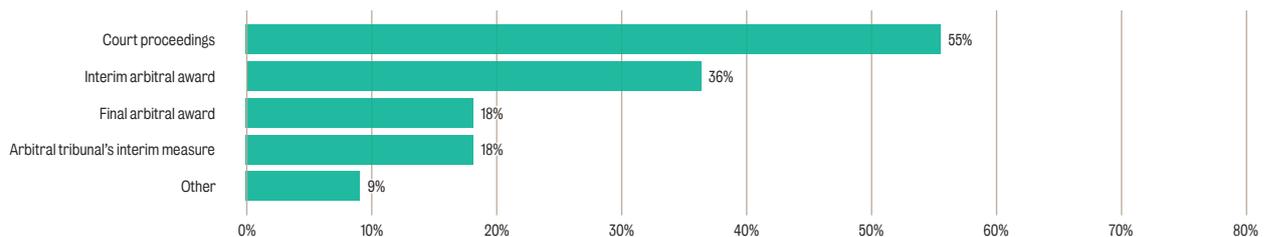


38. Method of enforcement

Respondents were also questioned about the means through which the enforcement of the Dispute Board's decision was sought.

Figure 74 indicates that 72% of Individuals reported being involved in the enforcement of a Dispute Board decision by an arbitral tribunal, via either an interim award (36%), a final award (18%), or an interim measure (13%). 55% reported being involved in court enforcement proceedings.

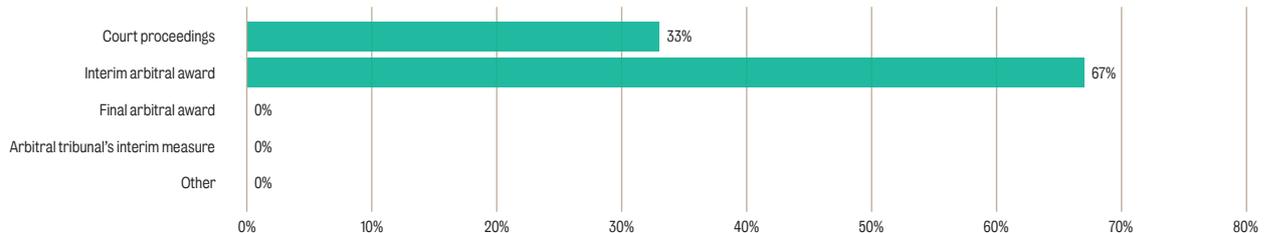
Figure 74: Methods of enforcing Dispute Board decisions (Individuals' responses)
Based on 11 responses received. Respondents were able to select more than one option if applicable



Only one Individual reported having been involved in an enforcement proceeding 'other' than arbitration or court proceedings, listing 'negotiation' as that alternative means of enforcement.

Entities reported being involved with only three enforcement proceedings; as Figure 75 illustrates, two were the subject of interim arbitration awards, and the third was enforced via a court proceeding.

Figure 75: Methods of enforcing Dispute Board decisions (Entities' responses)
Based on 2 responses received. Respondents were able to select more than one option if applicable



39. Enforcement rates

Figure 76 indicates that, in the experience of 30% of Individuals, enforcement was granted between 91% and 100% of the time.

Figure 76: How often was the enforcement of a Dispute Board's decision granted? (Individuals' responses)
Based on 10 responses received

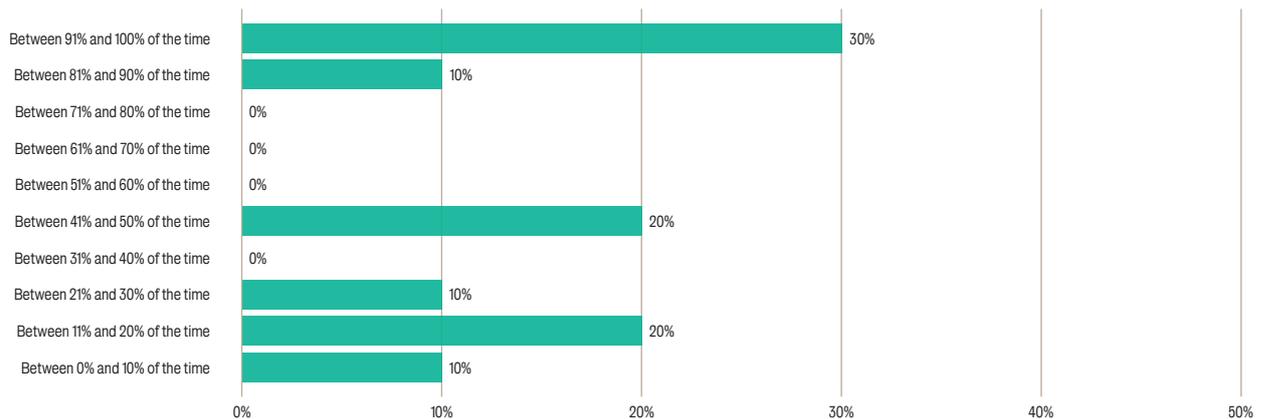
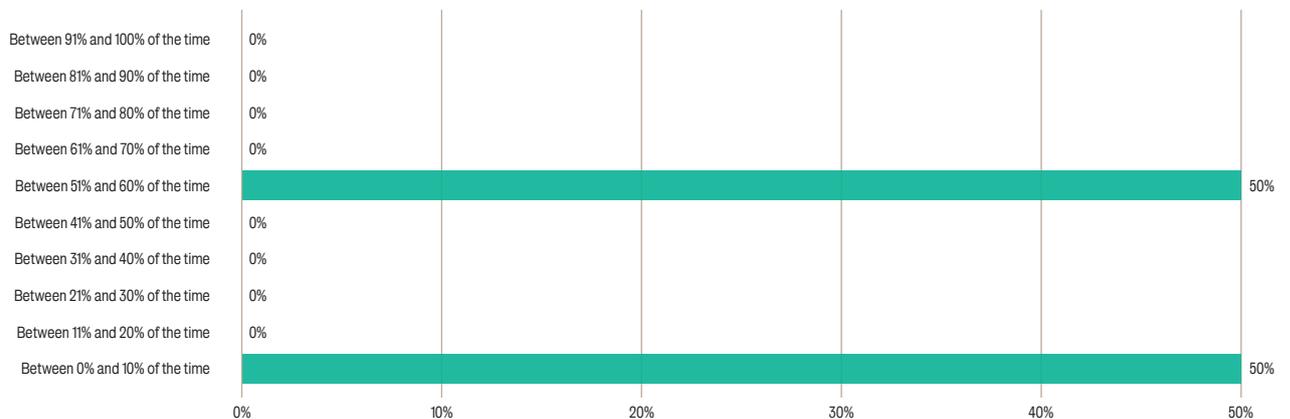


Figure 77 shows that, in the experience of 50% of Entities, enforcement was granted between 51% and 60% of the time, whereas in the experience of the other 50% of Entities, enforcement was granted only between 0% and 10% of the time. It will be recalled that the data relates only to three enforcement proceedings.

Figure 77: How often was the enforcement of a Dispute Board's decision granted? (Entities' responses)
Based on 2 responses received



Chapter 5: Costs of the Dispute Board

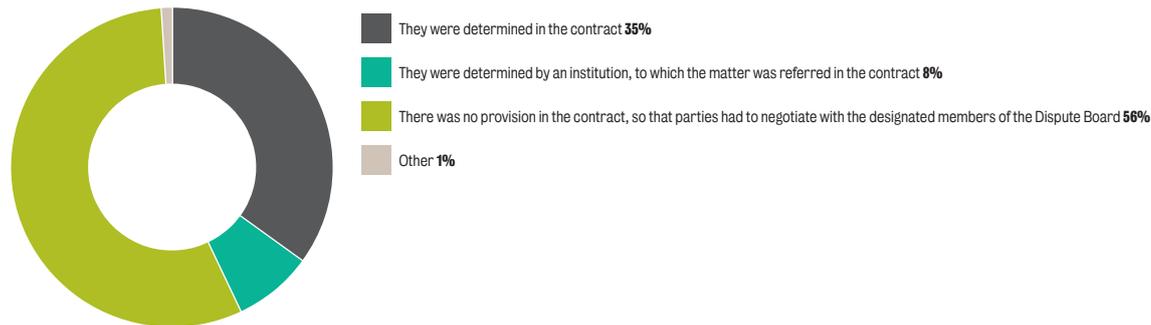
40. Provision on Dispute Board fees

Turning to the costs associated with Dispute Boards, Individuals and Entities were asked to indicate the most common methods to determine the Dispute Board's fees.

Figure 78 shows that, in the experience of 56% of Individuals, there were no contractual provisions for determining the fees of the Dispute Board, and the parties had to negotiate the fees with the designated members of the Dispute Board. In contrast, 35% of Individuals reported occasions where the fees of Dispute Board members were determined by the contract.

Figure 78: Methods of determining Dispute Board fees (Individual's responses)

Based on 130 responses received

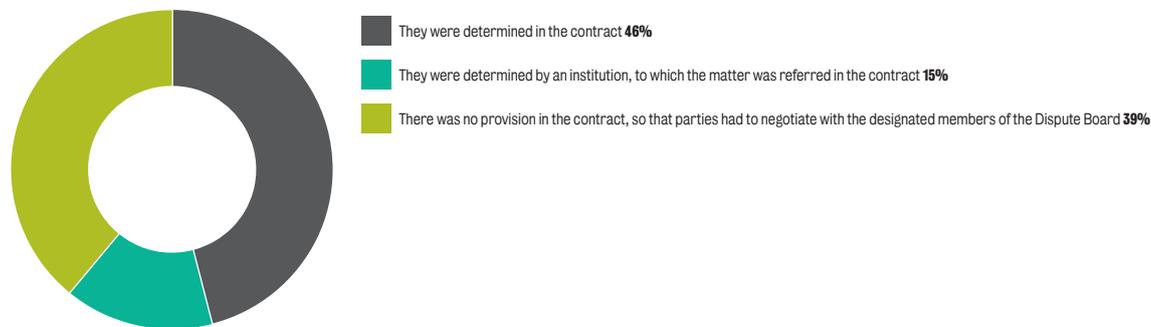


Despite one Individual having indicated 'Other' as the most common means to determine the Dispute Board's fees, no further information was provided about that experience.

Figure 79 shows that, in the experience of 46% of Entities, the fees of Dispute Board members were determined by the contract. 39% of Entities indicated that, most commonly, there was no provision in the contract, and the parties had to negotiate the fees with members of the Dispute Board.

Figure 79: Methods of determining Dispute Board fees (Entities' responses)

Based on 26 responses received

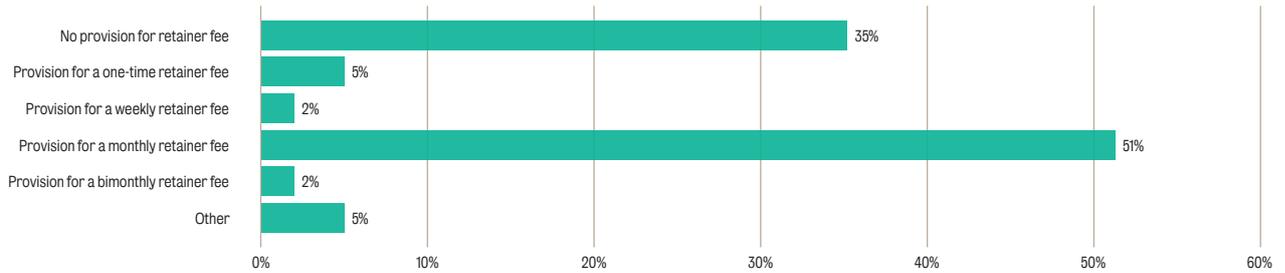


41. Use of retainer fees

Subsequently, respondents were asked whether a retainer fee was commonly established as part of the fees of the Dispute Board members.

Figure 80 indicates that the most common scenario in the experience of Individuals (51% of the time) was that the parties agreed on a provision establishing a monthly retainer fee to be paid to the Dispute Board members. On the other hand, 35% of Individuals indicated that their most common experience was the absence of any retainer fee provision.

Figure 80: Practice for establishing the Dispute Board's retainer fee (Individual's responses)
Based on 129 responses received

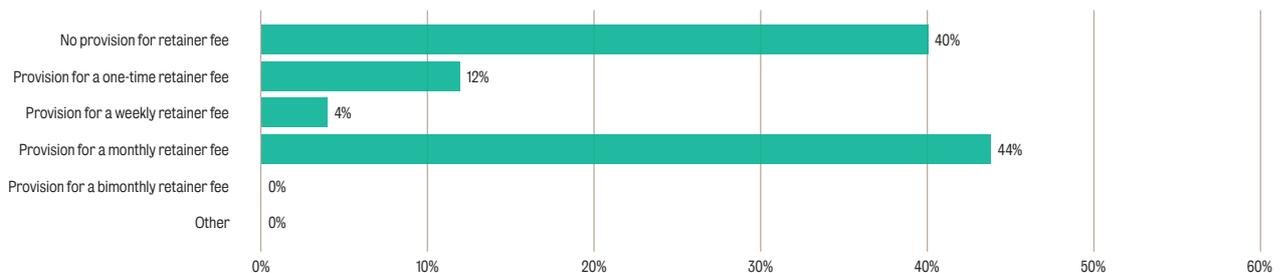


In the case of Individuals reporting 'Other', the following circumstances were indicated.

- Annual retainer fee.
- Lump sum.
- A trimonthly retainer fee.
- A daily retainer fee.

Figure 81 indicates that the most common scenario in the experience of Entities (44% of the time) was that the parties agreed on a provision establishing that a monthly retainer fee be paid to the Dispute Board members. At the same time, most commonly there was no provision that Dispute Board members be paid a retainer fee.

Figure 81: Practices for establishing the Dispute Board's retainer fee (Entities' responses)
Based on 26 responses received



42. Average retainer fees

Respondents were asked for the average yearly retainer fee for a Dispute Board based upon their experience.

Figure 82 shows that, in the experience of 51% of Individuals, the Dispute Board's retainer fee most commonly was less than \$25,000 a year. Another 43% of Individuals indicated that the most common annual retainer fee was between \$25,001 and \$50,000 a year.

Figure 82: Average annual retainer fee (Individuals' responses)

Based on 91 responses received. Respondents were able to select up to three options

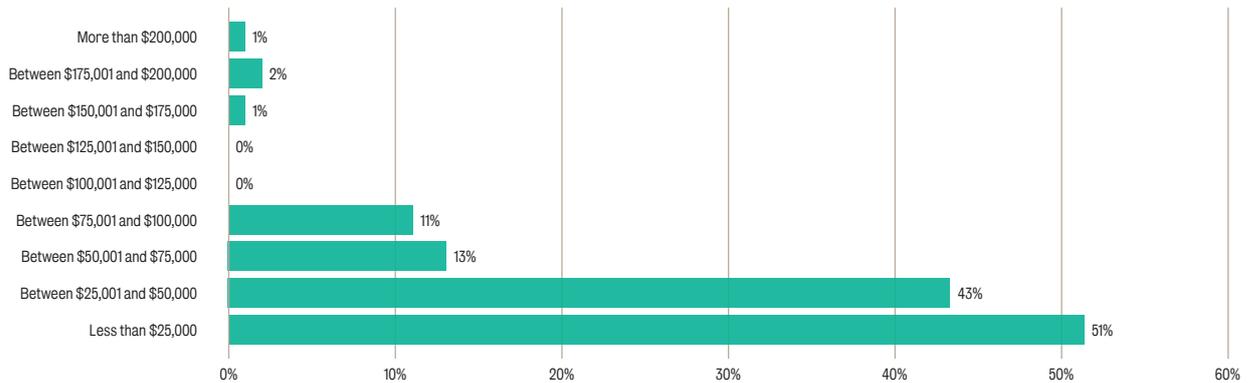
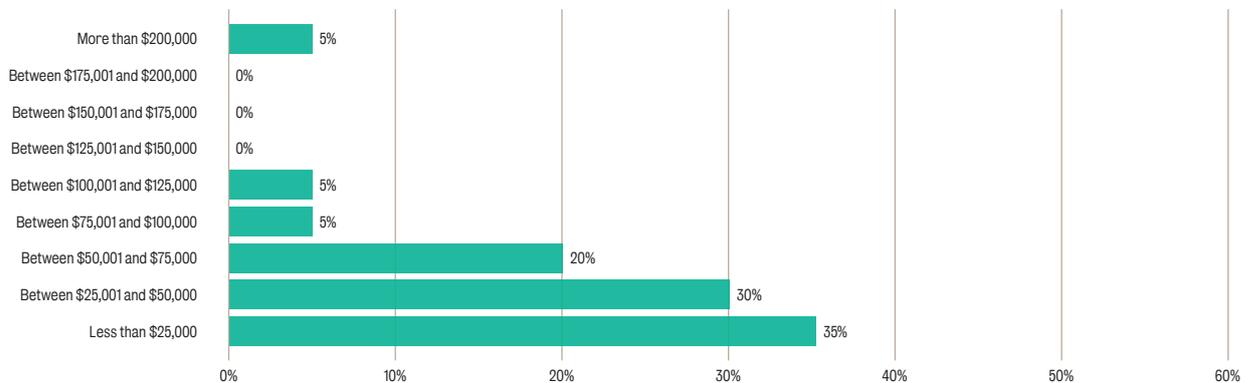


Figure 83 shows that the experience of Entities was very similar. 35% of Entities indicated that a Dispute Board's retainer fee was most commonly less than \$25,000 per year, with another 30% of Entities stating that the most likely amount was between \$25,001 and \$50,000 per year.

Figure 83: Average annual retainer fee (Entities' responses)

Based on 20 responses received. Respondents were able to select up to three options



43. Average hourly fees

Other than the retainer fee, the Dispute Board’s fees can be determined hourly, daily, or otherwise. With that in mind, respondents were questioned about their experience in this regard.

Figure 84 shows that 28% of Individuals answered that, between 2018 and 2023, they were not involved in a Project where the fees of the Dispute Board member were fixed at an hourly rate. Those respondents with experience of fees set at an hourly rate most commonly reported an average hourly fee between \$201 and \$300, with 28% of Individuals identifying this range. The second most cited range, indicated by 18% of Individuals, was slightly higher, specifically between \$301 and \$400.

Figure 84: Average hourly fees (Individuals’ responses)

Based on 125 responses received. Respondents were able to select up to three options

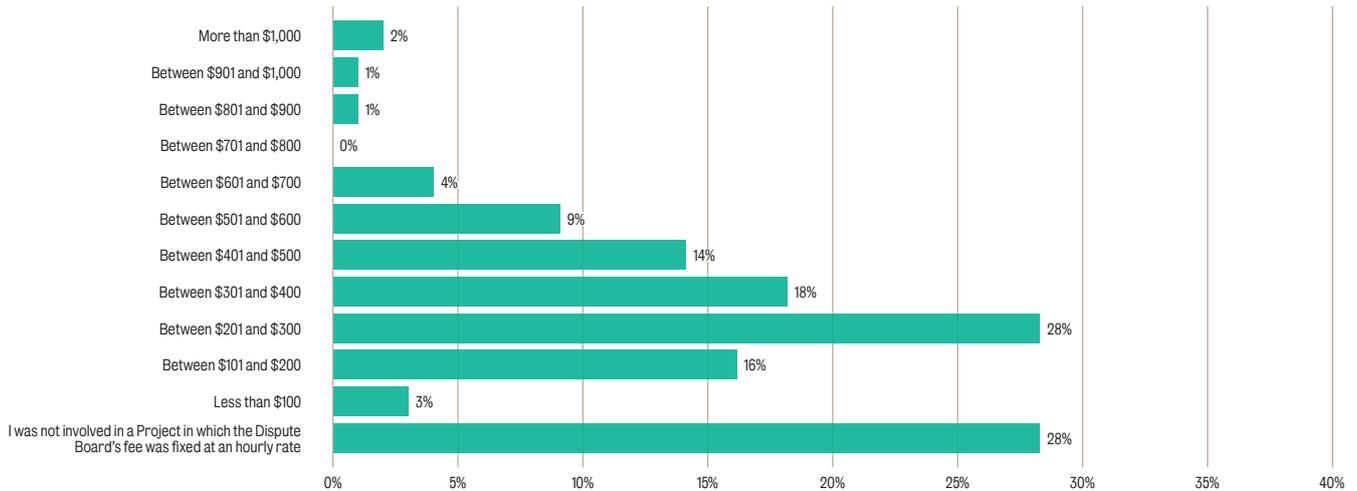
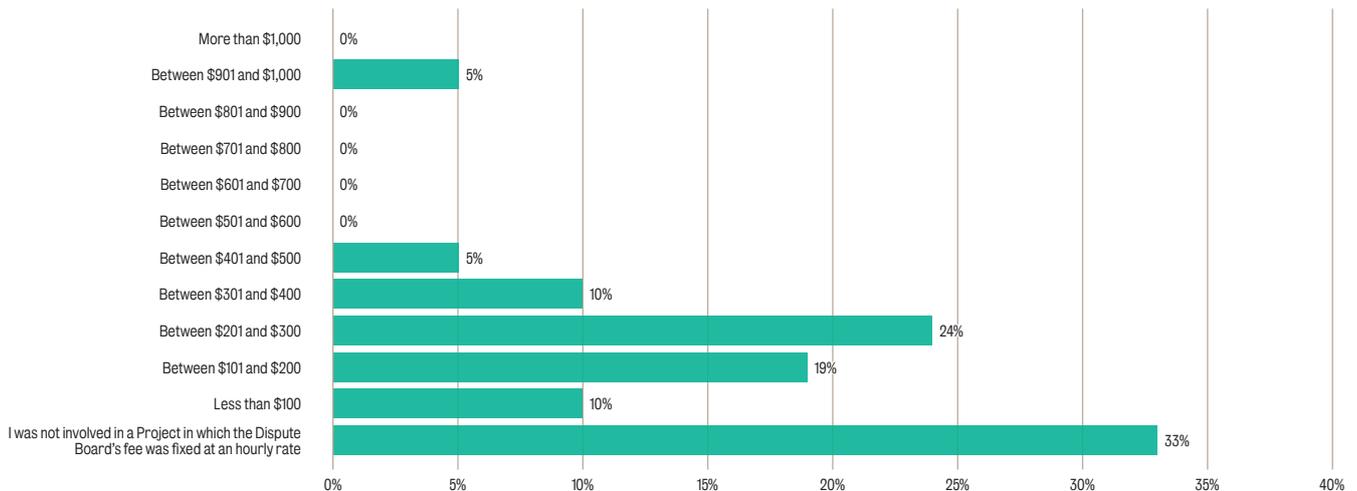


Figure 85 shows that responses from Entities were similar. 33% of Entities indicated that between 2018 and 2023, they were not involved in a Project where the fees of the Dispute Board member were fixed at an hourly rate. Amongst respondents with experience of hourly fees, the most common range listed for such a fee was between \$201 and \$300, as reported by 24% of Entities. Unlike with Individuals, however, the second most reported range for Entities was slightly lower, specifically between \$101 and \$200, as indicated by 19% of Entities.

Figure 85: Average hourly fees (Entities’ responses)

Based on 21 responses received. Respondents were able to select up to three options



44. Average daily fees

Figure 86 indicates that 27% of Individuals reported that, between 2018 and 2023, they were not involved in a Project where the fees of the Dispute Board member were fixed at a daily rate. Amongst the respondents with experience of fees fixed at a daily rate, the most common response was an average daily fee between \$2,001 and \$3,000, as reported by 31% of Individuals. The second most experienced value was slightly lower, namely between \$1,001 and \$2,000, as indicated by 21% of Individuals.

Figure 86: Average daily fees (Individuals' responses)

Based on 121 responses received. Respondents were able to select up to three options

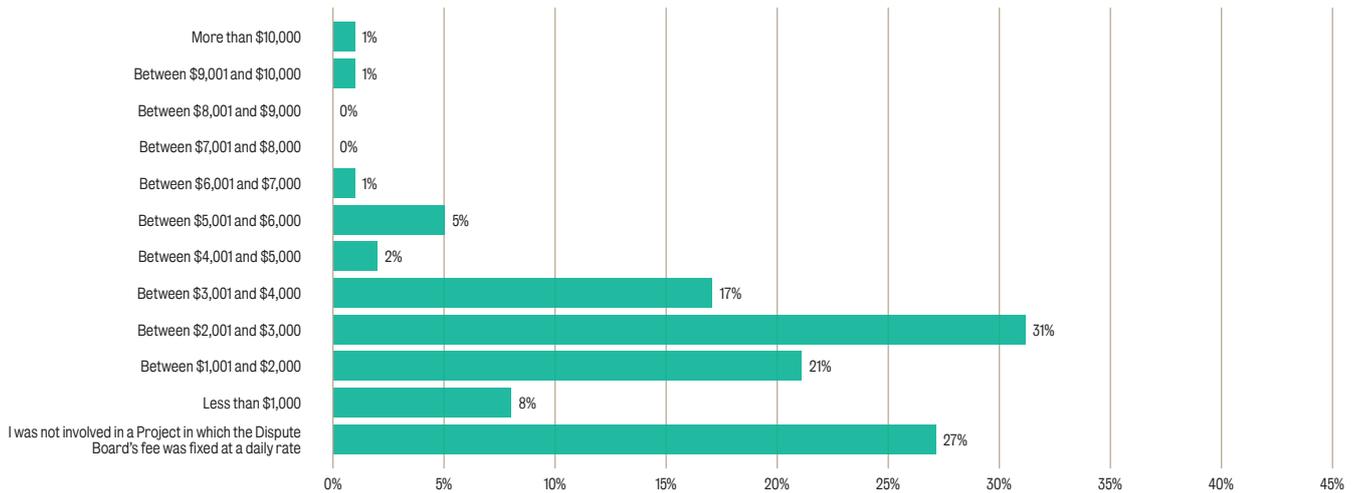
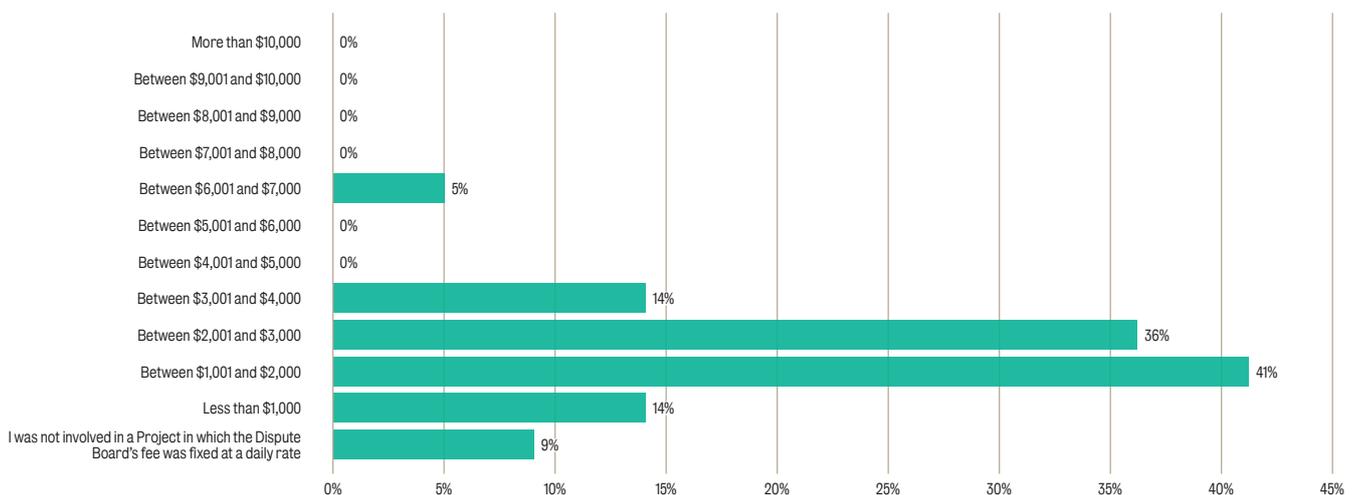


Figure 87 shows that only 9% of Entities reported that, between 2018 and 2023, they were not involved in a Project where the fees of the Dispute Board member were fixed at a daily rate. Amongst the respondents with experience of fees fixed at a daily rate, the most common response also indicated an average daily fee between \$1,001 and \$2,000, as reported by 41% of Entities. Unlike Individuals, however, the second most experienced value was higher, namely between \$2,001 and \$3,000, as indicated by 36% of Entities.

Figure 87: Average daily fees (Entities' responses)

Based on 22 responses received. Respondents were able to select up to three options



45. Average total costs

Regardless of whether the fees of the Dispute Board member included a retainer fee or were fixed daily or hourly, respondents were also asked questions about the overall costs of the Dispute Boards with which they had been involved.

Figure 88 indicates that, for Individuals, the cost of a Dispute Board is most commonly between \$100,001 and \$200,000, as reported by 27% of Individuals. Second and third were smaller ranges, namely, between \$50,001 and \$100,000, as reported by 23% of Individuals, and between \$1 and \$50,000, as reported by 17% of Individuals.

Figure 88: Average total costs (Individuals' responses)

Based on 115 responses received. Respondents were able to select more than one option if applicable

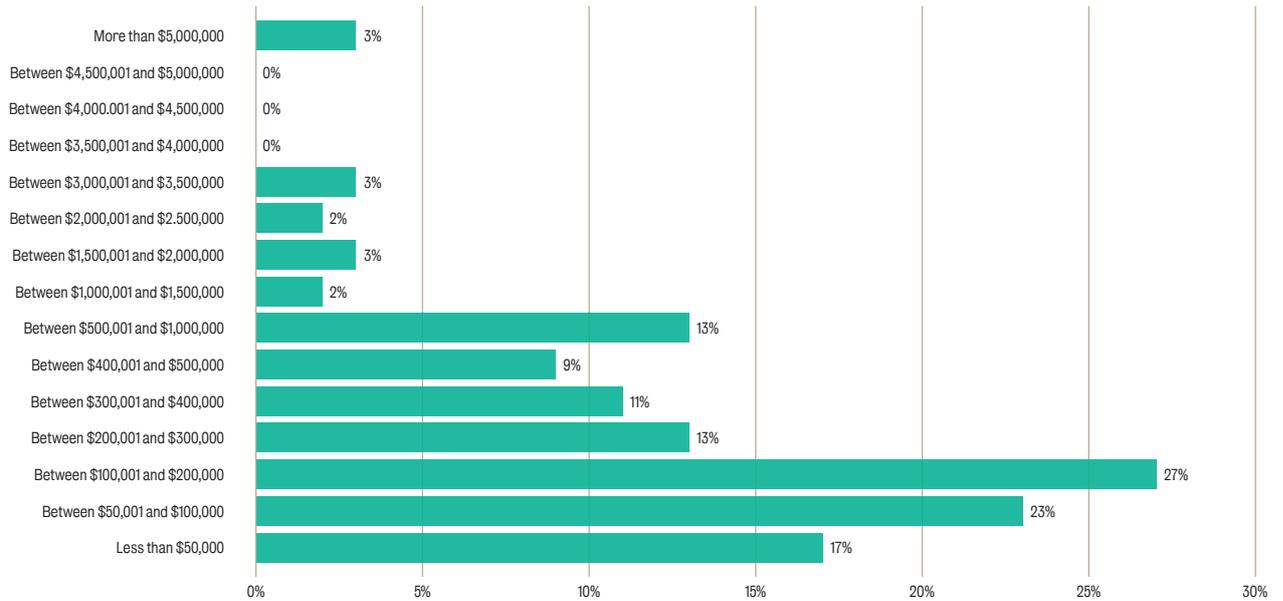
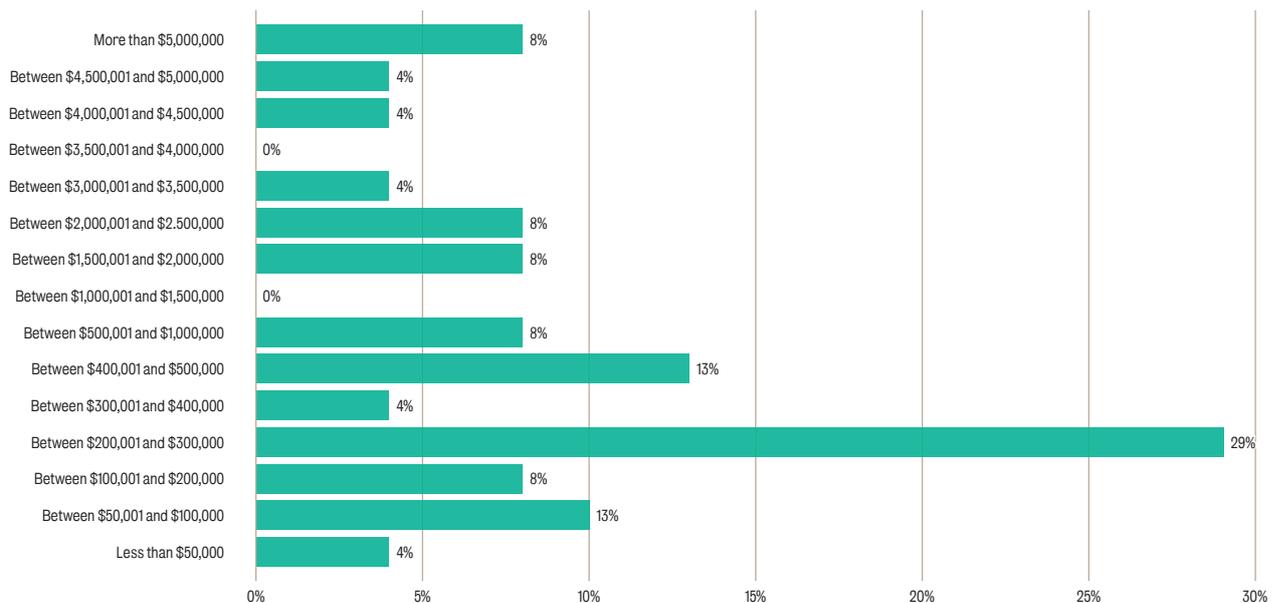


Figure 89 shows that, for Entities, the cost of a Dispute Board was most commonly between \$200,001 and \$300,000, as reported by 29% of Entities. Second and third was a tie between the ranges of \$50,001 to \$100,000 and \$400,001 to \$500,000.

Figure 89: Average total costs (Entities' responses)

Based on 24 responses received. Respondents were able to select more than one option if applicable



46. Total costs of Dispute Board as a percentage of total value of Project

Naturally, looking at the average costs of a Dispute Board alone does not provide a full picture of its cost impact of such a mechanism, as the latter also depends on the value of the relevant Project. Therefore, we asked respondents to indicate the typical percentage that the total costs of the Dispute Board represented with respect to the total value of the Project.

Figure 90 shows that 55% of Individuals reported a typical total cost between 0% and 0.5% of the total value of the Project. 43% of Individuals reported that the Dispute Board's costs normally are between 0.5% and 1%.

Figure 90: Dispute Board costs as a percentage of the total value of the Project (Individuals' responses)
Based on 117 responses received. Respondents were able to select more than one option if applicable

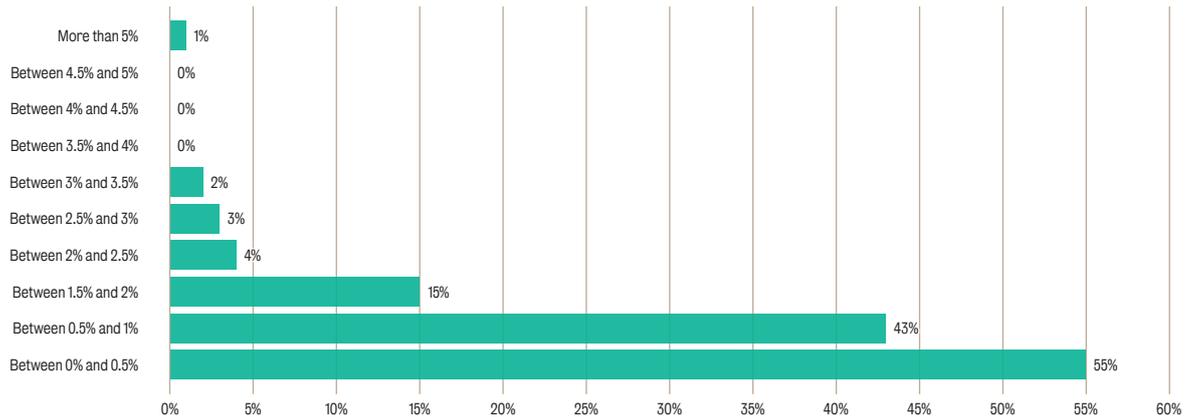
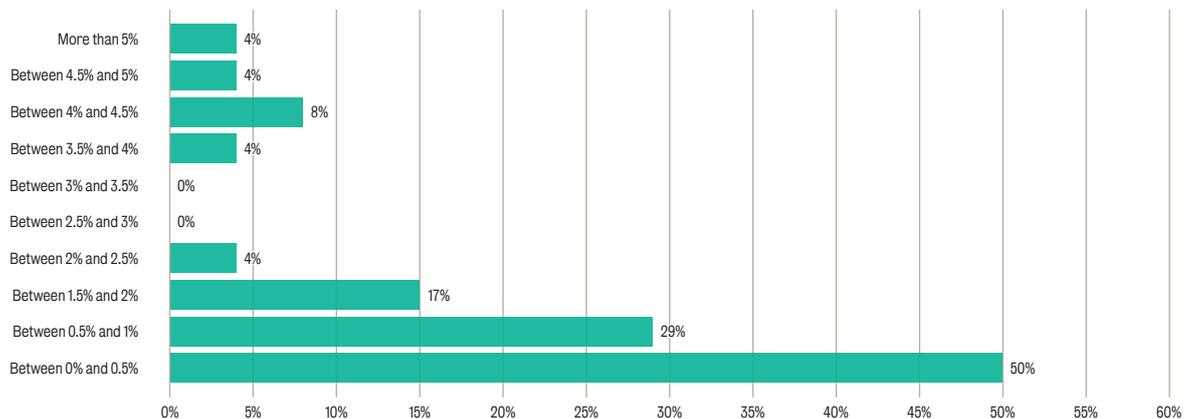


Figure 91 shows that in the experience of 50% of Entities, the total cost of the Dispute Board only represents between 0% and 0.5% of the costs of the Project. 29% of Entities reported that the Dispute Board's costs normally are between 0.5% and 1%. The frequencies with which the costs of the Dispute Board were higher as a percentage of the costs of the Project progressively decreased, except for a few responses indicating instances in which the costs of the Dispute Board amounted to more than 3.5% of the costs of the Project, as reported by 20% of Entities.

Figure 91: Dispute Board costs as a percentage of the total value of the Project (Entities' responses)
Based on 24 responses received. Respondents were able to select more than one option if applicable

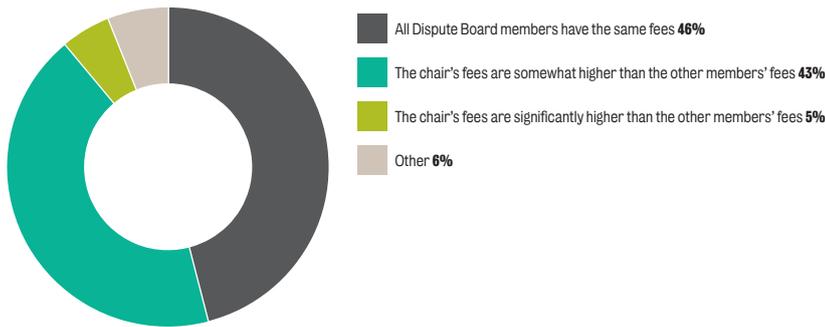


47. Fees distribution amongst Dispute Board members

Respondents were asked whether different Dispute Board members often had different fees and specifically whether the chairs' fees differed from those of the other members.

Figure 92 shows that, while 46% of Individuals reported that all Dispute Board members normally had the same fees, 43% of Individuals noted that the chair's fee was normally somewhat higher than the other members' fee.

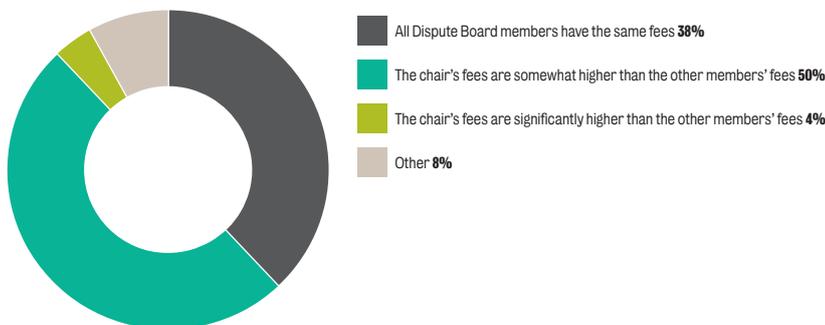
Figure 92: Fees distribution amongst Dispute Board members (Individuals' responses)
Based on 127 responses received



We asked respondents who answered 'Other' to explain to what they were referring. Most of the responses obtained referred to the fact that those Individuals had only taken part in Dispute Boards composed by a single member and thus could not provide an answer to the questions. One Individual, however, indicated he or she did not know the fees of the Dispute Board members. Another Individual indicated that he or she had a case in which one non-chair Dispute Board member had a higher fee than both the other non-chair member and the chair.

Figure 93 shows that, in the case of Entities, most of the respondents (50%) indicated that the chair's fee was normally somewhat higher than the other members' fees, but 38% of Entities indicated that their most common experience was for all Dispute Board members to charge the same fees.

Figure 93: Fees distribution amongst Dispute Board members (Entities' responses)
Based on 26 responses received



We asked respondents who answered 'Other' to indicate which scenario that would be. One Entity reported a case in which all Dispute Board members had different fees from one another. In another case, one Entity commented that, in their experience, international Dispute Board members would have higher fees than local Dispute Board members.

48. Other costs: external lawyers

In addition to the Dispute Board's fees, and depending on the complexity of the dispute or the parties' preference, the parties may incur additional costs during the Dispute Board process by deciding to involve external lawyers or experts (eg quantum, delay, technical)

Figure 94 shows that 45% of Individuals have rarely or never seen involvement by external lawyers, whereas 39% of Individuals indicated that external lawyer involvement occurs always or most of the time.

Figure 94: How often did parties use external lawyers in the Dispute Board process? (Individuals' responses)
Based on 129 responses received

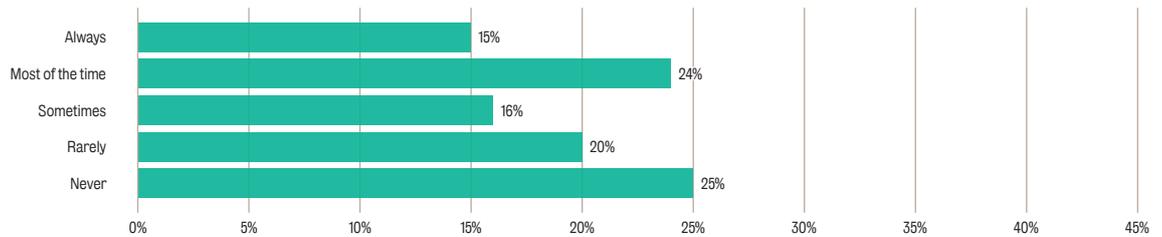
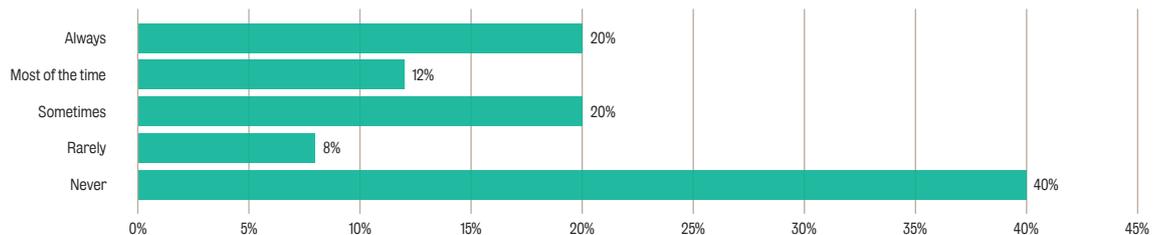


Figure 95 shows that 40% of Entities have never seen external lawyers involved, while 32% see external lawyers involved always or most of the time.

Figure 95: How often did parties use external lawyers in the Dispute Board process? (Entities' responses)
Based on 25 responses received

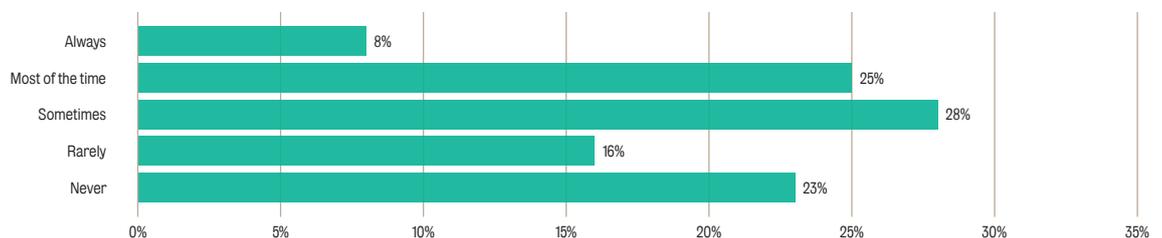


49. Other costs: external experts

Other than the involvement of external lawyers, it may also be the case that external experts were involved in the Dispute Board's procedure.

Figure 96 shows that Individuals have varied experiences of expert involvement in the Dispute Board process. 28% of Individuals reported that the experts are only sometimes involved. 25% of Individuals reported that experts were involved most of the time, whereas 23% of Individuals said that, in their experience, experts were never involved.

Figure 96: How often did parties use external experts in the Dispute Board process? (Individuals' responses)
Based on 129 responses received

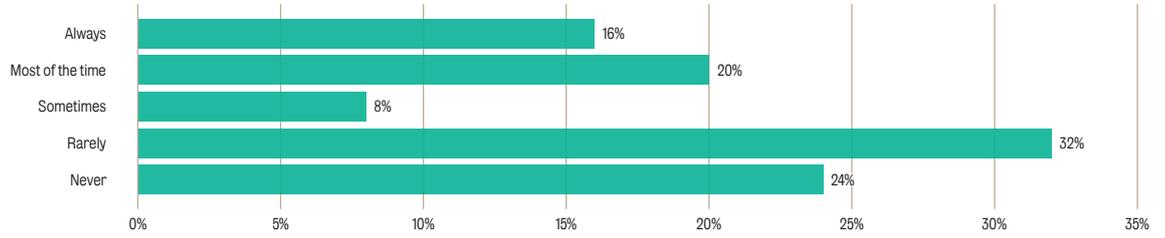


Chapter 5: Costs of the Dispute Board

In the case of Entities, Figure 97 shows that the most common case was that experts were only rarely involved (32% of responses). 24% of Entities reported that, in their experience, experts were never involved. Finally, 20% of Entities said that experts were involved most of the time.

Figure 97: How often did parties use external experts in the Dispute Board process? (Entities' responses)

Based on 25 responses received



Chapter 6: Users' perception of Dispute Boards

50. Usefulness of Dispute Boards for avoiding disputes

Respondents were asked if Dispute Boards were helpful in avoiding disputes.

Figure 98 reports the results concerning Individuals' opinions on the Dispute Board's usefulness for avoiding disputes. 86% of Individuals indicated that they found Dispute Boards very or extremely useful for avoiding disputes. 36% of Individuals found Dispute Boards very useful. Only 1% responded that they did not find Dispute Boards useful at all.

Figure 98: Individuals' perceived usefulness of Dispute Boards for avoiding disputes
Based on 134 responses received

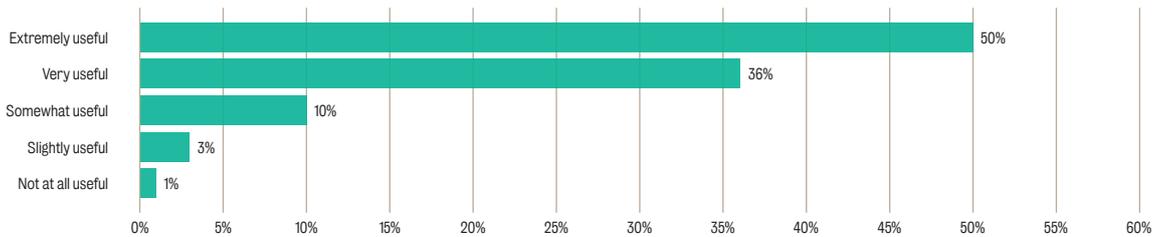
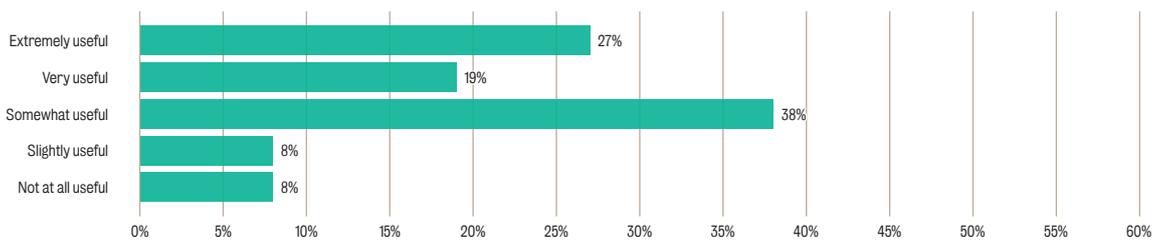


Figure 99 reports the results concerning the Entities' opinions on the Dispute Board's usefulness for avoiding disputes. In this case, the most common response was that the Dispute Board was only somewhat useful for avoiding disputes, as indicated by 38% of Entities. 27% of Entities, however, reported to have found Dispute Boards extremely useful. 8% responded that they did not find Dispute Boards useful at all.

Figure 99: Entities' perceived usefulness of Dispute Boards for avoiding disputes
Based on 26 responses received



51. Satisfaction with the duration of Dispute Board process

Respondents were also asked to indicate their satisfaction with the average duration and costs of the Dispute Board process.

Figure 100 reports that 45% of Individuals were satisfied with the average duration of the Dispute Board process, whereas 35% of Individuals were very satisfied. Only 1% of Individuals reported that they were very dissatisfied with the average duration of the Dispute Board process.

Figure 100: Individuals' satisfaction with the average duration of the Dispute Board process
Based on 133 responses received

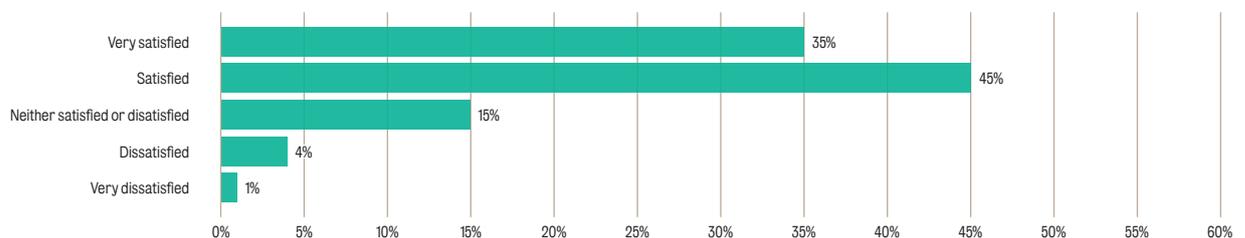
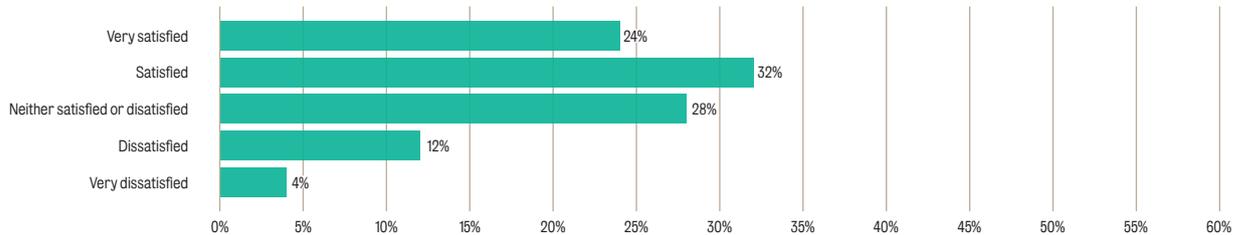


Figure 101 reports that a smaller percentage of Entities was either satisfied or very satisfied with the average duration of the Dispute Board process. Indeed, 32% of Entities were satisfied with the average duration of the Dispute Board process, whereas 24% of Entities were very satisfied. 4% of Entities reported that they were very dissatisfied with the average duration of the Dispute Board process.

Figure 101: Entities' satisfaction with the average duration of the Dispute Board process
Based on 25 responses received



52. Satisfaction with costs

Figure 102 reports that 50% of Individuals were satisfied, and 32% of Individuals were very satisfied with the average costs of the Dispute Board process. Again, only a little over 1% reported that they were very dissatisfied with it.

Figure 102: Individuals' satisfaction with the average costs of the Dispute Board process
Based on 133 responses received

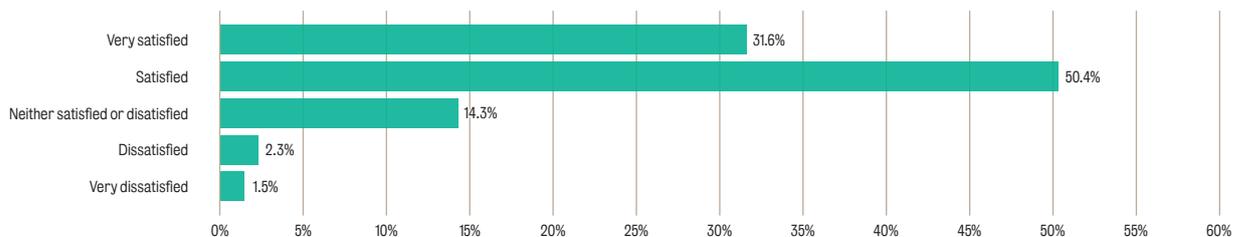
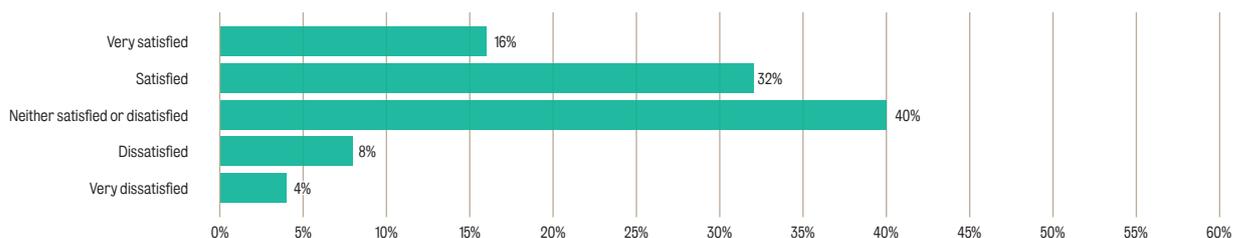


Figure 103 reports that, for Entities, 40% of the respondents said that they were neither satisfied nor dissatisfied with the costs of the Dispute Board. 32% of Entities, though, reported that they were satisfied with the average costs of the Dispute Board. 4% of the respondents, however, reported that they were very dissatisfied with the average costs of the Dispute Board.

Figure 103: Entities' satisfaction with the average costs of the Dispute Board process
Based on 25 responses received



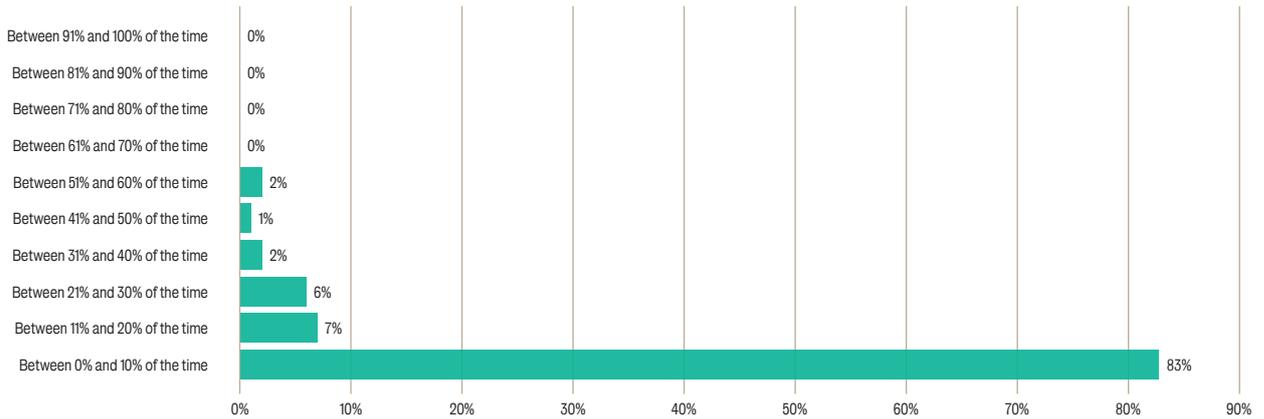
The difference between the perceptions and satisfaction of Individuals and Entities in terms of the usefulness, costs and duration of the Dispute Board process was interesting. More specifically, Individuals were much more satisfied with the mechanism's effectiveness, costs, and duration than Entities.

53. Suspicion of bias: single member or chair

Individuals and Entities were asked to indicate how often they suspected bias and, in particular, how often that suspicion concerned the Dispute Board's single or chair member or the other members of the Dispute Board.

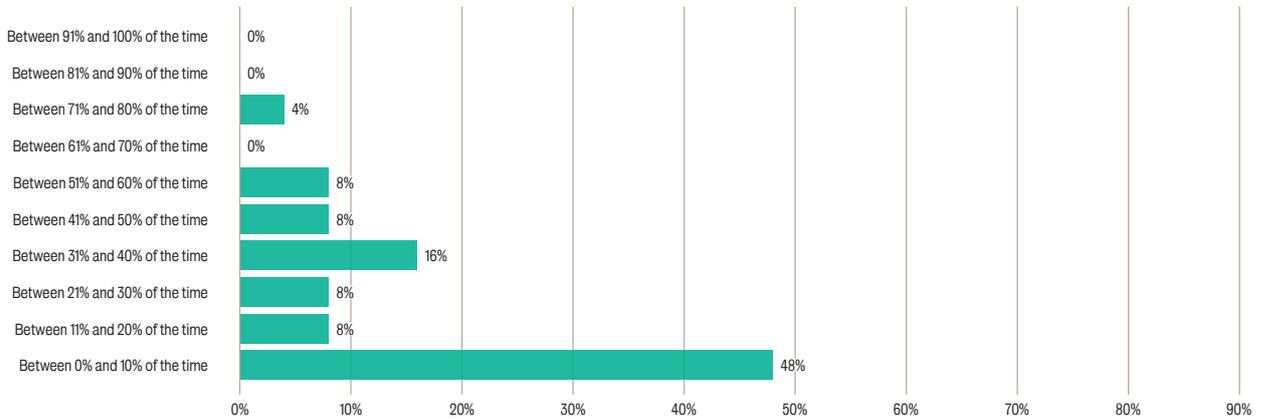
Figure 104 reports the answers given by Individuals. As seen below, only rarely (ie between 0% and 10% of the time) suspected that a chair of a tripartite Dispute Board or single member of a one-person Dispute Board was biased.

Figure 104: How often did you suspect that the Dispute Board's single member or chair was biased? (Individuals' responses)
Based on 125 responses received



Turning now to Entities, Figure 105 reports that only 48% reported having suspected that a chair or single member was biased only 0% to 10% of the time. Instead, a significant number of Entities reported being suspicious more often. For instance, 16% of Entities reported suspecting bias in a chair or single member between 31% and 40% of the time, and 4% reported suspecting bias in that leading Dispute Board member between 71% and 80% of the time.

Figure 105: How often did you suspect that the Dispute Board's single member or chair was biased? (Entities' responses)
Based on 25 responses received



54. Suspicion of bias: general members

Figure 106 reports the answers given by Individuals with respect to suspicions of bias from other members of the Dispute Board (excluding the chair or single members). While the frequency of suspicion was higher in this case than in the Individuals' suspicion of bias of the chair or single members, the numbers were still reassuring. Indeed, 74% of Individuals suspected bias only between 0% and 10% of the time.

Figure 106: How often did you suspect that the Dispute Board's general member (ie excluding chair or single member) was biased? (Individuals' responses)
Based on 122 responses received

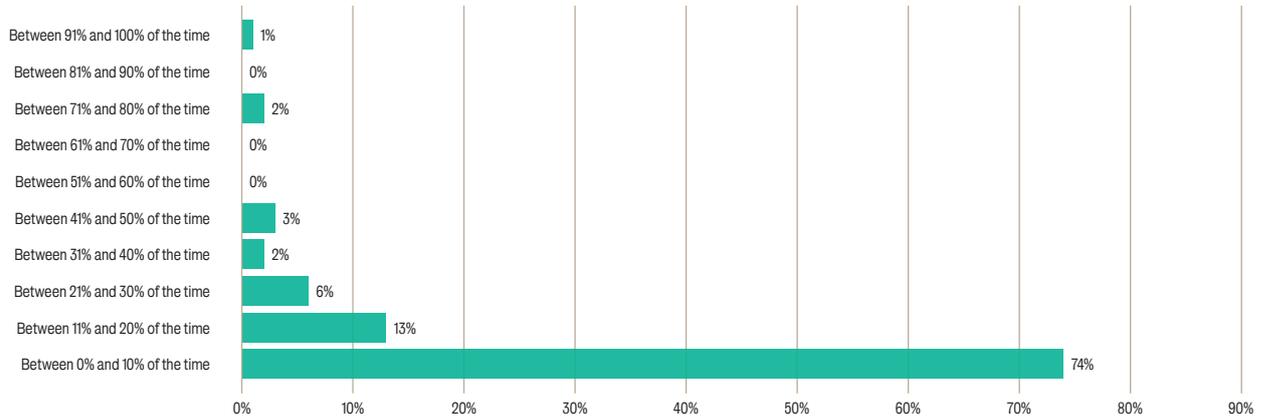
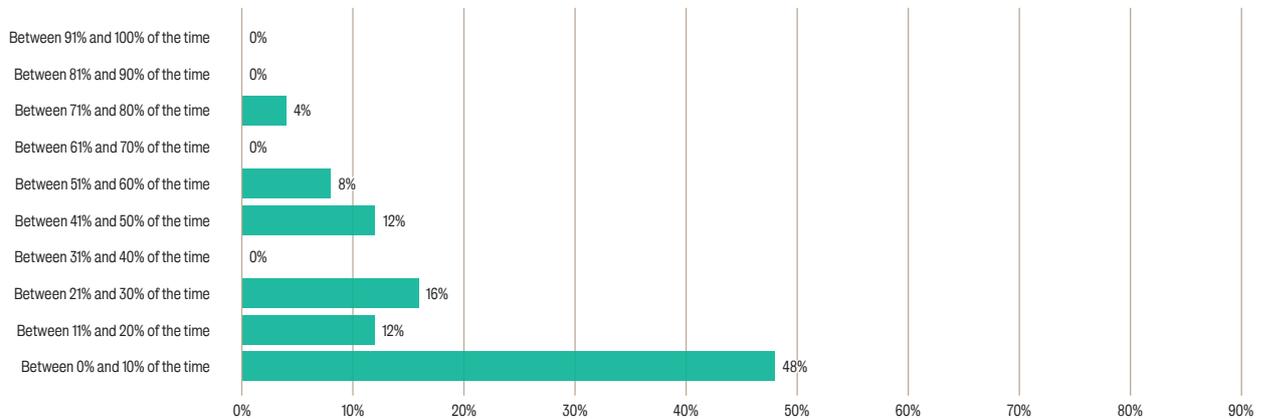


Figure 107 shows that there was no significant difference between Entities' suspicion of bias by the chair or single member and their suspicions in relation to the other members of the Dispute Board. Only 48% of Entities reported that they only suspected bias in those other Dispute Board members less than 10% of the time; in contrast, 16% of Entities reported suspecting bias in those other Dispute Board members between 21% and 30% of the time.

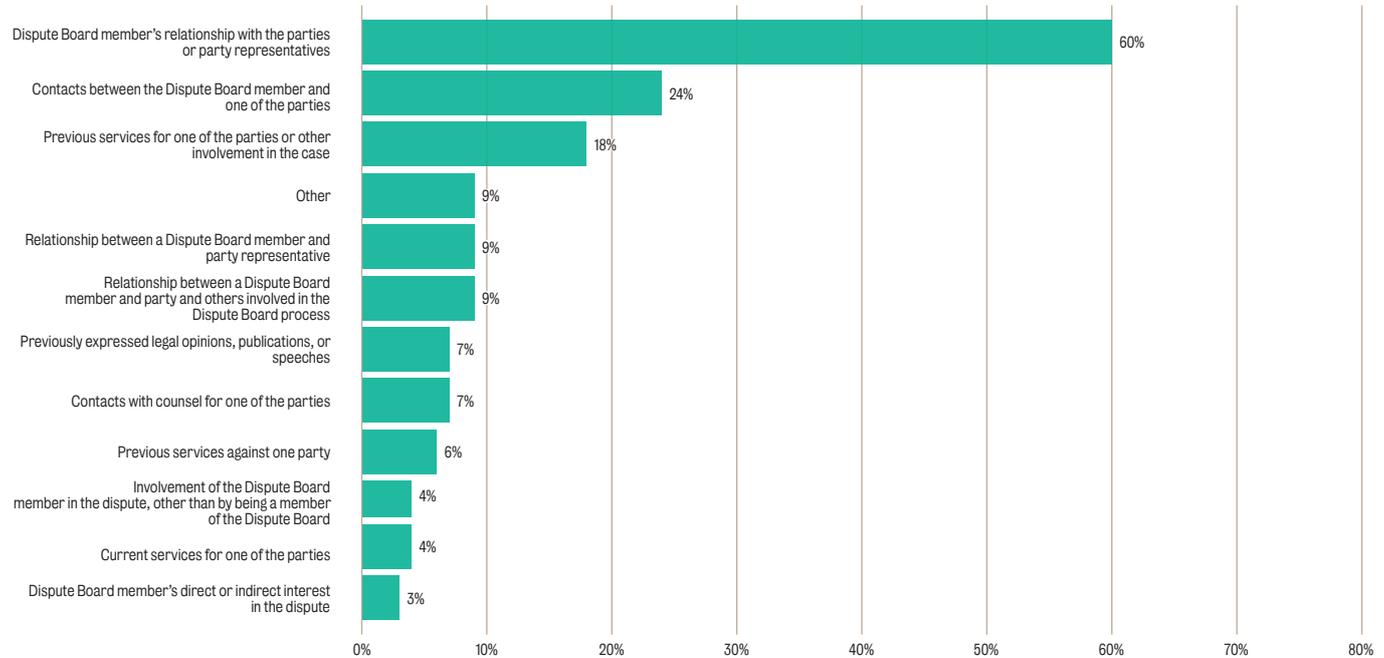
Figure 107: How often did you suspect that the Dispute Board's general member (ie excluding chair or single member) was biased? (Entities' responses)
Based on 25 responses received



55. Reasons for the suspicion of bias

Figure 108 shows the most common reasons for Individuals to suspect Dispute Board members might be biased. The leading cause, indicated by 60% of Individuals, was the relationship of a Dispute Board member with the parties or party representatives. The second leading cause was contact between the Dispute Board member in question and one of the parties, as reported by 25% of Individuals.

Figure 108: Most common reasons for Individuals' suspicion of Dispute Board members' bias
Based on 68 responses received. Respondents were able to select more than one option if applicable

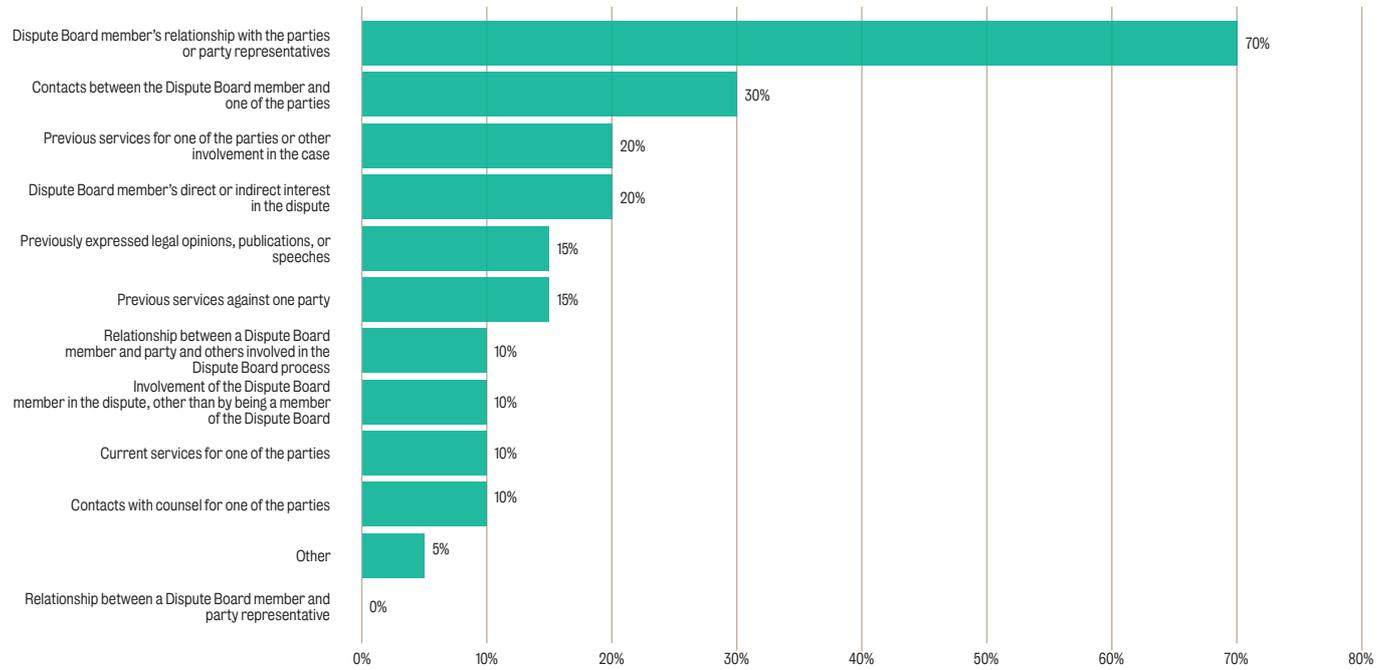


As seen from the chart above, certain Individuals reported to have suspected bias for a reason other than the ones listed above. Not all Individuals specified what those 'Other' reasons were. The responses of those that did are reported below.

- *Certain attitudes of one or both parties.*
- *Comments showing partial views.*
- *DB [sic] member trying to favour the party who appointed him.*
- *General Employer/Contractor Bias.*
- *Indirect approach and understanding of parties' case.*
- *Parties always proposing the same Dispute Board's member.*

Figure 109 compiles the most common reasons Entities suspected bias in Dispute Board members. The leading cause, indicated by 70% of Entities, was a relationship between the Dispute Board member and one of the parties or party representatives. The second leading cause, mentioned by 30% of the respondents, was contact between the Dispute Board member and one of the parties.

Figure 109: Most common reasons for Entities' suspicion of Dispute Board members' bias
Based on 19 responses received. Respondents were able to select more than one option if applicable



Few respondents indicated having suspected bias for a reason other than the ones listed above. When asked to specify what the 'Other' reason would be, only one Entity provided an answer, as reported below.

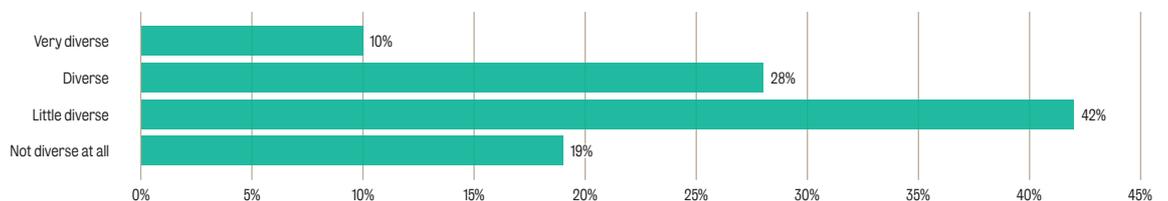
I Actions taken during the hearing.

56. Diversity of the Dispute Board

Individuals and Entities were asked to rate the perceived diversity of the composition of Dispute Boards.

Figure 110 indicates that 42% of Individuals found that the average composition of Dispute Boards was a little diverse. 28% of Individuals reported that the average composition of Dispute Boards was diverse. There were, however, 19% of Individuals whose experience was that Dispute Boards were not diverse at all.

Figure 110: How diverse was the composition of Dispute Boards? (Individuals' responses)
Based on 130 responses received

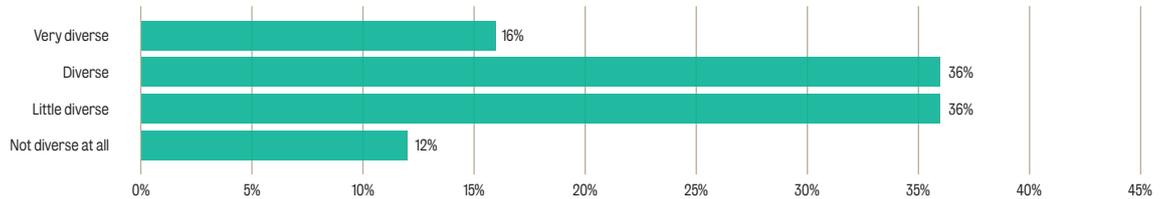


Chapter 6: User's perception of Dispute Boards

Turning to Entities, figure 111 shows that while 36% of Entities found the composition of Dispute Boards to be only a little diverse, 36% found it diverse. There were also 16% of Entities that considered the composition of Dispute Boards to be very diverse.

Figure 111: How diverse was the composition of Dispute Boards? (Entities' responses)

Based on 25 responses received



57. Improvement of diversity

In terms of the improvement of the diversity rate in the past five years, Individuals have indicated a positive experience.

Figure 112 indicates that 41% of Individuals reported that diversity has improved, as opposed to a total of 22% of the respondents who found the opposite. The remaining 37% of Individuals indicated that they were not sure.

Figure 112: Individuals' perceived improvement of the diversity of the composition of Dispute Boards in the last 5 years

Based on 131 responses received

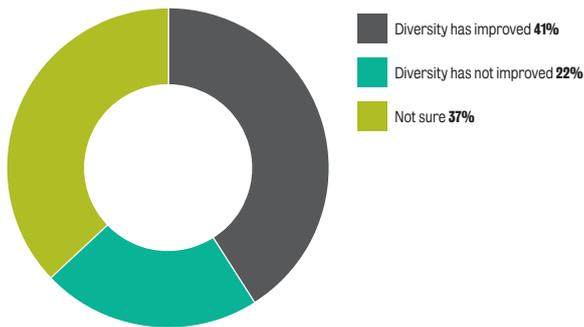
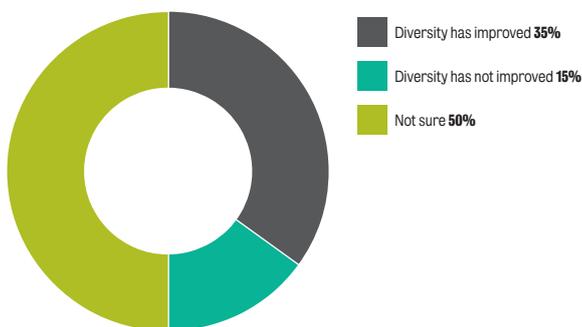


Figure 113 indicates that 35% of Entities reported that diversity has improved, as opposed to 15% finding that diversity has not improved. 50% of Entities indicated that they were not sure.

Figure 113: Entities' perceived improvement of the diversity of the composition of Dispute Boards in the last 5 years

Based on 26 responses received



Part II

Institutions



Chapter 7: Involvement of Institutions

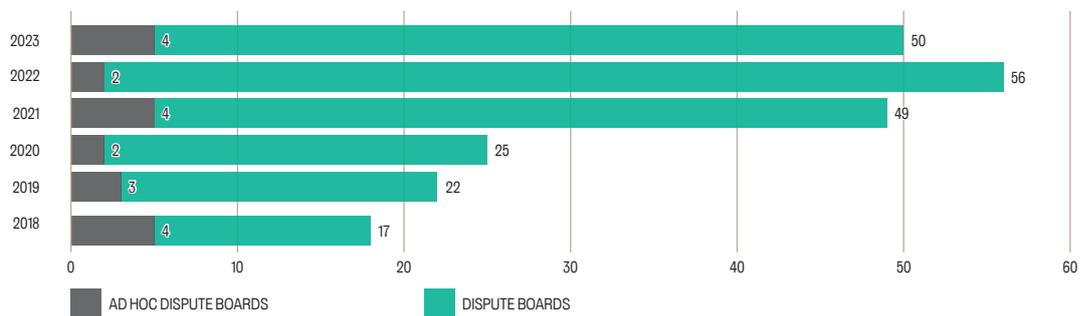
58. Annual use of Dispute Boards

This section reports the results of the survey of Institutions. In this study, an Institution is defined as ‘an institution, or its respective nominating body, which was (or could have been) requested to intervene in the constitution or functioning of a Dispute Board’. A list of the responding Institutions is in Annex A.

Institutions were asked to specify the number of Dispute Boards with which they were requested to intervene between January 2018 and December 2023 (inclusive). Specifically, they had to indicate, for each of those calendar years, (i) the number of Dispute Boards with which they were involved, and (ii) how many of those Dispute Boards were ad hoc as opposed to standing.

Figure 114 reflects a total of 219 Dispute Boards over the course of six years. Of these, 91.3% were standing Dispute Boards (ie 200) and 8.7% were ad hoc Dispute Boards (ie 19).

Figure 114: Number of Dispute Boards in which Institutions were involved
Based on 13 responses received



The number of Dispute Boards reported by Institutions was significantly smaller than the amount reported by Individuals and Entities during the same time period.

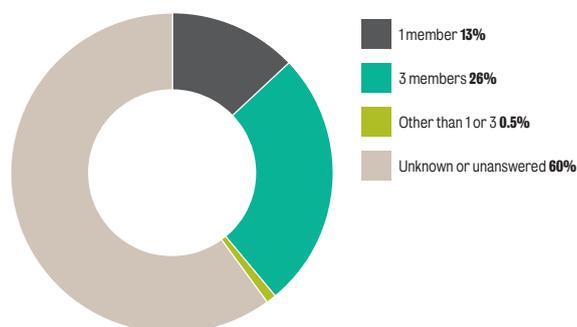
Still, there was a growing trend to involve Institutions in the process, as evidenced by the increasing number of reported cases over the years.

59. Composition of the Dispute Boards

With respect to the Dispute Boards reported, Institutions were asked to indicate how many consisted of a single member, three members, or a number of members other than one or three.

As evidenced by Figure 115, Institutions did not provide composition data on 60% of the Dispute Boards they reported. Where information was provided, there were a higher number of Dispute Boards composed of three members (26%) than those composed of a single member (13%). Only a scant few (0.5%) were reported not to be composed of one or three members.

Figure 115: Composition of the Dispute Board (Institutions’ responses)
Based on 12 responses received



Chapter 8: Institutions' practices

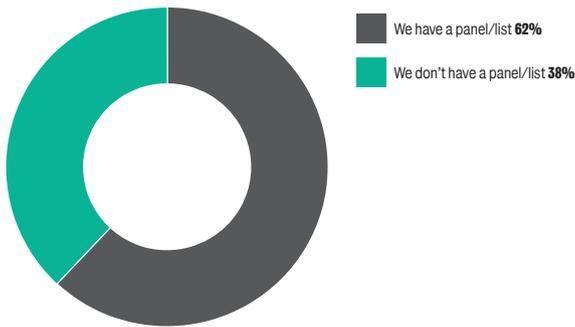
60. Institutions with a list for appointment

One possible role of Institutions during the constitution of a Dispute Board is to assist with the nomination of Dispute Board members. With that in mind, Institutions were asked to indicate whether they had a panel or list of potential Dispute Board members.

Figure 116 indicates that 62% of Institutions have a panel or list of Dispute Board members. On the other hand, 38% of Institutions reported not having such a list.

Figure 116: Do you have a panel or list of Dispute Board members to consider for appointment?

Based on 13 responses received



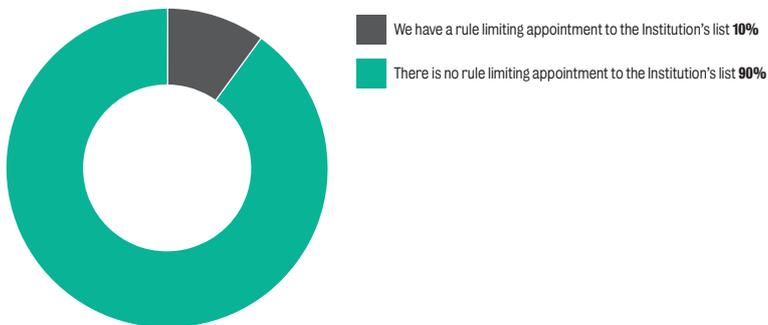
61. Policies limiting the Institution's appointment

Institutions that have a panel or list of Dispute Board members were also asked whether they had a rule or policy requiring that appointments made by Institutions be limited to the Institution's panel or list of Dispute Board members.

Figure 117 indicates that only 10% of Institutions had such a rule, whereas 90% indicated that they have no rule limiting the appointment of Dispute Board members to their own panel or list.

Figure 117: Do you have a rule or policy requiring that appointments be limited to the Institutions' panel or list?

Based on 7 responses received



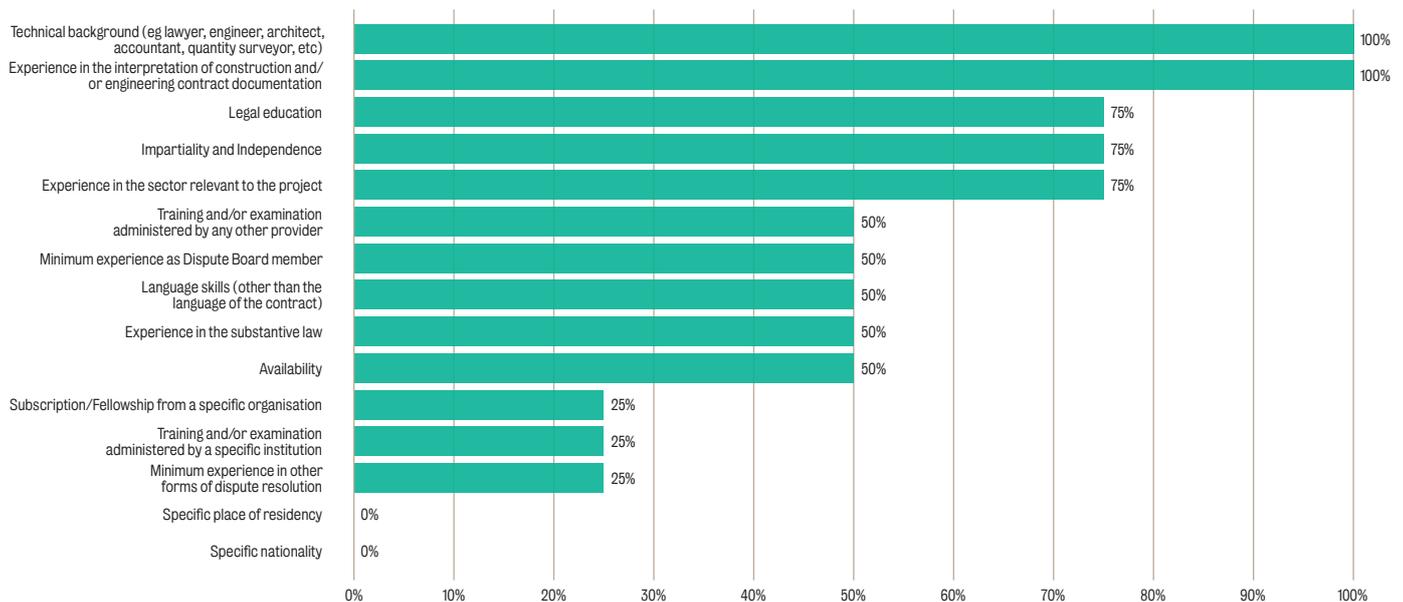
62. Criteria for joining the list

The Institutions which had a panel or list of Dispute Board members were also asked what criteria they consider relevant in selecting individuals to join it.

Figure 118 illustrates the answers. Tied in first place was the technical background of a candidate (eg lawyer, engineer, architect, accountant, quantity surveyor) and his or her experience in the interpretation of construction and/or engineering contract documentation, both of which were criteria indicated by all Institutions. Legal education, impartiality and independence, and experience in the sector relevant to the project were tied for second, as all three were listed as relevant by 75% of the Institutions.

It is important to note that, out of all Institutions that have a panel or list of Dispute Board members, only 57% answered this question.

Figure 118: Criteria considered relevant by Institutions for individuals to join their panel or list
Based on 4 responses received. Respondents were able to select more than one option if applicable

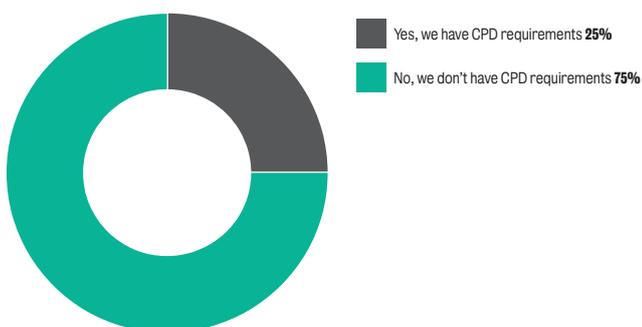


63. CDP requirements

Respondents were then asked whether there were any Continuing Professional Development (CDP) requirements for a Dispute Board member to join (or be kept on) the Institution's panel or list.

Figure 119 compiles the responses obtained, indicating that 25% of Institutions have CPD requirements for keeping a Dispute Board member on their list, whereas the remaining 75% of Institutions do not impose said requirements. Again, it is important to note that, out of all Institutions that have a panel or list of Dispute Board members, only four (57%) answered this question.

Figure 119: Do you apply Continuing Professional Development (CDP) requirements to the list's members?
Based on 4 responses received



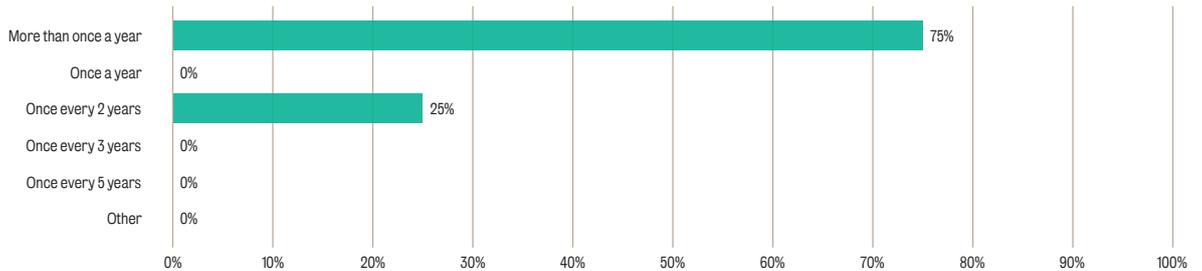
64. Review of the Institution's list

An additional question was posed as to how frequently Institutions that have a panel or list of Dispute Board members update their panel or list.

In response, 75% of Institutions indicated that they update or review their list of Dispute Board members more than once a year, whereas the remaining 25% of Entities indicated they review their panel or list once every two years. An important caveat here is that, out of all Institutions that have a panel or list of Dispute Board members, only four (57%) answered this question.

Figure 120: How often do you review your panel or list?

Based on 4 responses received



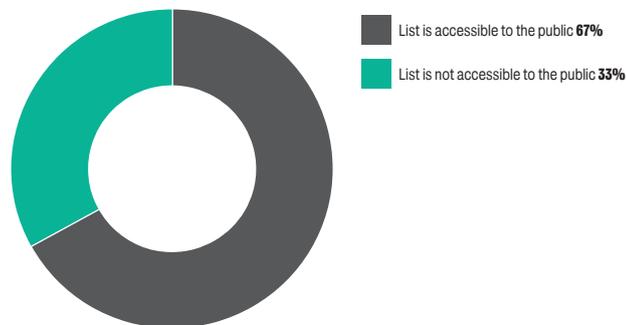
65. Accessibility of the Institution's list

Institutions that have a panel or list of Dispute Board members were also asked whether their panel or list was accessible to the public.

As seen in Figure 121, 67% of Institutions indicated that their panel or list of Dispute Board members was available to the public, whereas the remaining 33% reported that they do not make such data available to the public. It is important to note that, out of all Institutions who have a panel or list of Dispute Board members, only three (42.8%) answered this question.

Figure 121: List's accessibility to the public

Based on 3 responses received



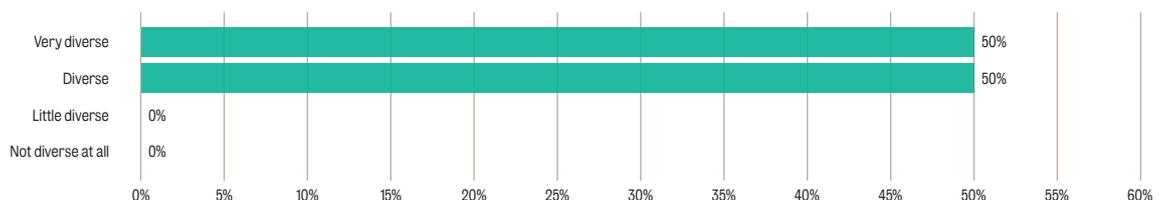
66. Diversity of the Institution's list

Institutions that have a panel or list of Dispute Board members were also asked about the diversity of their panel or list. Only four (57%) chose to respond.

Institutions were first asked to indicate whether they considered their panel or list of Dispute Board members to be diverse. As indicated in Figure 122, 50% of Institutions indicated that they considered their panel or list of Dispute Board members to be diverse, and another 50% indicated that they considered their panel or list to be very diverse.

Figure 122: How diverse is your list of Dispute Board members?

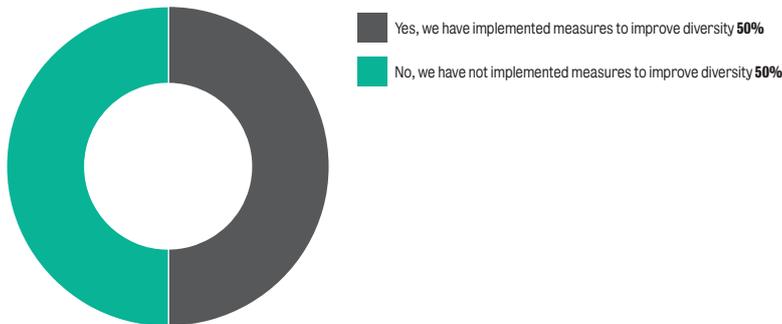
Based on 4 responses received



67. Measure to improve the diversity of the Institution's list

Institutions were further asked to indicate whether they had implemented any measures to improve the diversity of their panel or list of Dispute Board members between January 2018 and December 2023. As indicated in Figure 123, 50% of Institutions answered the question in the affirmative, whereas the remaining 50% of Institutions indicated that they had not implemented any such type of measures in the past six years.

Figure 123: Have you implemented measures to improve the diversity of their panel or list of Dispute Board members?
Based on 4 responses received



When asked about the measures implemented to improve the diversity of their panel or list of Dispute Board members, two responses were received:

I Invite applications to join.

- (1) When deciding on the incorporation and renewal of adjudicators to our DB [sic] list, we promote a balance that ensures gender equality, nationality, invitation of young adjudicators, diversity of professionals (engineers, architects, lawyers, etc.) and expansion of specialties (environmental engineering, civil engineering, electromechanical engineering, etc.);
- (2) Carrying out DB [sic] courses with the purpose of promoting the soft skills and knowledge necessary to be an adjudicator on our DB [sic] list, encouraging our students to allow us to evaluate them for a possible application to our DB [sic] list (entry to the list based on academic merit, meritocracy);
- (3) Carrying out DB [sic] events to encourage academic discussion on current issues related to DB [sic] and expand our roster to professionals who are interested (opening of our service and list of adjudicators); and
- (4) Other strategies.

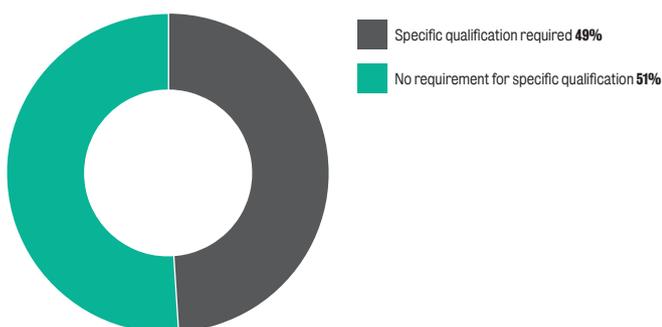
68. Requirements of Dispute Board's qualifications or attributes

Institutions were asked about the frequency with which Dispute Board agreements require Dispute Board members to have specific qualifications or attributes.

Institutions reported a total of 102 occasions (out of 207 Dispute Boards reported) in which the Dispute Board agreements required Dispute Board members to have specific qualifications.

Figure 124 illustrates those results, indicating that in 49% of the Dispute Boards reported by Institutions, a specific qualification was required from the Dispute Board members. In the remaining 51% of the cases, the Dispute Board's agreements did not include any requirement.

Figure 124: Requirements for specific qualifications or attributes (Institutions' responses)
Based on 12 responses received

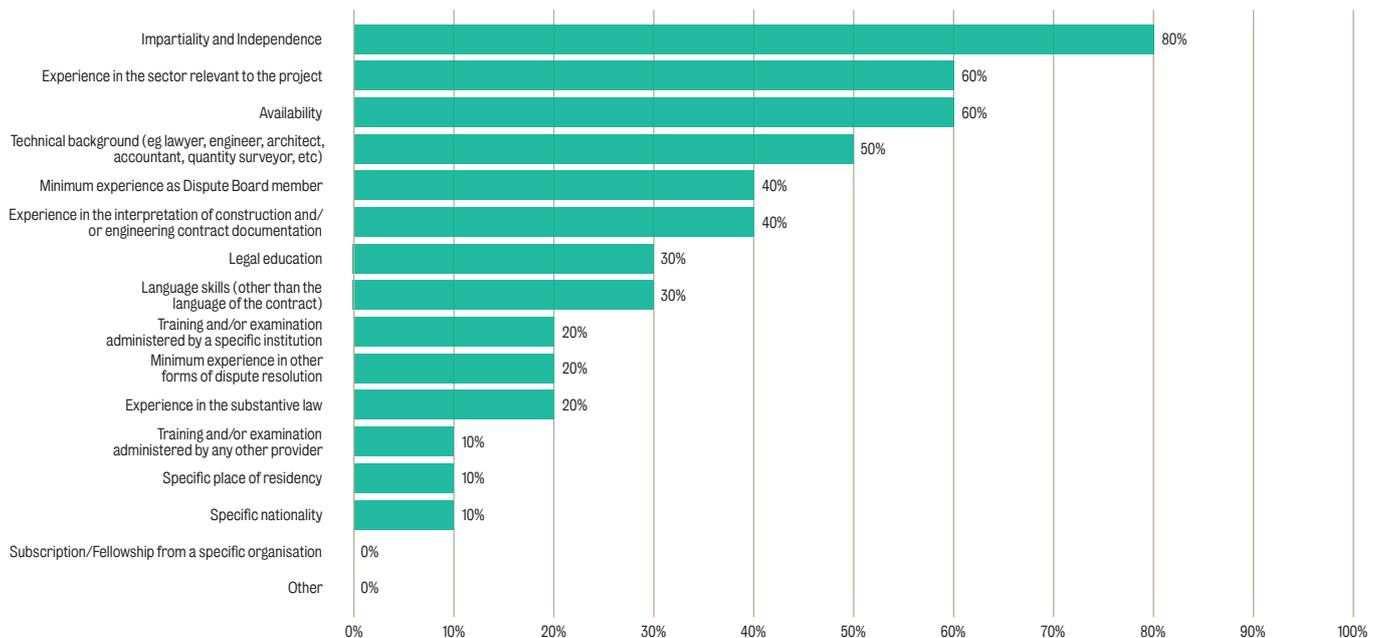


69. Most requested qualifications and attributes

For the cases in which qualifications were contractually required, Respondents were asked to identify the qualification or qualifications.

Figure 125 indicates that, in the Institutions' experience, the most required qualification or attribute of Dispute Board members was impartiality and independence, as indicated by 80% of Institutions. Another 60% of Institutions reported that experience in the sector relevant to the project and availability were also commonly requested amongst Dispute Board member qualifications or attributes.

Figure 125: Most requested qualifications or attributes (Institutions' responses)
Based on 10 responses received. Respondents were able to select more than one option if applicable

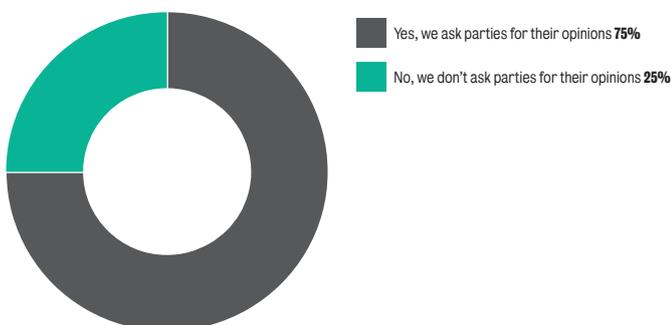


70. Parties' input in the appointment process

Institutions were also asked to indicate whether they expressly requested the parties to submit their opinions about the Institutions' appointment of a Dispute Board member.

Figure 126 indicates that 75% of Institutions reported having requested the parties' opinions about the appointment of the Dispute Board members. 25% of the respondents indicated that they did not ask parties for their opinions.

Figure 126: Do you ask the parties for their opinions before appointing a Dispute Board member?
Based on 12 responses received

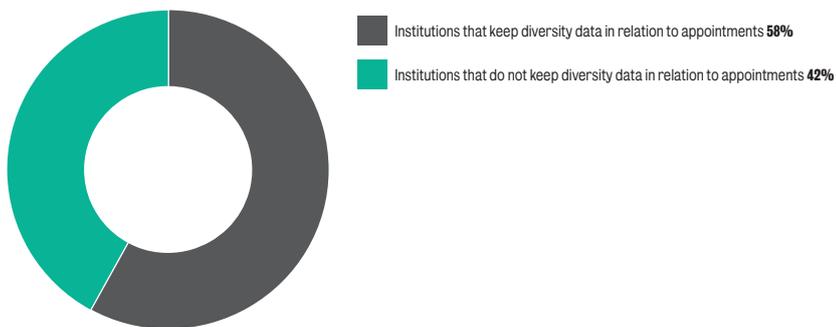


71. Storage of diversity data

In addition, Institutions were asked whether they keep diversity data in relation to appointments (eg age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation).

Figure 127 reflects that 58% of Institutions keep such data, whereas 42% do not.

Figure 127: Storage of diversity data on appointments of Dispute Board members
Based on 12 responses received



When asked for their reasons for not keeping diversity data, Institutions provided the following responses:

- *Not implemented.*
- *Not relevant.*
- *Not relevant for the job duties.*
- *No personal data.*

Chapter 9: Services & Costs

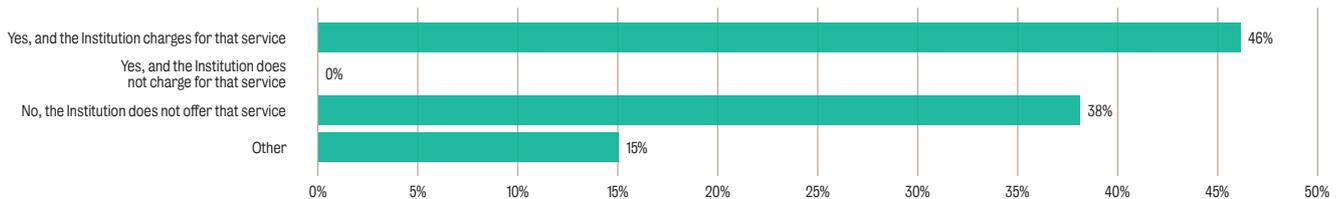
As the use of Dispute Boards has expanded, the services offered by Institutions supporting Dispute Boards have evolved. The survey investigated the role Institutions may play in administering Dispute Board procedure, determining the fees of Dispute Board members, and reviewing Dispute Board decisions.

72. Service offer: Administration of the Dispute Board's procedure

Figure 128 illustrates that only 46% of Institutions offered the service of administering the Dispute Board's procedure. 38% of the respondents confirmed that they did not offer those services.

Figure 128: Do you offer the service of administering the Dispute Board's procedure?

Based on 13 responses received



The respondents who indicated 'Other' in their responses could explain their answers. Only one Institution chose to do that. Its response is reported below.

I Does not administer DB [sic] proceedings. It can however act as depositary of funds and pay the DB [sic] members in accordance with an agreed process.

The data indicates that administering a Dispute Board's procedure is not a feature that most Dispute Board institutions commonly offer. This distinguishes Dispute Board institutions from those of other dispute resolution mechanisms, like arbitration. At the same time, while complete administration of the Dispute Board process may not be offered, the Institutions reported various services that assist in the administration of the process, such as acting as a fee depositary or assisting in the payment of Dispute Board members.

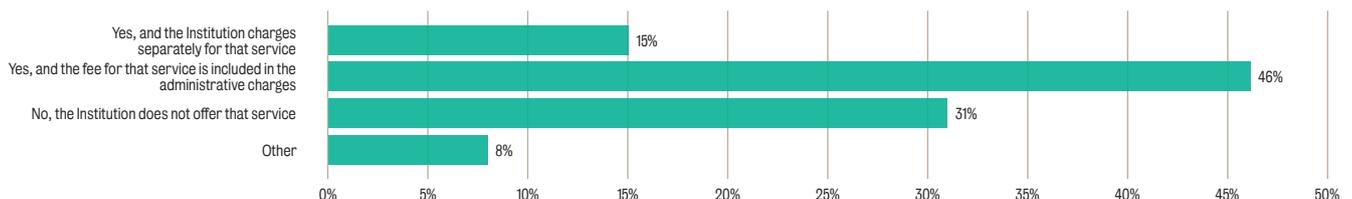
73. Service offer: Appointment of a Dispute Board member

Figure 129 illustrates that 46% of Institutions offered the service of appointing a Dispute Board member and considered the fee for that service included in its administrative charges. 15% of Institutions reported that they offered such a service and charged separately for it. 31% of Institutions do not provide this service.

Institutions that indicated 'Other' in their response could explain their answer. In that regard, one Institution explained that it does offer the service of appointing Dispute Board members, but it does not charge for it.

Figure 129: Do you offer the service of appointing Dispute Board members?

Based on 13 responses received



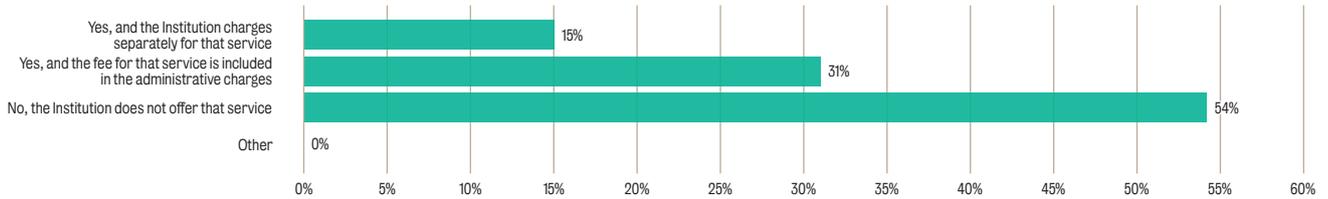
The data indicates that the service of appointing Dispute Board members was commonly offered by Institutions. For a broader understanding of this topic, the charts in this section should be read in conjunction with the charts presented in Section 5 above on Individuals' and Entities' roles in the appointment or constitution of the Dispute Board.

74. Service offer: Determination of the Dispute Board's fees

Figure 130 illustrates that 54% of Institutions did not offer the service of fixing the fees of Dispute Board members. 31% of Institutions offered this service but considered the fee for it already included in the administrative charges of the procedure. 15% of Institutions reported that they offered the service of fixing the fees of the Dispute Board members and charged separately for it.

Figure 130: Do you offer the service of fixing the fees of the Dispute Board member?

Based on 13 responses received



75. Use of retainer fees

Further questions were asked to Institutions that offer the service of fixing the fees of Dispute Board members about the way Dispute Board members were remunerated and the amounts commonly fixed. Out of all Institutions that offer the service of fixing the fees of the Dispute Board, only three (50%) answered these questions.

Figure 131 indicates that one Institution (33%) confirmed that, when fixing the Dispute Board's fees, it typically established a retainer fee. The other two Institutions (67%), reported not having typically established a retainer fee.

Figure 131: Do you typically establish a retainer fee when fixing the fees of the Dispute Board member?

Based on 3 responses received



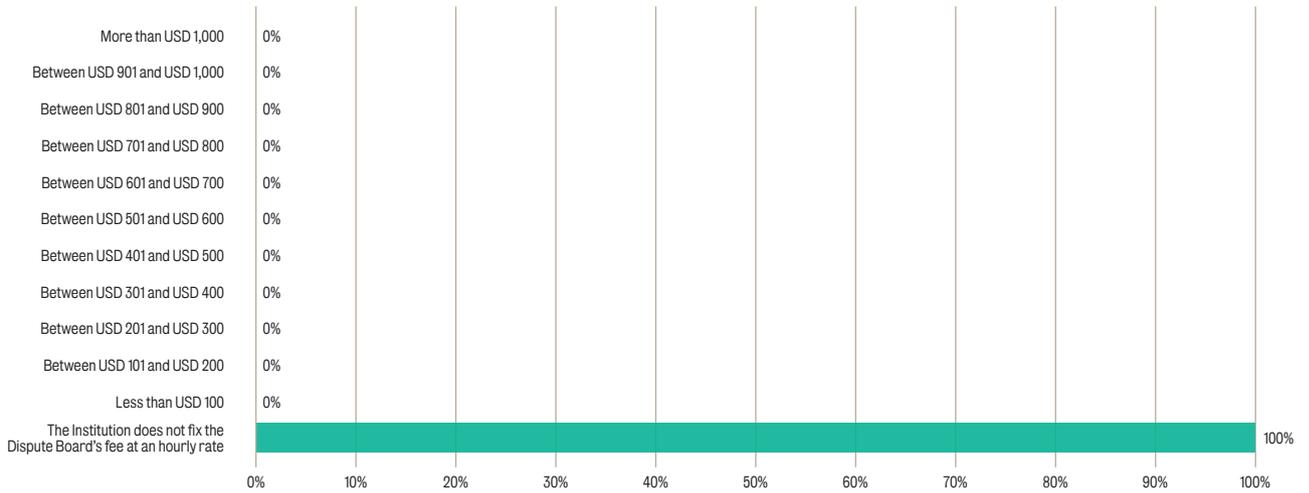
The one Institution that reported charging a retainer fee for fixing fees of Dispute Board members said that its common practice was to establish a trimonthly retainer fee, the yearly value of which would be between \$50,001 and \$75,000.

76. Average hourly fees

The next question was whether the fees of the Dispute Board members were fixed at an hourly or daily rate, Figure 132 indicates that all Institutions confirmed that they did not commonly fix the Dispute Board’s fee at an hourly rate.

Figure 132: Average hourly fees typically established by Institutions

Based on 3 responses received

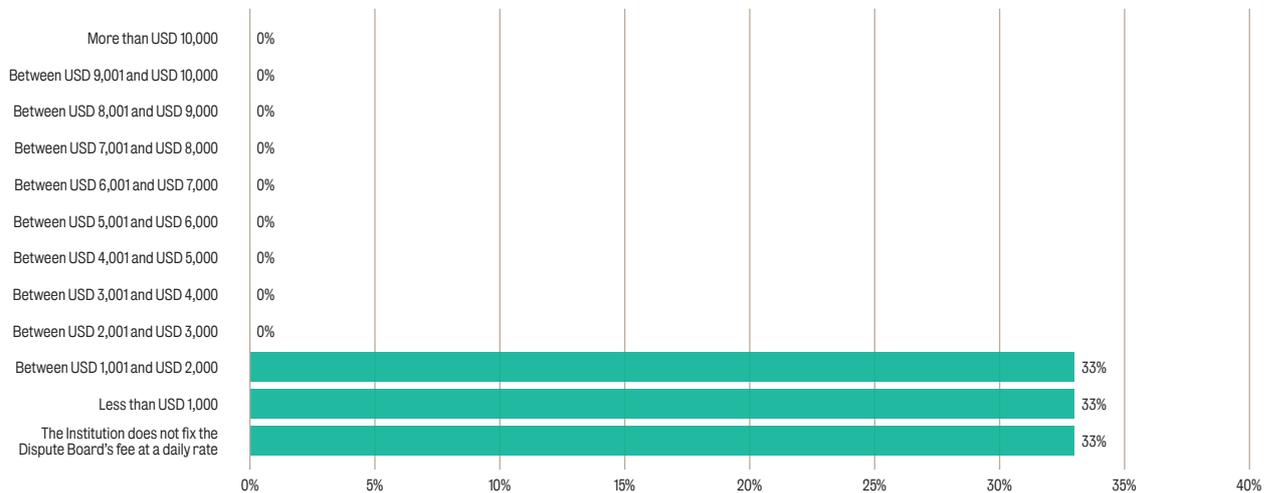


77. Average daily fees

Figure 133, shows that two of the three Institutions typically establish daily fees. Out of those, one reported that the daily fee was typically less than \$1,000, whereas the other reported a daily fee between \$1,001 and \$2,000.

Figure 133: Average daily fees typically established by Institutions

Based on 3 responses received

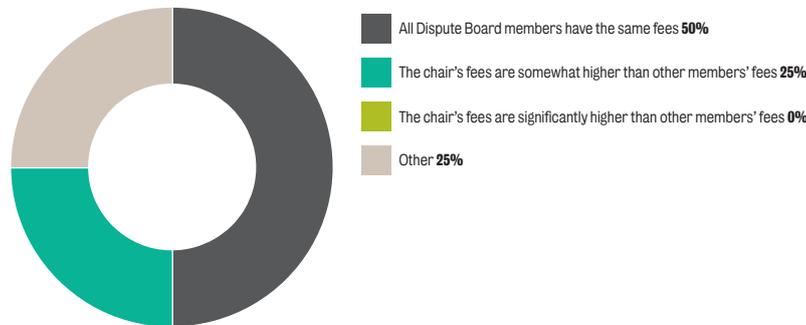


78. Fee distribution amongst Dispute Board members

Figure 134 indicates that half of the Institutions reported that all Dispute Board members have the same fees, whereas 25% reported that the chair's fees were somewhat higher than the other members' fees. The remaining 25% who described the scenario as 'Other' did not further elaborate.

Figure 134: Fees distribution amongst Dispute Board members (Institutions' responses)

Based on 4 responses received



79. Number of determinations of the Dispute Board's fees

Finally, despite 46% of Institutions having reported offering a fee-fixing service (Figure 130 above), when asked to specify the number of Dispute Boards for which Institutions fixed the fees between January 2018 and December 2023, only one case was reported.

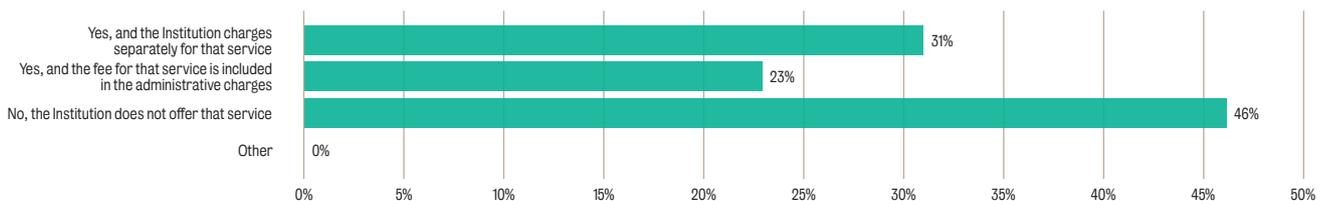
Considering the timeframe of this research (ie from January 2018 to December 2023) and the number of Institutions, the fact that only one case was reported in this section is significant and indicates that the Institutions' service of fixing the fees of the Dispute Board is not often used. This may suggest that there is only a small market for fee-fixing services. In any case, the charts in this section should be read in conjunction with the charts presented in Section 18 above on Individuals and Entities' input on the determination of the fees of the Dispute Board members.

80. Service offer: Decision on challenges against a Dispute Board member

Figure 135 illustrates that 46% of Institutions did not offer the service of deciding challenges against the appointment or continuation of services of a Dispute Board member. 31% of Institutions offered this service for a separate fee; 23% offered it without charge, as the cost was included in the Institution's administrative fees.

Figure 135: Do you offer the service of deciding a party's challenge to the appointment (or the continuation of the services) of a Dispute Board member?

Based on 13 responses received



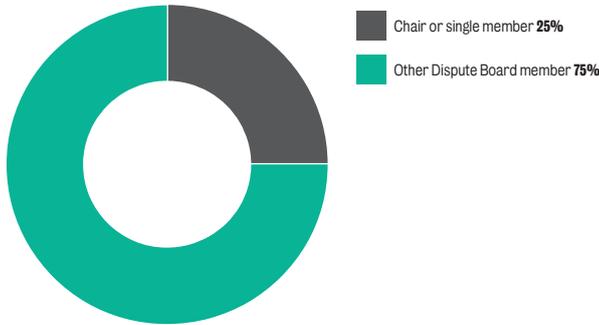
81. Number of challenges received

The seven Institutions that hear challenges to the appointment (or the continuation of the services) of a Dispute Board member were asked the number of challenges they decided between January 2018 and December 2023. A total of four challenges were reported, none of which was upheld.

82. Challenge of a Dispute Board member

Figure 136 indicates the percentage of challenges received against the chair or single member of the Dispute Board in comparison with the challenges received against other members of the Dispute Board (ie the wings). The chart indicated that 75% of the challenges reported were made against a Dispute Board member other than the chair or single member.

Figure 136: Profile of challenged Dispute Board members in the challenged decided by Institutions
Based on 7 responses received



83. Reasons for challenge

Institutions were also asked to rank (from a pre-existing list of options) reasons for challenges against the appointment (or the continuation of the services) of a Dispute Board member from most common to least common in their experience.

As Figure 137 reflects, the top three reasons were, in order, lack of impartiality or independence arising during the procedure, pre-existing conflicts of interest, and lack of disclosure of information.

Figure 137: Common reasons behind the challenges against a Dispute Board member
Based on 4 responses received

1st Ranked	Lack of impartiality or independence arising during the procedure
2nd Ranked	Pre-existing conflict of interest
3rd Ranked	Lack of disclosure of information
4th Ranked	Alleged breach of applicable code of conduct or ethical rules (eg fairness, integrity, decorum, etc.)
5th Ranked	Lack of expertise

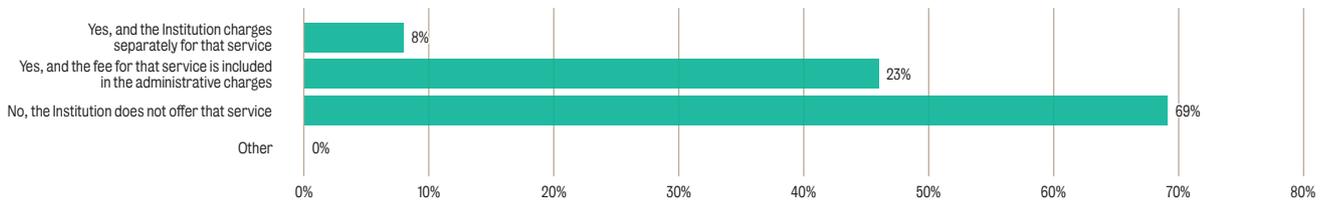
Again, considering the timeframe of this research (ie from January 2018 to December 2023) and the number of responding Institutions, the fact that only four cases were reported in this section is noteworthy and may indicate that parties do not often rely upon Institutions for challenging Dispute Board members. It may also mean parties did not have grounds to challenge Dispute Board members. In any case, the charts in this section should be read in conjunction with the charts presented in Section 22 above on Individuals' and Entities' suspicions of bias.

84. Service offer: Review of a decision to be rendered by the Dispute Board

Figure 138 illustrates that 69% of Institutions do not offer to review the decisions of a Dispute Boards. Of the 31% that do, 23% of Institutions do not charge separately for it, as the fee is considered included in the Institution's administrative charge, and 8% require a separate payment for reviewing the decision.

Figure 138: Do you offer the service of reviewing a decision to be rendered by the Dispute Board?

Based on 13 responses received



85. Number of decisions reviewed

The Institutions that review Dispute Board decisions were asked to provide information on the number of requests they received to perform that service between January 2018 and December 2023. Only one request for review was reported. The Institution that reported that request said that its review resulted in the Dispute Board's decision being amended for the reason reported below. .

■ *The law was imprecise and [the decision] needed to be amended.*

Part III

Funders



Chapter 10: Use of Dispute Boards

86. Annual use of Dispute Boards

This section reports the results of the survey addressed to Funders. In this research, a Funder is defined as ‘a person or organisation that funded or financed a Project for which a Dispute Board was considered or adopted’. Four funders replied to the survey. They reported 1,891 Dispute Boards.

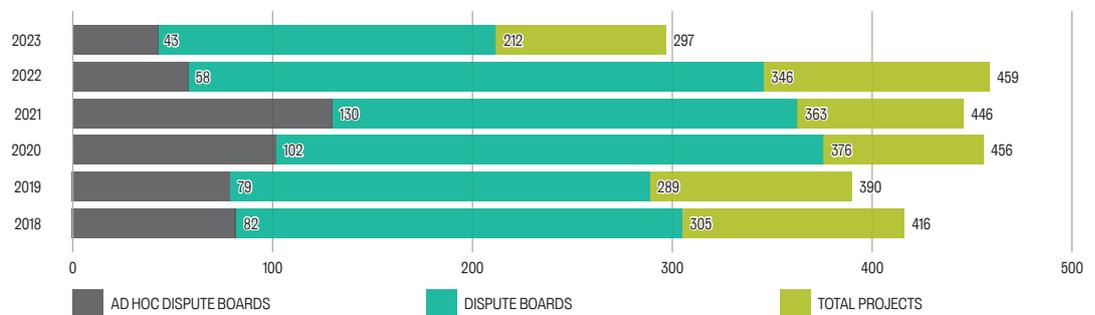
Funders were asked to indicate the number of Dispute Boards in which they were involved between January 2018 and December 2023 (inclusive). Specifically, they had to indicate, for each of those calendar years, (i) the number of new Projects in which they were involved, (ii) how many of those Projects provided for the constitution of some type of Dispute Board, and (iii) how many of those Dispute Boards were of an ad hoc nature (as opposed to standing Dispute Boards).

As Figure 139 illustrates, Funders were involved with the most Projects in 2022, whereas 2020 was the year in which they were involved with the most Projects with a Dispute Board.

The chart reflects a total of 2,464 Projects over the course of six years. It indicates that 76.7% of Projects (ie 1,891) included Dispute Boards. Out of those, 26.1% (ie 494) were ad hoc Dispute Boards, and 73.9% (ie 1,397) were standing Dispute Boards.

Figure 139: Number of Dispute Boards in which Funders were involved

Based on 4 responses received



87. Policies to include Dispute Boards in Projects

Funders were asked whether they had any rule or policy for including a Dispute Board in all or certain Projects that they funded or financed. Figure 140 indicates that all Funders answered the question in the affirmative, confirming that they had in place a policy for including Dispute Boards in certain Projects.

Figure 140: Do you have a policy to include Dispute Boards in your Projects? (Funders' responses)

Based on 4 responses received



Funders were asked what their policy was. The responses obtained are reported below.

- All construction projects above R [ZAR] 500 million in value to have dispute boards. depending on the complexity of the project the decision to have a one person or three-person board to be made by the project manager. Ad hoc boards to be used for projects less than R [ZAR] 500 million in value.
- In our policy, Standing Dispute Board is strongly recommended to the Borrowers. If project size is larger than 10 billion Japanese Yen, we recommend three members.
- Construction contract values greater than \$ 500,000 allow for an ad hoc dispute board.
- We advocate as a rule the use of FIDIC contracts which includes DAB [sic] provisions.

Chapter 11: Dispute Board characteristics

88. Considerations to include Dispute Boards in Projects

Funders were also asked whether the inclusion of a Dispute Board in a Project was ever discussed, but then a decision was made not to include it.

Figure 141 indicates that 75% of Funders answered in the affirmative.

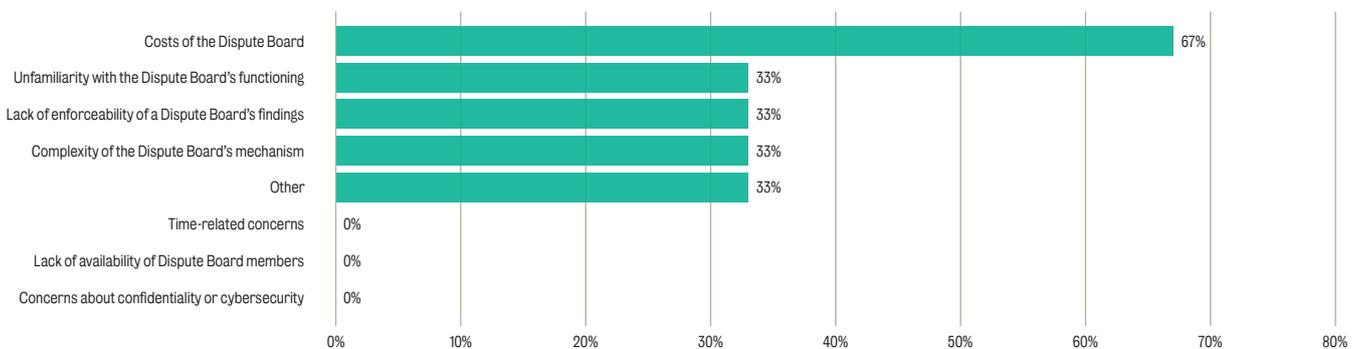
Figure 141: Have you ever discussed including a Dispute Board in the contract, but then the decision was made not to include it? (Funders' responses)
Based on 4 responses received



89. Reasons for deciding against the adoption of a Dispute Board

For those Funders who replied 'yes', we asked for the reasons behind that decision. Figure 142 illustrates that the most frequent answer, selected by 67% of Funders, was the costs of the Dispute Board. Tied in second were unfamiliarity with the Dispute Board's functioning, lack of enforceability of the Dispute Board's findings, the complexity of the Dispute Board's mechanism, and 'Other', each indicated by 33% of Funders as the most common cause behind their decision.

Figure 142: Funders' reasons for deciding against the inclusion of a Dispute Board in the contract
Based on 3 responses received. Respondents were able to select more than one option if applicable



90. Use of standard forms of contract

Considering that inclusion of a Dispute Board provision in the contract may stem from the parties' initiative or from the adoption of a standard form of contract which provides for the establishment of a Dispute Board, Funders were asked how many of the contracts for their Projects were standard form contracts, as opposed to bespoke contracts.

Figure 143 and Figure 144 report the Funders' responses. Specifically, Funders reported that out of 1,891 Dispute Boards reported, 90% (ie 1,703) were constituted based on provisions contained in standard forms of contract.

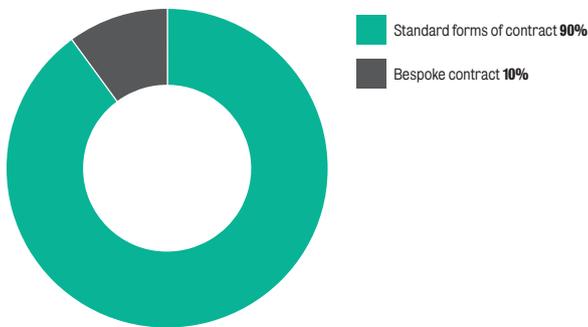
Figure 143: Number of Dispute Boards based on standard forms of contract (Funders' responses)

Based on 4 responses received



Figure 144: Percentage of Dispute Boards based on standard forms of contract (Funders' responses)

Based on 4 responses received



91. Standard forms of contract most frequently used

Similarly to the responses obtained from Individuals and Entities, the data here indicates a significant relationship between the adoption of Dispute Boards and standard forms of contract.

Funders were also asked to rank common standard or model forms of contract from most to least frequently used. Figure 145 indicates that the top three, in order, are FIDIC, AIA, and ConsensusDOCS, an exact match to the responses provided by Individuals.

Figure 145: Funders' ranking of most frequently used forms of standard contracts

Based on 3 responses received

1st Ranked	FIDIC
2nd Ranked	American Institute of Architects (AIA)
3rd Ranked	ConsensusDOCS

Other frequently used standard or model forms of contract mentioned by Funders are listed below in alphabetical order.

Cahier des Clauses Administratives Générales (CCAG TRAVAUX) – France

Engineering Advancement Association of Japan (ENAA) model forms

92. Involvement in the negotiation of the Dispute Board agreement

Funders were asked whether they were commonly involved in the negotiation of the Dispute Board agreement. Figure 146 indicates that all four Funders that answered the question said that they were not involved in Dispute Board agreement negotiations.

Figure 146: Are you commonly involved in the negotiation of the Dispute Board agreement?

Based on 4 responses received

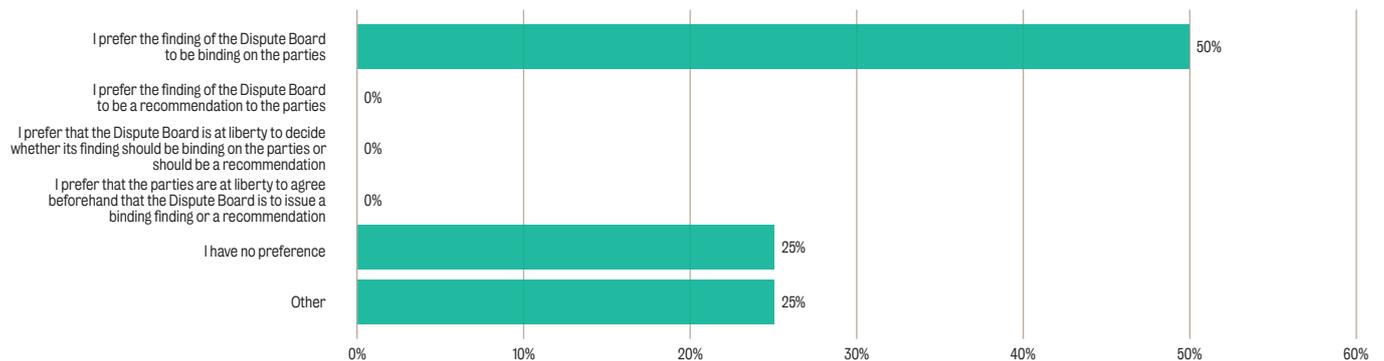


93. Preferred Dispute Board's findings

The four Funders were asked whether they preferred for Dispute Board findings to be binding. Figure 147 illustrates that two preferred that the Dispute Board findings be binding on the parties, one had no preference, and the last one gave its answer as 'Other'.

Figure 147: Funders' preference regarding the nature of the Dispute Board's findings

Based on 4 responses received

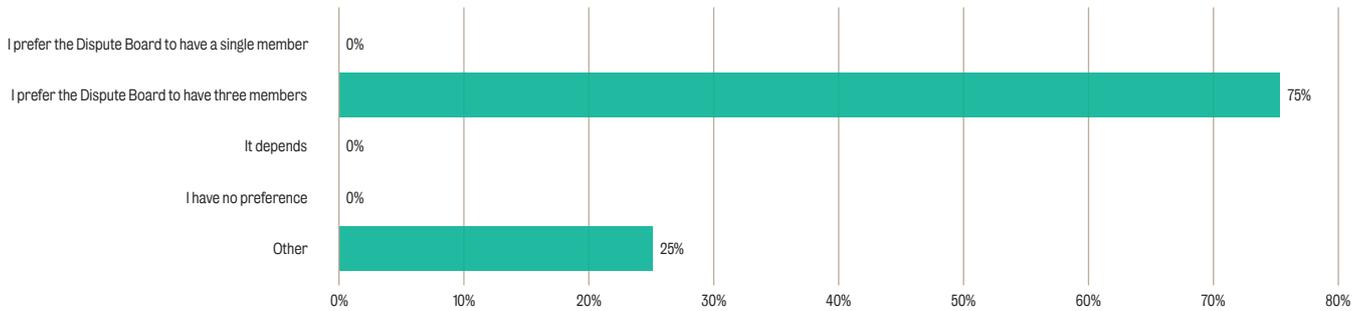


The Funder who responded 'Other' said that 'In our policy and standard form of contract, DB decision after referral is binding and DB's informal opinion is handled as recommendation'.

94. Preferred Dispute Board's composition

We also asked Funders about their preferences in relation to the composition of the Dispute Board. Figure 148 indicates that, in answer to that question, three of the Funders reported that they preferred Dispute Boards composed of three members. The remaining one answered the question with 'Other', stating that it prefers a three-person Dispute Board for projects worth more than \$70 million.

Figure 148: Funders' preference regarding the composition of Dispute Boards
Based on 4 responses received

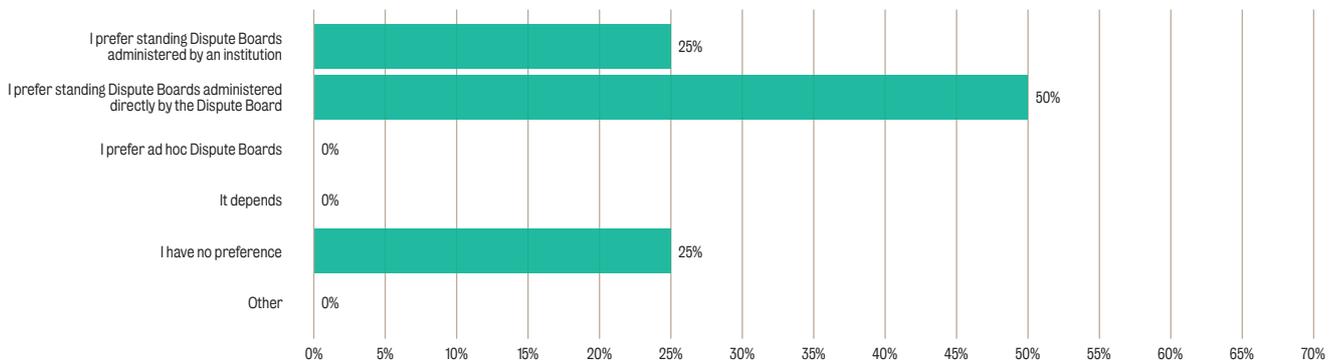


The Funder who answered 'Other' said that it prefers a Dispute Board to have three members if the project size is larger than the equivalent of \$70 million.

95. Preferred type of Dispute Board

As to the respondents' preferences in terms of whether the Dispute Board should be standing or ad hoc, Figure 149 shows that exactly half of the Funders (50%) indicated that they prefer a standing Dispute Board. As to the remaining respondents, 25% indicated that they have no preference, whereas 25% indicated that they prefer standing Dispute Boards administered by an Institution. Interestingly, no Funders indicated a preference for ad hoc Dispute Boards.

Figure 149: Funders' preference regarding the type of Dispute Boards
Based on 4 responses received



Chapter 12:

Funder's perception of Dispute Boards

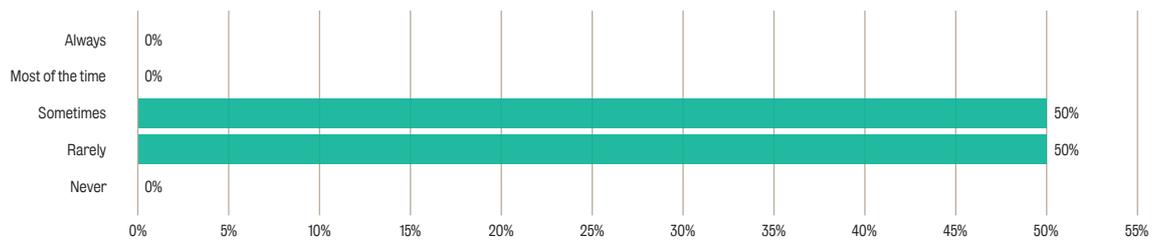
96. Involvement in the Dispute Board's procedure

Funders were asked whether they were commonly involved in the Dispute Board's procedure.

Figure 150 shows that while two (50%) of Funders indicated that they were sometimes involved in the Dispute Board's procedure, the other two (50%) indicated that they were only rarely involved in the Dispute Board's procedure.

Figure 150: How often are you involved in the Dispute Board's procedure?

Based on 4 responses received



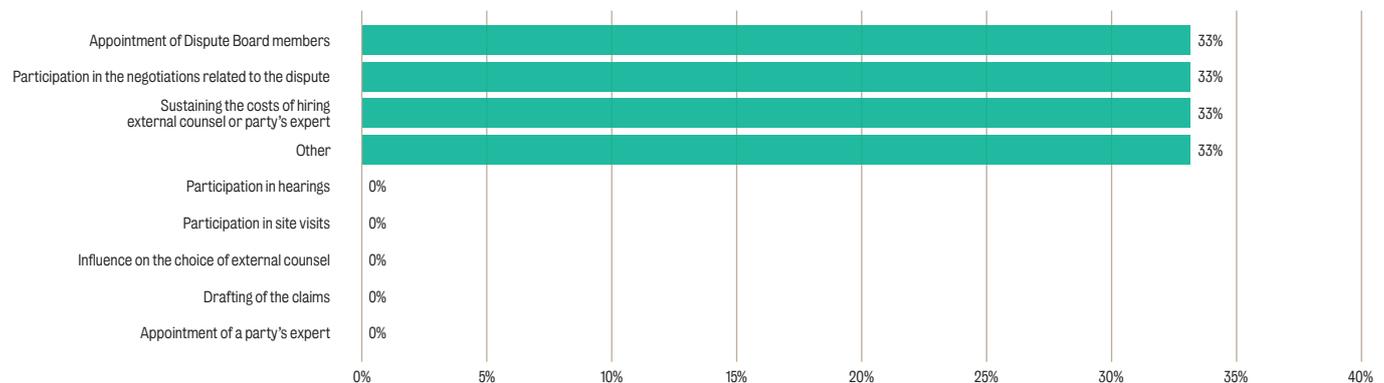
97. Aspects of common involvement

In addition, Funders were requested to identify those aspects of the Dispute Board process with which they were most involved.

As shown in Figure 151, there were four aspects in which Funders said that they were involved. Those are, identified at an equal rate by the Funders, participation in dispute negotiations, sustaining the costs of external counsel or party experts, the appointment of Dispute Board members, and one 'Other' aspect. Under the header 'Other', one Funder indicated that it was commonly involved in the 'financing of any additional costs'.

Figure 151: Aspects of the Dispute Board's procedure in which Funders were commonly involved

Based on 3 responses received. Respondents were able to select more than one option if applicable

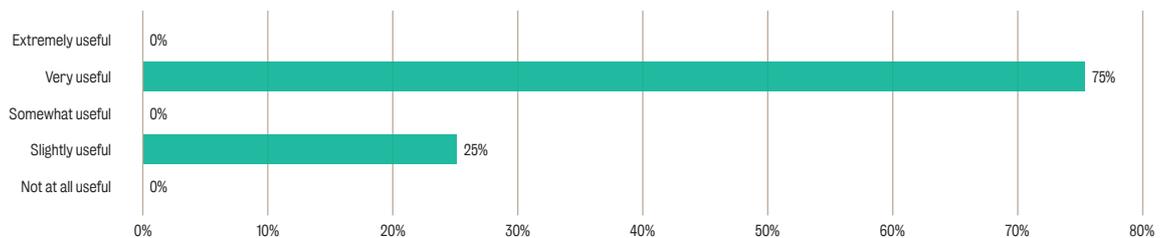


98. Usefulness of Dispute Boards for avoiding disputes

Funders were also asked about their perception of the usefulness of the Dispute Board process.

As Figure 152 reflects, three (75%) of the Funders said that they found Dispute Boards to be very useful for avoiding disputes, whereas one (25%) only found Dispute Boards to be slightly useful.

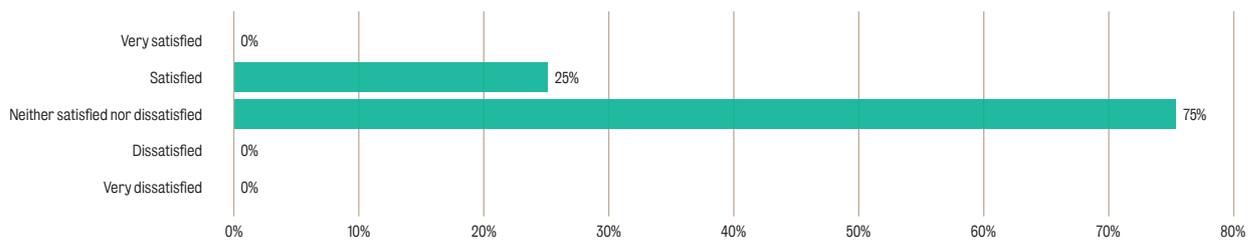
Figure 152: Funders' perceived usefulness of Dispute Boards for avoiding disputes
Based on 4 responses received



99. Satisfaction with the duration of Dispute Board process

The Funders were also asked if they were satisfied with the duration and costs of the Dispute Board process. Figure 153 illustrates that three (75%) of the Funders were neither satisfied nor dissatisfied with the average duration of the process, with one (25%) saying that they were satisfied with it.

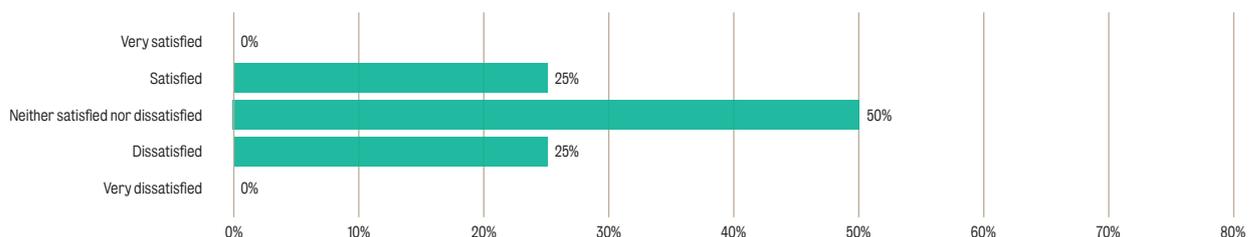
Figure 153: Funders' satisfaction with the average duration of Dispute Board process
Based on 4 responses received



100. Satisfaction with the costs of the Dispute Board process

Figure 154 shows true division among the Funders with respect to their level of satisfaction with the average costs of the Dispute Board process: one (25%) was satisfied, another (25%) was dissatisfied, and two (50%) were neither satisfied nor dissatisfied.

Figure 154: Funders' satisfaction with the average costs of Dispute Board process
Based on 4 responses received



Part IV

Miscellaneous



Chapter 13: Support for international convention facilitating enforcement

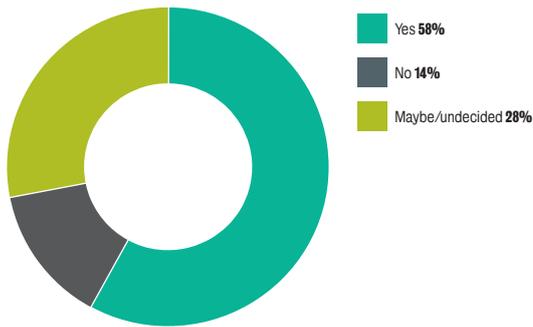
101. Individuals' support

All respondents were asked whether the construction industry would benefit from the existence of an international convention facilitating the circulation and enforcement of the Dispute Board decisions.

As Figure 155 reflects, 58% of Individuals thought the construction industry would benefit from such a convention, 14% disagreed, and 28% were not sure.

Figure 155: Would the construction industry benefit from the existence of an international convention facilitating the circulation and enforcement of the Dispute Board's decisions? (Individuals' responses)

Based on 137 responses received

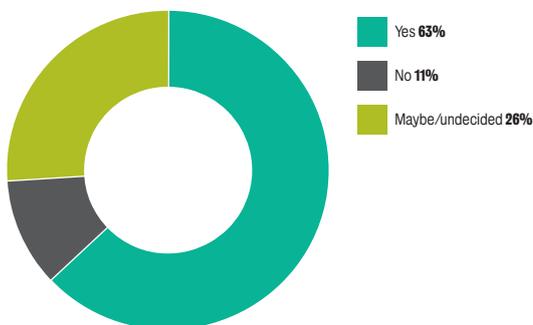


102. Entities' support

As Figure 156 reflects, 63% of Entities thought the construction industry would benefit from such a convention, 11% disagreed, and 26% were not sure.

Figure 156: Would the construction industry benefit from the existence of an international convention facilitating the circulation and enforcement of the Dispute Board's decisions? (Entities' responses)

Based on 27 responses received

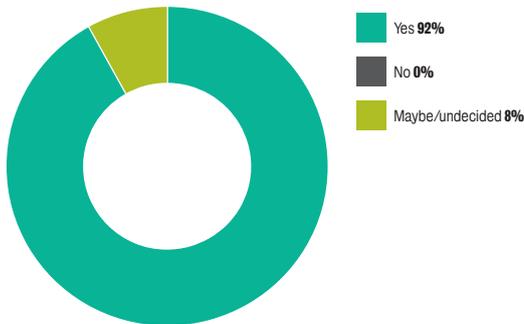


103. Institutions' support

As Figure 157 reflects, 92% of the Institutions that responded to the question thought the construction industry would benefit from such a convention, none affirmatively thought that it would not be a benefit, but 8% were undecided.

Figure 157: Would the construction industry benefit from the existence of an international convention facilitating the circulation and enforcement of the Dispute Board's decisions? (Institutions' responses)

Based on 13 responses received

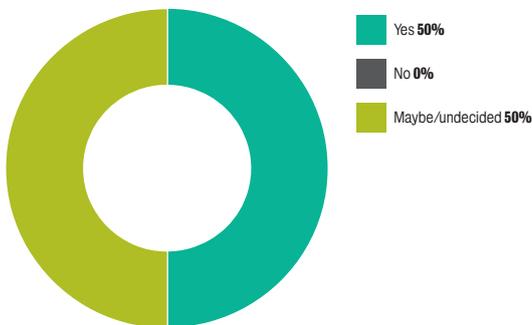


104. Funders' support

Finally, as Figure 158 reflects, of the four Funders who responded to the survey, two (50%) thought the construction industry would benefit from such a convention and two (50%) were undecided. As was the case with the respondent Institutions, no Funder said that the construction would not benefit from such a convention.

Figure 158: Would the construction industry benefit from the existence of an international convention facilitating the circulation and enforcement of the Dispute Board's decisions? (Funders' responses)

Based on 4 responses received



105. Reasons given by those who voted in favour

Respondents were invited to explain their opinions on the impact to the construction industry of an international convention facilitating the circulation and enforcement of Dispute Board decisions.

Below are the responses given by those respondents who felt that the construction industry would benefit from an international convention facilitating the circulation and enforcement of Dispute Board decisions.

- | *As in arbitration, it would be helpful.*
- | *At this moment, if a party does not comply with a DB's [sic] decision, the only 'tool' the other has is to terminate the contract. But it is important that a treaty or convention be created that allows the interested party to demand compliance with the decision of a DB [sic].*
- | *Because it is a faster way to solve conflicts in addition to preventing them. The DBs [sic] know what the project is about, unlike an arbitration.*
- | *Because the objective of the DAB [sic] is the prevention of conflicts, prioritising the execution of the project within the established deadlines.*
- | *DAAB [sic] is still a growing aspect in construction in Africa, more CPDs [sic] are needed on its application.*
- | *DB [sic] are not well-known by the courts. A recognized convention will surely help.*
- | *DB [sic] Decision will be final and the Parties will buy into it.*

- | *Experience is always an indispensable aid to science. In Dispute Boards, experience cannot be replaced. You don't buy it in a store.*
- | *It brings more security and predictability.*
- | *It would confer more authority to DAB [sic] decisions and increase pressure on Engineer to determine impartially.*
- | *It would increase the dispute types database, and probably help making decisions for unexpected situations, such as delays caused by COVID for instance.*
- | *It's better than initiating arbitration proceedings.*
- | *It's good to have uniform decisions.*
- | *Looking at how the Contractor and the Client's Representative, the Engineer work, Dispute Boards are in my opinion a must on all projects on site.*
- | *Most parties would embrace it more.*
- | *Indicates patterns and precedents.*
- | *Standardisation is almost always helpful.*
- | *Stop unfair treatment of contractors by client organisations.*
- | *Support the acceptance of the use of DAB [sic] as it would demonstrate the efficiency and fairness of the DAB [sic].*
- | *The Decisions would be enforceable and the parties would not need to initiate an arbitration and obtain an award to enforce the DB decision.*
- | *The Parties resort to the fact that Dispute Board's Decision is not final and hesitate to take action.*
- | *There remain to many issues around the enforceability of DAB [sic] decisions causing delay and extra costs.*
- | *This would benefit all users.*
- | *Trend.*
- | *Yes, an international convention that facilitates the circulation and enforcement of Dispute Board decisions would allow contracting parties from different countries to feel greater security in the use of Dispute Boards, thus favoring [sic] their dissemination.*
- | *Yes, for the same reason the NYC [sic] supports enforcement of arbitration awards.*

106. Reasons given by those who voted against

Below are the responses given by those respondents who felt that the construction industry would not benefit from an international convention facilitating the circulation and enforcement of Dispute Board decisions.

- | *Because the resolution role is either expert determination or arbitration, and both are well understood in international law.*
- | *Circulation makes little sense. Present enforcement mechanisms can easily be specified in the Contract.*
- | *Circulation yes, enforcement no.*
- | *Confidential to the parties and always fact-based.*
- | *Confidentiality should be maintained.*
- | *Contracts already contain provisions for enforcement if binding decision. No need for international convention.*
- | *DB [sic] decision is contractual and has no jurisdiction.*
- | *DB [sic] is not Arbitration.*
- | *DB's [sic] decisions are more facilitative of the Parties to complete their Projects without unnecessarily being disrupted by disputes, and not doctrinal or contributing to precedents or case law.*
- | *Dispute Board decisions are private and confidential to the parties and should remain that way.*
- | *Do not believe it would solve the problem with enforcement in those areas where there is a problem. Takes emphasis away from the dispute avoidance function of the DB [sic] which is paramount.*
- | *Each country has its own protocols and unique construction procedure.*
- | *Every contract is bound by the government rules where the contractual activity taking place.*

- | *I consider DB [sic] decisions should be kept private and should not be disclosed to the general public. I am against increasing the regulations for DB [sic] as they would be turned into min [sic] arbitrations, we shall allow freedom of the parties and DB [sic] in the process. Each country/region/sector has different needs which cannot be standardised.*
- | *I think the different countries laws are to [sic] different from each other.*
- | *Must respect local laws and access to local courts.*
- | *Non binding.*
- | *Projects and disputes are local.*
- | *The current Disputes Resolution Board Foundation is an excellent organisation and doesn't need any oversight or changes – if it ain't broke – don't fixi [sic].*
- | *The DRB's [sic] will have the best chance of being knowledgeable and competent.*
- | *The parties trust the DB [sic] environment and are not concerned to be punished if they say something 'wrong'.*
- | *Enforcement will cause them to become defensive and the DB [sic] will lose its most valuable role, assisting the teams to be transparent and proactively resolve friction points.*
- | *To many variables within specifications and laws.*

107. Reasons given by those undecided

Below are the responses given by those respondents who were unsure if the construction industry would not benefit from an international convention facilitating the circulation and enforcement of Dispute Board decisions.

- | *Australia tends to do things differently than international standards.*
- | *Chilling effect, wrong focus, no point in attempting to establish precedent in matters decided summarily on a partial record.*
- | *Doubt if the results of DB [sic] decisions would affect the preparation of claims leading to disputes.*
- | *Due to the legal varied legal jurisdictions that exist, such as the common law and civil. Achieving consensus will be a challenge.*
- | *I have experienced DRB [sic] on projects since the mid 1990's and have seen their positive impacts. But in the last years I have seen DRB's over step [sic] their role, violate the tenants of their contract, discount the opinion of one of both of the parties to the contract (Owner or Contractor or both), and many other inappropriate actions.*
- | *I understand that are very big cultural differences on handling projects on the top of differences of legislation.*
- | *In the US I feel there are too many different jurisdictions so agreement to this approach may be impossible.*
- | *It appears to me that the circulation/making public of the reasoning would cause additional pressure to the DB [sic] in reaching decisions.*
- | *Most jurisdictions have established rules for DB [sic] decision enforcement. New rules would only cause confusion.*
- | *My believe is that decisions will be complied if the parties recognize during the execution of the project that the agreed.*
- | *DB [sic] is adequate and satisfies their expectations about its performance.*
- | *New BRB [sic] member:*
- | *Preference is for recommendations, not binding decisions.*
- | *Situations are all different. It is difficult to take a standard view.*
- | *Such international convention may give effect to Dispute Board's decisions. It should be quicker solution and more cost-effective comparing to arbitration.*
- | *The differences in construction industry practices and types of contracting standards would seem to make this less beneficial to the parties.*
- | *The most [sic] of the contractors are not familiar with Dispute Board System and benefits.*
- | *There are already other mechanisms and provisions, in the contracts and in the regulations, which grant probatory nature to the DB [sic] decisions, even when there is a party reluctant to comply with it.*
- | *Too many jurisdictions would have to agree.*
- | *Too much diversity to apply across the board.*
- | *Undecided as there has been no such internal discussion yet.*
- | *We do not have much experience using Dispute Board.*

Chapter 14:

Comments and views

This section reports additional comments received by respondents in all categories. The comments are reported here as they were received and without any editing.

108. Individuals' additional comments

(1) Dispute Board Members must not belong to the same nationality as the Employer or Contractor. I have experienced a fellow DB member resorting to using his native language to request additional clarifications when party representatives struggle to communicate in English (the Contract language). There was suspicion by all that the DB Member was in giving advise rather than translating. While the World Bank Special Conditions mandate this requirement, enforcement is limited, particularly by the Employer who often prefers to appoint a local DB member, typically a retired long-serving member of the Employer's organisation.

(2) There is no mechanism currently available to sanction the very few Dispute Board members who are corrupt as they cannot be reported to any organisation [exception being FIDIC if they are listed on the FIDIC Adjudicator's List]. Unfortunately, corruption within the DB does not raise concerns ['Red Flags'] for the financier, resulting in an increasing number of instances where DB members behave improperly. Regrettably, this group often includes inexperienced individuals lacking formal adjudication training, particularly the young and inexperienced ones.

Availability of Board members is extremely important. Potential Board candidates should decline the opportunity to join a Board if they are solidly booked months in advance.

Avoidance should continue to be mandatory and emphasised in all training and education.

DB's deciding on topics where they have few experience , without consulting real experts.

DBs should have a reporting mechanism to the funding body.

Define the responsibilities of the members and the president of the board

Despite the potential for dispute avoidance with 'standing' boards, most Parties often prefer to have the dispute referred to and decided by the DB. Retainer fee need to be minimised – the amount could be stated in the contract.

Most losing Parties issue a Notice of Dissatisfaction just to protect their rights for arbitration, but rarely take the dispute to the next level. three member boards should comprise an Engineer, lawyer and Quantity Surveyor.

Difference b/ W East & West, Common Law and Civil Law, Contract Law and other choices adopted by countries for arbitration

Dispute Boards should be enforced by contracts to guarantee the avoidance of claims, if possible, so projects can be successful. That benefits all of society even if they act on private endeavours .

Dispute Boards should be implemented if the contract provides for them. At present only about 40% of contracts which stipulate the engagement of a Dispute Board actually implement them. Employers do not implement because of the alleged cost.

DRB are better than letting the disputes go to legal people who don't understand the complexities and common practice in construction.

Encourage mentoring

Enforcement of Adjudication

Every effort should be made to avoid having lawyer(s) on a DRB unless they have practical construction experience.

Excelent mechanism, has to be used more frequently and understood as a completely efficient alternative for dispute resolution. [original in Spanish].

Excellent Strategy for Resolving Issues

Expert determination is the most satisfactory form of dispute resolution, provided the experts really are experts.

Explaining that my preference for Adjudication boards (in opposition to Recommendation boards) is because I am in Latin America, where previous experiences in Recommendation boards has sistematicly failed.

For DB practitioners , I believe ther is enough work. Yet, it is quite difficult for a qualified rookie to find DB work. So, when it comes to growing the DB numbers and increasing diversity, we perhaps need to consider how the process can co-opt rookies.

I believe in Mexico they are not used frequently which is a big mistake

I recommend standing DAAB in place from the outset of the contract implementation in international competitive procurement of works!

I think it is important to pay attention to impartiality and avoiding misunderstandings in that respect which easily can happen if a DB member expresses opinions on contract provisions without asking both parties if they wish that.

I would like to underline the differences between the legal environment around a private and a public contract and respectively the traditions and the cultures influencing the parties attitude in the dispute.

If a DB is really the key mechanism in construction projects, or it may depend on the complexity or other key factors of the project. I don't agree that BD is always applicable. I think it depends, and surely the relation between parties could be a factor to consider.

Importance of pro-active, inquisitorial dispute avoidance.

In construction contracts with a DB of 3 members, at least 2 members should be engineers. It is not acceptable to have a DB of 3 members with 2 lawyers members

It is important for DBs' members to stay on top of the works so that they can make informed decisions about claims. Otherwise, it may take a long time for them to fully understand the issue and come to a decision. It is essential that DBs' members maintain their independence, and all parties involved should take this responsibility seriously.

It will improve the success of DRBs if more experienced Engineers are trained involved.

Lawyers are becoming too involved rather than experts in contracts and construction.

Make the selection process of DRB members fairer - figure out a way to appoint more women and minorities.

More contract forms should provide specific measures for the Dispute Board to facilitate dispute avoidance (per FIDIC 2017)

More publication regarding case study on Dispute Board cases is needed

Most of the issues are resolved during the execution of the project. lengthy arbitration is avoided.

My recent experience has mainly been single member and no referrals, so not very useful for your research
Only very interesting a case as ICC expert proceedings (about 10mio \$, resolved by agreement based on Expert decision)

My understanding is that DB, mainly standing one, can be a powerful tool to help projects to be concluded on-time with a minimum amount of conflicts

Public sector and private sector capacity building is the key to success.

Should there be a "cap" on the value of claims submitted to a DB? In general I oppose the concept because claimants can game the system by adjusting the value of their claim to be above or below the cap. That said, I have the sense that well thought out DB Determinations of over say USD 2 million will be rejected by the losing party and the claim will be heard again in arbitration or litigation.

The administration of dispute board is needed to mention in the third party agreement

The DB is a voluntary process by the parties for themselves. The parties have respect for the knowledge and experience of the DB they appointed. Unlike other ADR processes that focus on adjudication, a DB encourages transparency, communication and cooperation so the parties can proactively identify friction points and implement solutions to minimize damages. That resolve claims and avoid disputes and other forms of ADR or litigation.

The existence of a DRB on a project can result in lower delays to the project as decision are thought out responses and additional construction costs are kept in check.

The necessity to train qualified DB members and for them to understand the importance of having availability and time to properly perform its role.

The participation of lawyers in site visits or periodic meetings of the Dispute Boards should be avoided

The references to DABs that I have been involved with all become close to arbitration procedures, with the involvement of both senior (KC) and junior barristers, planning & quantum experts and the application of formal legal procedures found in litigation.

There is a need to make all parties more aware of the advantages of Dispute Boards especially in the Southern African context.

There might be a possibility to restrict the number of DB per person to avoid the situation where the DB member are not available and not concentrated (tired by too many travels). Or issuance of a recommendation or restriction at the time of appointment to avoid overload per member.

There should be more interest from lending institutions/financiers.

They're not yet too common in Aviation and in the Australian market – in my experience.

Training and more training is required for board members in order to for clients to be more confident in the board resolutions

Training as a dispute board member is very important. The role of a dispute board member is unique and involves specialist skills - and I say that after a long career as advocate (I am a KC) who worked predominately in arbitration, expert determination, adjudication, facilitation and mediation, and before that, working as a Projects Engineer.

109. Entities' additional comments

Although I have seen the positives I now see more and more the DRB members overstepping their role and responsibilities causing the Contractors and Owners to question at the project level the need for this service.

I would only authorize a nominating body nominating the DAB member(s), and not the parties. Most likely a member proposed by an employer is accepted by the contractor for commercial reasons. However, such a candidate has often a relation with the employer.

In Latin America, the number of DB members is increasing based only on their previous experience on arbitration. Since arbitration is related but is different than DB, I think those members should pass the certification of any international DB institution, otherwise, the DB procedures may lack its nature and main goal (avoid and solve disputes)

It is important that the adjudicator has empathy with the parties, inviting them to communication and dialogue. It is important that the parties know the mechanism to put it to good use, in favor of the project.

The current crop of practitioners seems to think that the parties work for them, not the other way around.

The current Dispute Board's practice is useful but lacks mechanism for enforcement to unsatisfied parties.

The major lenders in the Independent Power and Water development sectors do not require Boards and as Funders they do have the ability to enforce this. They appear more interested in imposing unrealistic and unreasonable environmental standards than establishing a fair and equitable contract.

The more education by DBRF within the construction industry as to benefits to project outcomes of Dispute Boards, in terms of proactive avoidance of disputes, the better.

The projects where the Employer is a government authority the Dispute Board decision shall be challenged in case the decision is against the Employer since the Employer's personnel is not empowered to accept a decision which is not final as the Employer is actually using the government money / tax money of the people of that country. Hence, the dispute shall be challenged and either arbitration or litigation has to be sought by the Employer. In line with this notion, Dispute Board recommendation or decision against the Employer has no value and further measures are taken which undermines the efficiency of the Dispute Board in these type of projects (where the Employer is a government authority). Consequently, the Dispute Board is not effective in this sense and context which in my opinion requires certain changes to be enforced and/or omitted for the Parties to reach a resolution.

To use and take advantage of Dispute Board, we need to accumulate experience and knowledge. Maybe we have to have a close contact with legal consultant or lawyer.

110. Institutions' additional comments

Parties often establish their Dispute Board once the dispute has arisen. It's important to emphasize the preventive role of a Dispute Board as well its standing nature. Furthermore, Dispute Boards could offer benefits beyond the construction sector.

I think it's an excellent option that should be mandatory, but at a lower cost to the parties

111. Funders' additional comments

Although we consider the Standing DB is effective for the dispute avoidance and resolution in the project, there is no sufficient and detailed information which supports the parties's satisfaction with its length and costs. Therefore, it would be highly appreciated if you share the result of this research.

DAB needs to be promoted in certain geographical regions as this is a fairly uncommon concept.

Annexes

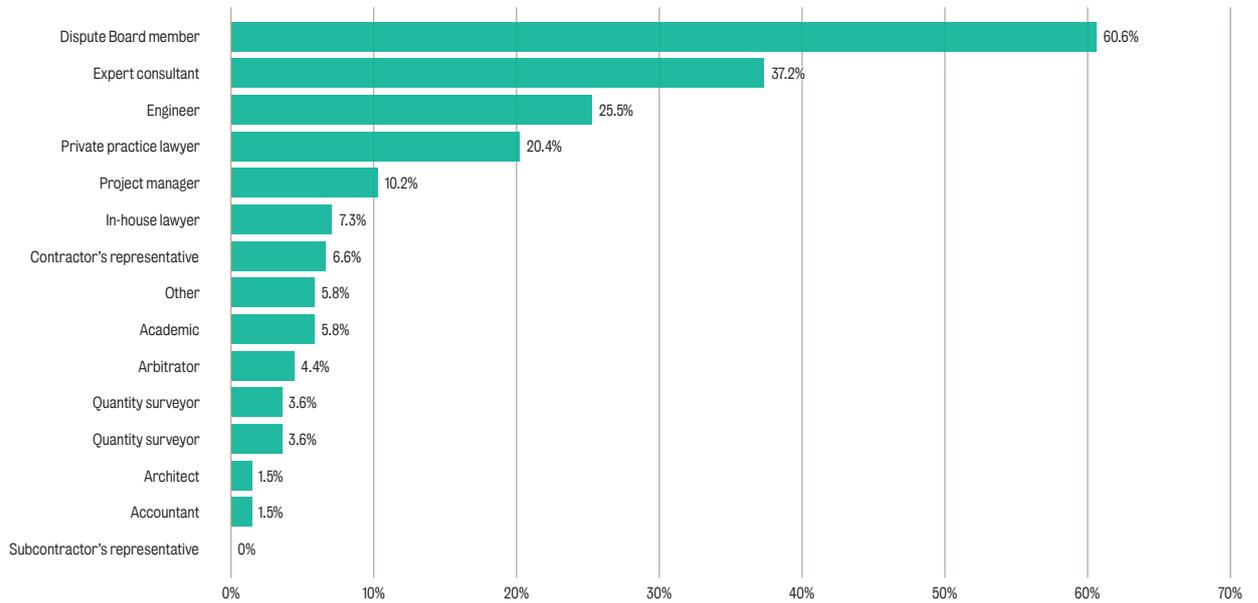


Annex A: Profile of respondents

Individuals

Figure A: Individuals' main professional role

Based on 137 responses received. Respondents were able to select more than one option if applicable



Individuals who indicated 'Other' in their responses were invited to provide details on their roles. Those details are listed below.

- | *Contract and claim management*
- | *Contract Management Consultant*
- | *Real estate Agent*
- | *Adjudicator*
- | *FIDIC Trainer*
- | *Partnering Facilitator on public works projects*
- | *Dispute resolution*
- | *Independent Contracts, Claims and Dispute Resolution Specialist*

Annex A:
Profile of respondents

Figure B: Region in which Individuals' main activities were concentrated
(the regions and subregions below were described in accordance with the United Nations Geoscheme)
Based on 137 responses received. Respondents were able to select more than one option if applicable

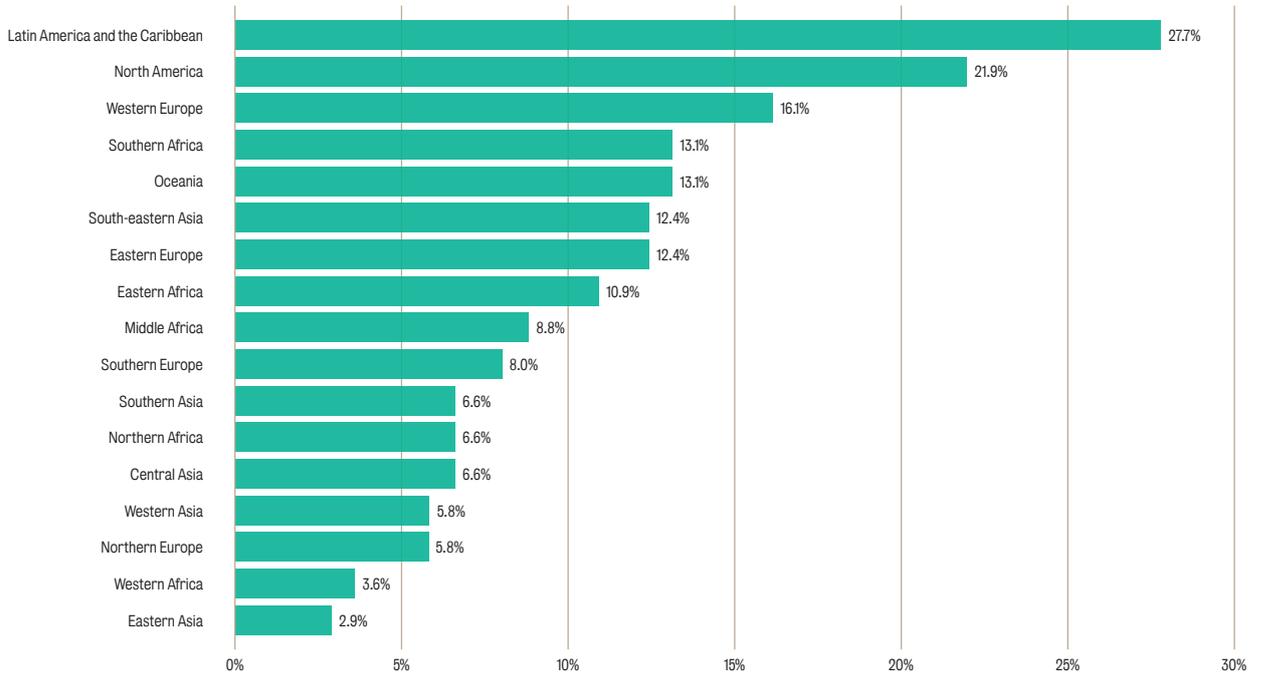
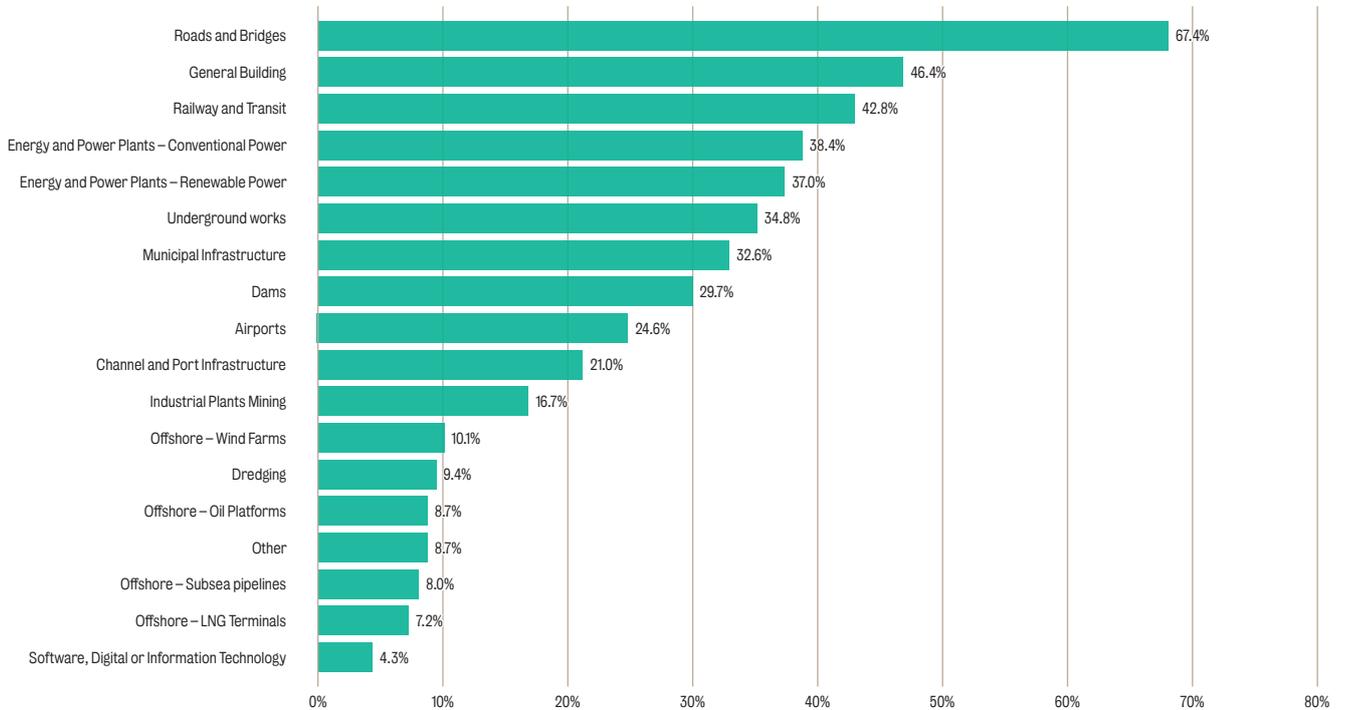


Figure C: Industry Sector that best describes Individuals' main activities
Based on 138 responses received. Respondents were able to select more than one option if applicable



Annex A: Profile of respondents

Individuals who indicated 'Other' in their responses were invited to provide details on the industry sectors in which they primarily work. Those details are listed below in alphabetical order.

- | *Carbon Markets*
- | *Health infrastructure*
- | *Indigenous People*
- | *Infrastructure*
- | *Legal Industry*
- | *Pipelines*
- | *Residential and commercial building projects*
- | *River defenses*
- | *Sanitation*
- | *Water infrastructure*
- | *Water supply and sanitation, WWTPs*
- | *Water Treatment Plant and potable water transfer-distribution*

Figure D: Have you ever acted as a Dispute Board member?
Based on 138 responses received



Annex A: Profile of respondents

Figure E: Are you part of an Institution's panel or list of Dispute Board members (or equivalent)?

Based on 138 responses received



Individuals were also asked to indicate the panels to which they belonged. Those institutions mentioned are listed below in alphabetical order.

- | ACES PRO
- | Airport Authority – Los Angeles
- | American Arbitration Association
- | Anakawa Peru
- | CAM-CCBC
- | Camara FGV
- | Camera arbitrale milano
- | Catholic Peruvian University Arbitration Center
- | CBMA Rio de Janeiro
- | CDRC
- | Centro de Arbitraje y Resolución de Conflictos de la Pontificia Universidad Católica del Perú
- | Chartered Institute of Arbitrators
- | Chesapeake Bay Bridge and Tunnel
- | CIESP/FIESP
- | City of Columbus, Ohio (USA) Public Works
- | City of Fort Wayne
- | City of San Diego, CA
- | City of Toronto Transit Commission, Ontario Canada
- | City of Toronto, Ontario Canada
- | Colegio de Ingenieros Perú
- | Contraloría General de la República del país de Perú
- | Department of Design and Construction – New York City
- | Department of Energy – US
- | Department of Transport & Main Roads – Queensland
- | Department of Transportation – California
- | Department of Transportation – Colorado
- | Department of Transportation – Florida
- | Department of Transportation – Georgia
- | Department of Transportation – Michigan
- | Department of Transportation – Nevada
- | Department of Transportation – Ohio
- | Department of Transportation – Texas
- | Department of Transportation – Washington
- | Dispute Board in Charlotte
- | DRBF
- | Eskom
- | FIDIC
- | ICC
- | Indiana (USA) Board of Public Works
- | Kamuli Municipal Council Dispute resolution board
- | Lima Chamber of Commerce,
- | Los Angeles Metro
- | Metropolitan Transit Authority, Washington, DC (USA)
- | Ministry of Water and Environment
- | Narragansett Bay Commission
- | NC headed by Ann Russo
- | Ports Authority – Tanzania
- | Regional Mobility Authority – Central Texas
- | RICS
- | SAICE/ICE
- | Shanghai Arbitration Centre
- | Tarrant Regional Water District -Dallas/Fort Worth, Texas (USA)
- | The Electrical State Enterprise
- | Transport Agency – New Zealand
- | Transport for NSW
- | VBI
- | Water and Power Development Authority
- | Wisconsin Department of Transportation, West Allis, WI (USA)
- | World Bank

Entities

Figure F: Entities' main role

Based on 26 responses received. Respondents were able to select more than one option if applicable

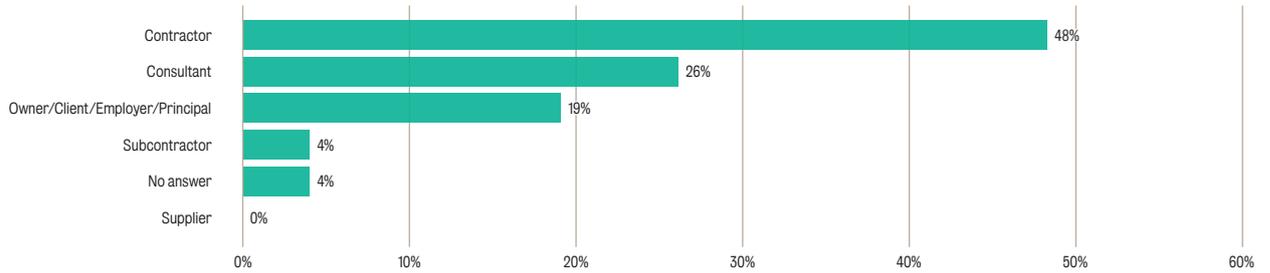


Figure G: Region in which Entities' main activities were concentrated

(the regions and subregions below were described in accordance with the United Nations Geoscheme)

Based on 27 responses received. Respondents were able to select more than one option if applicable

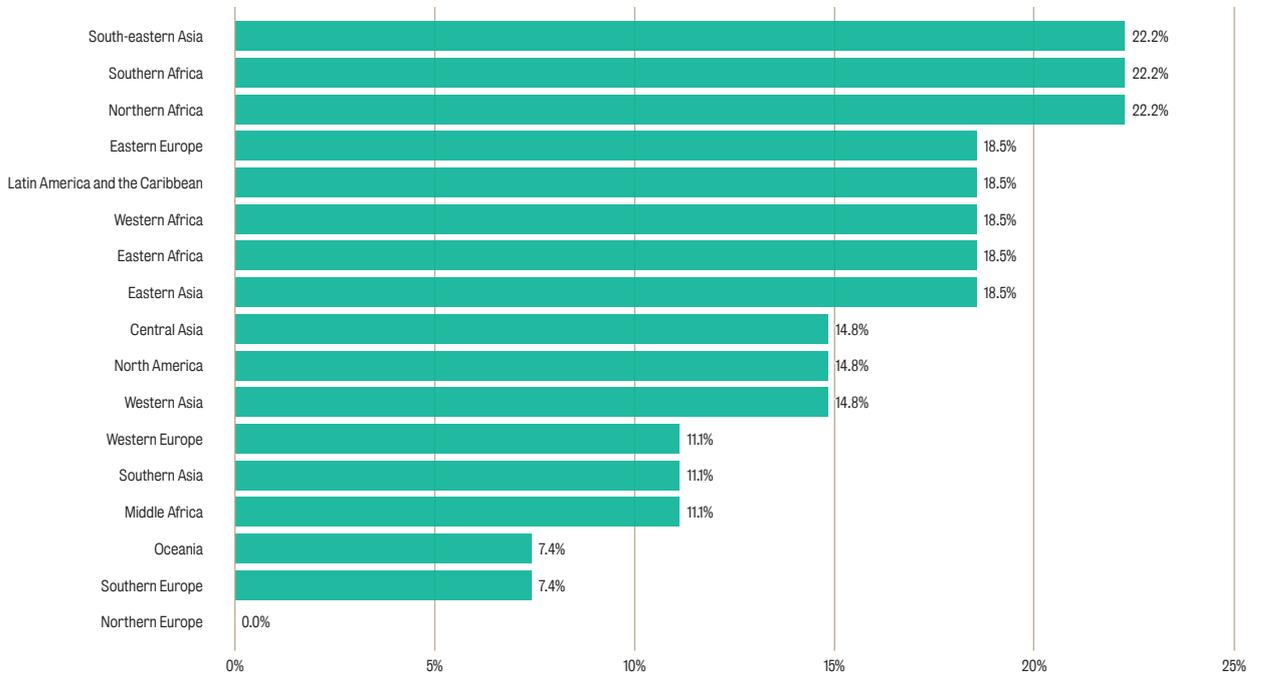
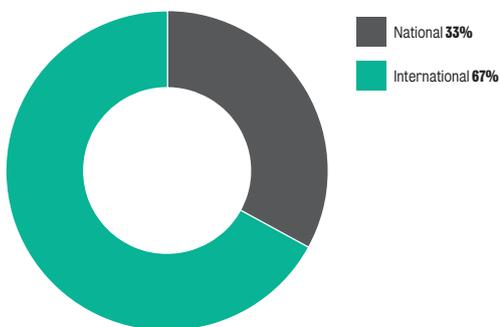


Figure H: Geographical range of Entities' activities

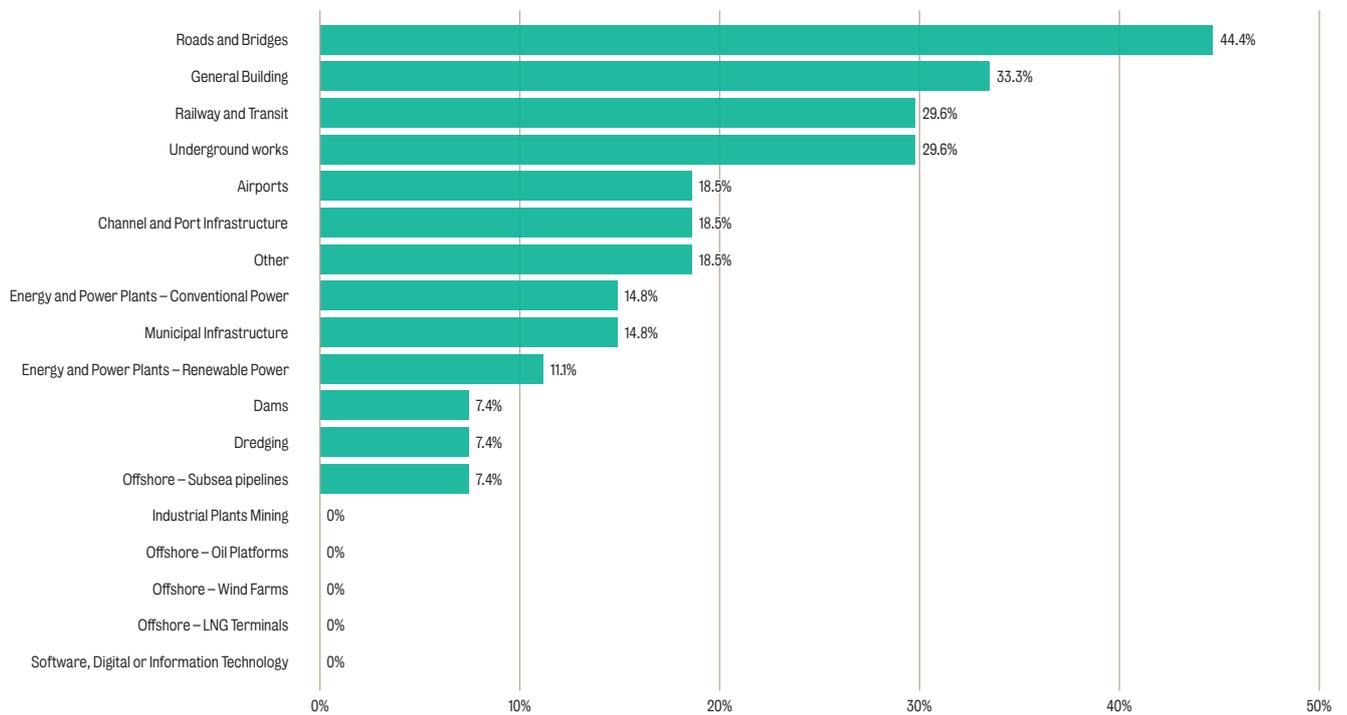
Based on 27 responses received



Annex A: Profile of respondents

Figure I: Industry Sector that best describes Entities' main activities

Based on 27 responses received. Respondents were able to select more than one option if applicable



Entities who indicated 'Other' reported that their main activities were as follows. They are set out in alphabetical order.

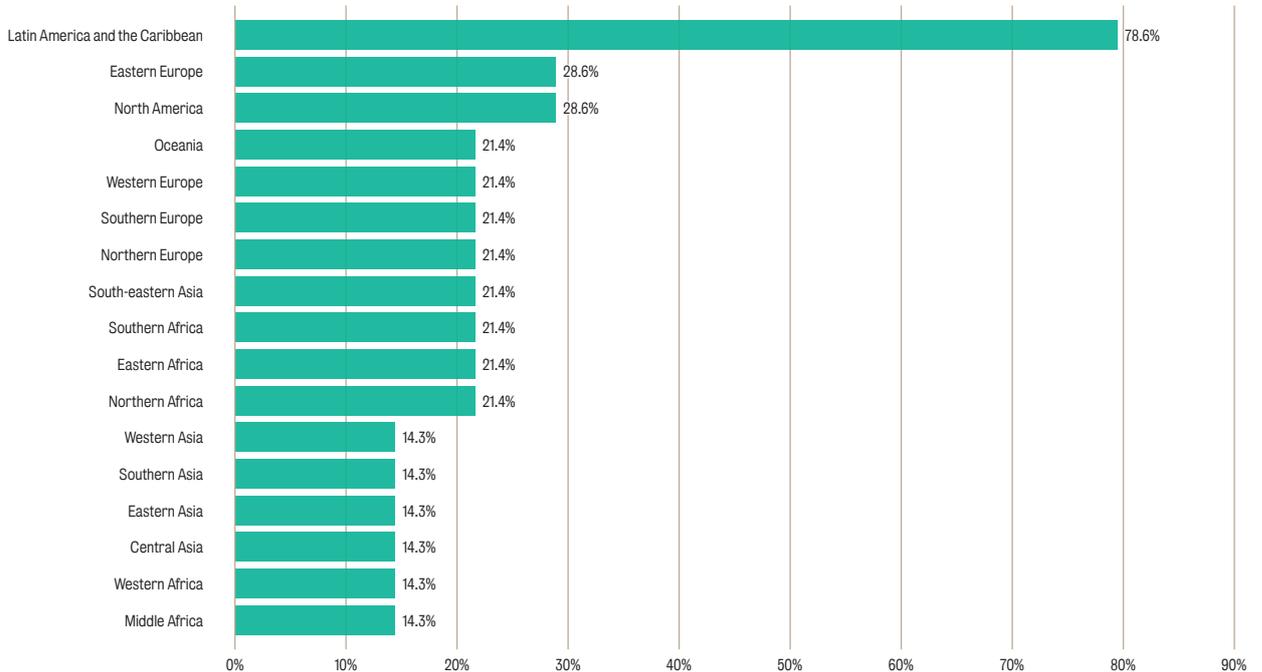
- *Desalination Plant*
- *Educational Infrastructure*
- *General Civil Infrastructures*
- *Transmission pipelines*
- *Water and Wastewater Treatment Plants*

Institutions

Institutions were the only category of respondents who were asked to identify themselves and agree to be identified in the research outputs. Accordingly, with their authorisation, below in alphabetical order is a list of the names of all respondents to the category, 'Institutions', as they identified themselves.

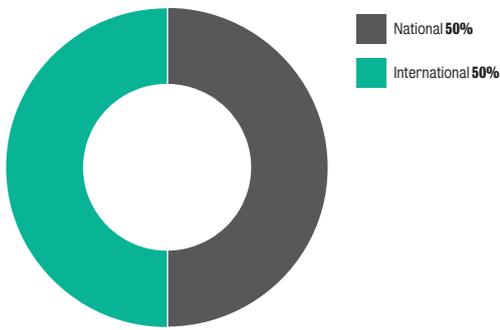
- *Arbitration Center – Lima Chamber of Commerce (Peru)*
- *Arcadis*
- *Cámara de Comercio e Industría de Arequipa*
- *Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada – CAM-CCBC*
- *Centro de Arbitraje & Dispute Board Asociación Zambrano*
- *Centro de Arbitraje Camara de Comercio de Cajamarca*
- *Dispute Resolution Board Foundation*
- *International Chamber of Commerce*
- *JS HELD*
- *MED ARB RB*
- *Philippine institute of constructors arbitrators and mediators inc*
- *Slovak Association of Consulting Engineers*
- *The Chamber of Conciliation, Mediation and Arbitration CIESP/FIESP*
- *UK Adjudicators – Dispute Board Panel*

Figure J: Region in which Institutions' main activities were concentrated (the regions and subregions below were described in accordance with the United Nations Geoscheme) Based on 13 responses received. Respondents were able to select more than one option if applicable



Annex A:
Profile of respondents

Figure K: Geographical range of Institutions' activities
Based on 13 responses received



Funders

Figure L: Region in which Funders' main activities were concentrated
(the regions and subregions below were described in accordance with the United Nations Geoscheme)
Based on 4 responses received. Respondents were able to select more than one option if applicable

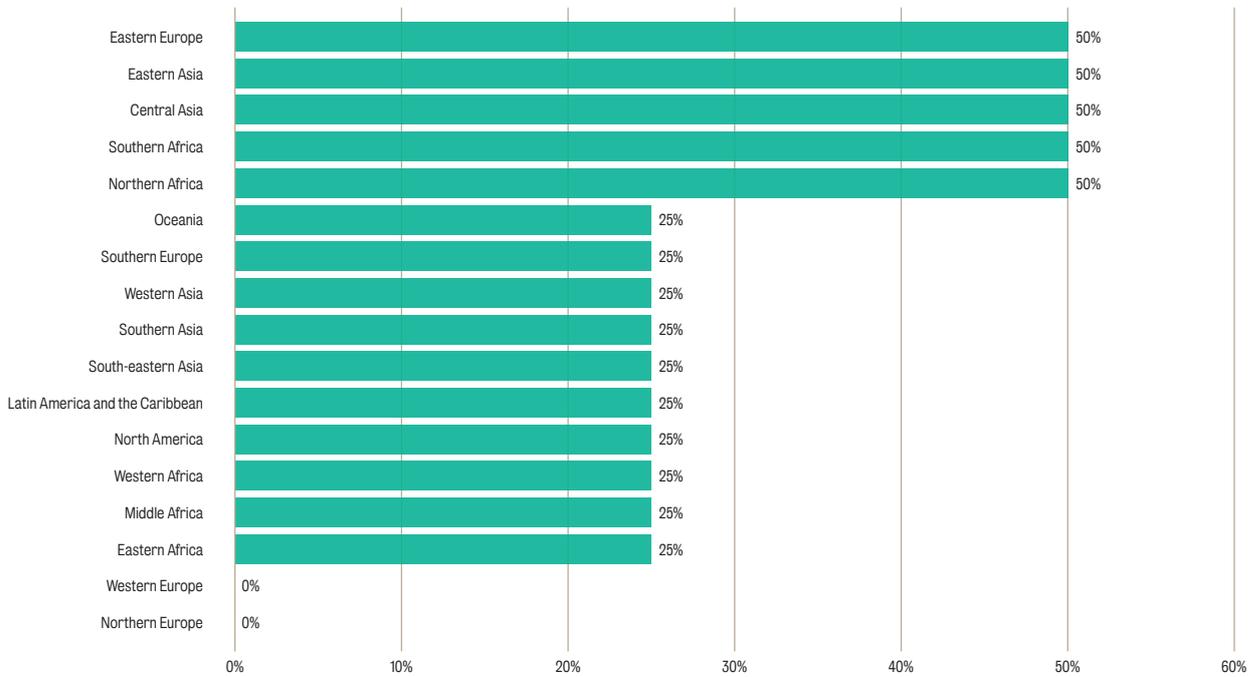
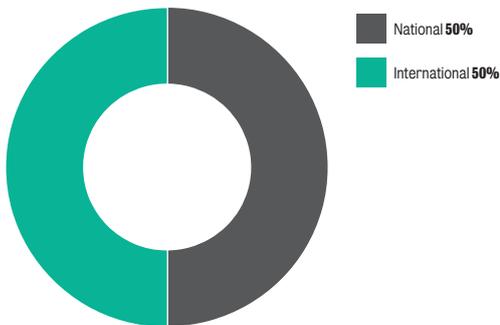


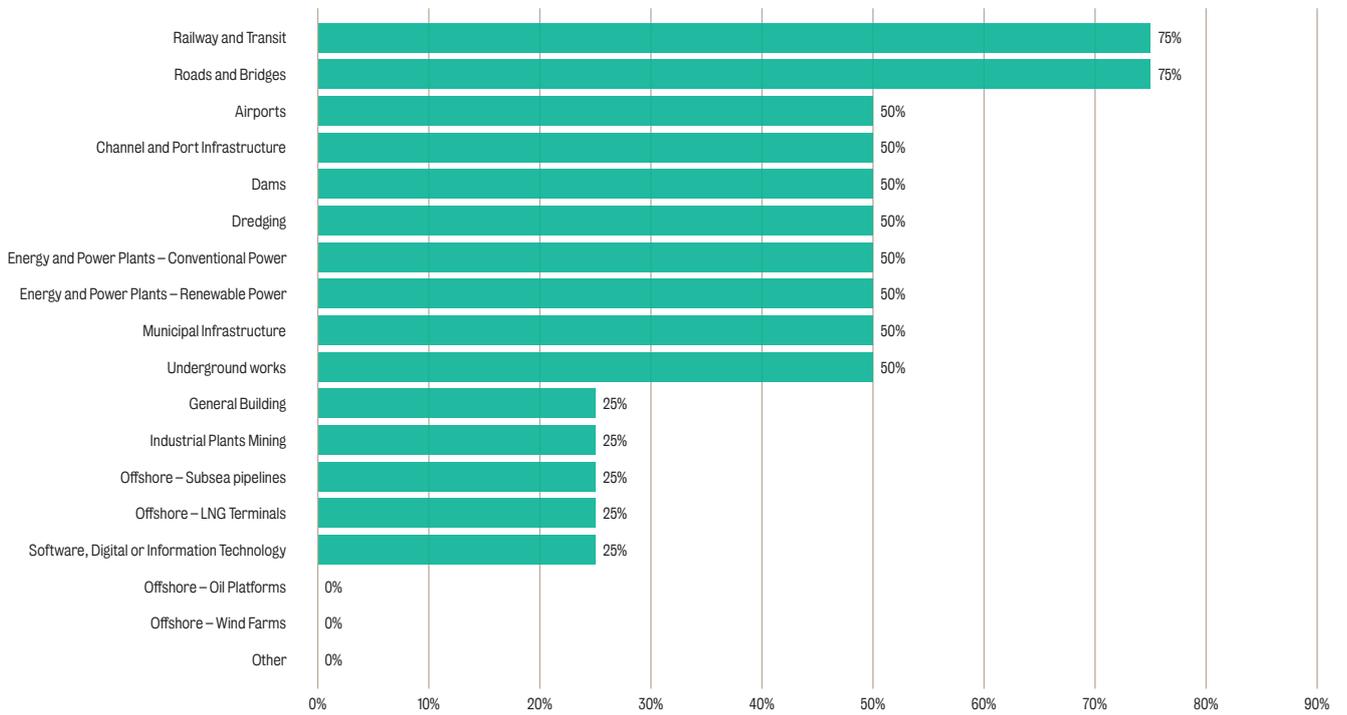
Figure M: Geographical range of Funders' activities
Based on 4 responses received



Annex A:
Profile of respondents

Figure N: Industry Sector that best describes Funders' main activities

Based on 4 responses received. Respondents were able to select more than one option if applicable



Annex B:

Summary of key findings

Individuals and Entities

- Individuals indicated that, out of 3,323 Projects reported over the course of six years (2018-2023), 50.9% of those Projects (ie 1,692) included Dispute Boards. Of those, 69.9% (ie 1,165) were standing Dispute Boards, and 31.1% (ie 527) were ad hoc Dispute Boards.
- Entities indicated that, out of 530 Projects reported over the course of six years (2018-2023), 40.9% of those Projects (ie 217) included Dispute Boards. Of those, 40.6% (ie 88) were standing Dispute Boards, and 59.4% (ie 129) were ad hoc Dispute Boards.
- 41% of Entities reported having a rule or policy for including a Dispute Board in all or certain Projects in which they were involved.
- 26% of Entities indicated that they discussed the inclusion of a Dispute Board in the contract but then decided not to include it. Amongst the main reasons behind that decision were the costs of a Dispute Board (indicated by 86% of Entities), unfamiliarity with how Dispute Boards function (indicated by 43% of Entities), and the lack of enforceability of Dispute Board findings (indicated by 43% of Entities).
- Individuals indicated that out of 1,692 Dispute Boards reported, 65% were constituted based on provisions contained in standard forms of contract. Entities reported 217 Dispute Boards, 62% of which were constituted based on provisions contained in standard forms of contract.
- Individuals reported that 49% of the Dispute Boards in which they were involved were composed of three members, whereas another 15% were composed of a single member. In the remaining cases, either the Dispute Boards were composed of a number of members other than one or three, or no information was provided.
- Entities reported that 23% of the Dispute Boards in which they were involved were composed of three members, whereas another 25% were composed of a single member. In the remaining cases, either the Dispute Boards were composed of a number of members other than one or three, or no information was provided.
- Individuals reported that 88% of the Dispute Boards in which they were involved provided for the parties' involvement in the nomination of the Dispute Board members, either alone (50%) or with the participation of an Institution in the nomination process (38%).
- Entities reported that 66% of the Dispute Boards in which they were involved provided for the parties' involvement in the nomination of the Dispute Board members, either alone (28%) or with the participation of an Institution in the nomination process (38%).
- Individuals reported there were almost as many Dispute Board agreements expressly requiring the Dispute Board members to have specific qualifications or attributes (49%) as Dispute Board agreements with no such requirement (50%). For the remaining 1%, information was not provided.
- Entities reported that 28% of their Dispute Board agreements expressly required the Dispute Board members to have specific qualifications or attributes, whereas 65% of their Dispute Board agreements did not contain such requirements. No information was provided for the remaining 'Dispute Boards reported by Entities.
- Individuals and Entities reported that the most required qualifications or attributes from Dispute Board members were experience in the interpretation of construction and/or engineering contract documentation, experience in the sector relevant to the Project, and impartiality and independence, in that order. Those were the same requirements considered most important by Individuals and Entities for Dispute Board members to possess.
- 36% of Individuals and 46% of Entities prefer that the finding of the Dispute Board be binding on the parties.
- 64% of Individuals and 67% of Entities prefer Dispute Boards composed of three members.
- 83% of Individuals and 72% of Entities indicated they prefer standing Dispute Boards, either administered by an Institution or directly by the Dispute Board members.
- 23.3% of Individuals reported that Dispute Board members were most often requested to meet at least once every 91 to 120 days. In the experience of 58% of Individuals, regular meetings with the parties and/or site visits always take place as provided in the Dispute Board agreement.
- 27% of Entities reported that Dispute Board members were most often requested to meet at least once every 31 to 60 days, another 27% of Entities reported 61 to 90 days as the most common timeframe, and still another 27% of Entities reported 91 to 120 days as the most common timeframe in their experience.
- 36% of Individuals and 41% of Entities indicated that they found online meetings useful to the Dispute Board process.
- The most common value disputed before Dispute Boards, according to Individuals' experience, was between \$2,000,001 and \$5,000,000 (27%). In Entities' experience, equally commonly reported ranges were between \$1,000,001 and \$2,000,000 (31%) and between \$5,000,001 and \$10,000,000 (31%).
- In the experience of Individuals, the most frequent causes of disputes brought before the Dispute Board were changes by clients (42%), clients' lack of information or decisiveness (30%), and inadequate contract administration (27%).
- In the experience of Entities, the most frequent causes of disputes brought before the Dispute Board were changes by clients (36%), inaccurate design information (36%), and clients' lack of information or decisiveness (28%).
- In the experience of Individuals, the most frequent categories of claims brought before the Dispute Board were extensions of time (84%), loss and expense and/or damages for delay and/or disruption (52%), and hardship, force majeure, or unexpected events (34%).
- In the experience of Entities, the most frequent categories of claims brought before the Dispute Board were extension of time (72%), loss and expense and/or damages for delay and/or disruption (44%), and hardship, force majeure, or unexpected events (28%).

Annex B: Summary of key findings

- In Individuals' and Entities' experience, the Dispute Board process commonly lasted between 76 and 90 days. Individuals and Entities have indicated that the complexity of the case was the most common factor affecting the duration of the Dispute Board process.
- In the experience of Individuals, the most common cost-efficiency measures adopted by Dispute Boards were holding meetings (either in person or remotely), setting guidelines for submissions, and limiting time periods for submissions.
- In the experience of Entities, the most common cost-efficiency measures adopted by Dispute Boards were holding meetings in person, setting guidelines for submissions, and deciding a case on a 'documents only' basis.
- 76% of Individuals and 92% of Entities indicated the electronic exchange of correspondence as the most common technological measure implemented by Dispute Boards.
- 50% of Individuals reported that in their experience, Dispute Boards adopt dispute avoidance measures very often or always. In their experience, the most common result of those measures was that the dispute was completely avoided, as reported by 45% of Individuals.
- 32% of Entities reported that in their experience, Dispute Boards adopt dispute avoidance measures very often or always. In their experience, the most common result of those measures was that the scope of the dispute was relatively reduced, as reported by 33% of Entities.
- For both Individuals and Entities, the most adopted dispute avoidance measure adopted by the Dispute Boards was the conduction of regular project meetings to discuss progress, challenges, and potential issues.
- 30% of Dispute Boards reported by Individuals had the power to issue binding decisions, whereas 27% only had the power to issue recommendations. For the remaining 33% of cases, the binding nature of the findings was either not reported or unknown.
- 32% of Dispute Boards reported by Entities had the power to issue binding decisions, whereas 15% only had the power to issue recommendations. For the remaining 53% of cases, the binding nature of the findings was either not reported or unknown.
- 40% of Individuals indicated that in their experience, the parties complied with a Dispute Board's non-binding recommendations most of the time.
- 35% of Entities indicated that in their experience, the parties complied with a Dispute Board's non-binding recommendations only sometimes.
- 38% of Individuals indicated that in their experience, the parties complied with binding decisions of Dispute Boards most of the time.
- 35% of Entities indicated that in their experience, the parties complied with binding decisions of Dispute Boards most of the time.
- 30% of Individuals and 28% of Entities reported that, in their experience, parties never issue with 'notices of dissatisfaction (or equivalent) in response to decisions issued by Dispute Boards.
- 51% of Individuals and 42% of Entities reported that, in their experience, the Dispute Board process was always a mandatory condition for commencing subsequent proceedings.
- 67% of Individuals and 72% of Entities indicated that subsequent proceedings, such as litigation or arbitration, were only commenced between 0% and 10% of the time.
- In the experience of 44% of Individuals and 50% of Entities, the decision reached in subsequent proceedings was never substantially different from the decision of the Dispute Board.
- 91% of Individuals and 92% of Entities have never been involved in a proceeding to enforce a Dispute Board decision.
- 72% of those Individuals who have been involved in the enforcement of a Dispute Board decision reported it being by means of an arbitral tribunal's decision, meaning either an interim measure, an interim award, or a final award.
- 67% of Individuals reported their involvement in the enforcement of a Dispute Board decision by means of an arbitral tribunal's interim award.
- 30% of Individuals reported that enforcement of a Dispute Board decision was granted between 91% and 100% of the time.
- 50% of Entities reported that enforcement of a Dispute Board decision was granted between 51% and 60% of the time. The other 50% indicated that enforcement was granted only between 0% and 10% of the time.
- 56% of Individuals and 39% of Entities reported that, most commonly, there was no provision in the contract regarding Dispute Board fees, and the parties had to negotiate fee arrangements with members of the Dispute Board.
- 51% of Individuals and 44% of Entities reported that the most common scenario in their experience was that the parties agreed on a provision establishing a monthly retainer fee.
- Individuals and Entities reported that, in their experience, the most common value of a Dispute Board members retainer fee was equivalent to less than \$25,000 a year.
- Individuals and Entities reported that, in their experience, the most common value of a Dispute Board member's hourly fee was between \$201 and \$300.
- Individuals reported that, in their experience, the most common value of a Dispute Board member's daily fee was between \$2,001 and \$3,000. In the experience of Entities, the most common value of a Dispute Board member's daily fee was between \$1,001 and \$2,000.
- In terms of the average Dispute Board's total costs, Individuals reported that the most common range of costs in their experience was between \$100,001 and \$200,000. Entities, in contrast, reported that the most common range of costs in their experience was between \$200,001 and \$300,000.
- 55% of Individuals and 50% of Entities indicated that the typical percentage that the total costs of the Dispute Board represented with respect to the total value of the Project was between 0% and 0.5%.

Annex B: Summary of key findings

- 46% of Individuals and 38% of Entities reported that, in their experience, Dispute Board members most commonly have the same fees.
- 25% of Individuals indicated they never saw the involvement of external lawyers in the Dispute Board process, and 23% indicated that they never saw the involvement of external experts.
- 40% of Entities indicated they never saw the involvement of external lawyers in the Dispute Board process, and 24% indicated that they never saw the involvement of external experts.
- 50% of Individuals and 27% of Entities found the Dispute Board extremely useful in avoiding disputes. 1% of Individuals and 8% of Entities indicated, instead, that Dispute Boards were not at all useful to the resolution of disputes.
- 35% of Individuals and 24% of Entities were very satisfied with the average duration of the Dispute Board process. 1% of Individuals and 4% of Entities indicated, instead, that they were very dissatisfied with the average duration of the Dispute Board process.
- 32% of Individuals and 16% of Entities were very satisfied with the average costs of the duration of the Dispute Board process. 1% of Individuals and 4% of Entities indicated, instead, that they were very dissatisfied with the average costs of the duration of the Dispute Board process.
- 83% of Individuals and 74% of Entities reported having suspected bias of the chair member very rarely, namely between 0% and 10% of the time.
- The leading cause of Individuals' and Entities' suspicions of a Dispute Board member's bias is a relationship between the Dispute Board member and the other party or its representatives.
- 42% of Individuals and 46% of Entities found the average composition of Dispute Boards a little diverse.
- 41% of Individuals and 35% of Entities believe that the diversity of the composition of Dispute Boards has improved in the last 5 years.
- Institutions reported that the most important criteria that they consider when evaluating candidates to join their panel or list of Dispute Board members are the technical background of the individual (ie whether he or she is a lawyer, engineer, architect, accountant, or quantity surveyor) and the experience of the individual in interpreting construction and/or engineering contracts.
- 75% of Institutions indicated that they do not have any Continuing Professional Development (CDP) requirements for a Dispute Board member to join (or be kept on) their panel or list.
- 67% of Institutions indicated that their panel or list of Dispute Board members was available to the public.
- 50% of Institutions indicated they consider their panel or list of Dispute Board members diverse, whereas another 50% responded that they consider their panel or list very diverse.
- 50% of Institutions reported to have implemented measures to improve the diversity of their panel/list of Dispute Board members in the last five years.
- Institutions reported that in 49% of the Dispute Boards in which they were involved, the Dispute Board agreement required the Dispute Board members to have a specific qualification or attribute.
- In the Institutions' experience, the most often required qualifications or attributes for Dispute Board members were impartiality and independence, experience in the sector relevant to the project, and availability.
- 75% of Institutions reported that they asked parties to submit their opinions in relation to the Institution's appointment of a Dispute Board member.
- 58% of Institutions indicated that they kept diversity data related to their appointment of Dispute Board members.
- 46% of Institutions indicated that they offer the service of administering the Dispute Board process.

Institutions

- Institutions reported that, over the course of six years (2018-2023), they were involved in the constitution or functioning of 219 Dispute Boards. Of those, 91.3% (ie 200) were standing Dispute Boards, and 8.7% (ie 19) were ad hoc Dispute Boards.
- Institutions reported that 26% of the Dispute Boards in which they were involved were composed of three members, whereas another 13% were composed of a single member. In the remaining cases, either the Dispute Boards were composed of a number of members other than one or three, or no information was provided.
- 62% of Institutions have a panel or list of Dispute Board members. Of those, 10% of Institutions have a rule or policy requiring that appointments made by Institutions be limited to the Institution's panel or list of Dispute Board members.
- 61% of Institutions indicated that they offer the service of appointing a Dispute Board member, either for a separate fee, a fee included in the administrative costs, or at no cost.
- 46% of Institutions indicated that they offer the service of fixing the fees of the Dispute Board member.
- 67% of Institutions indicated that they did not typically establish a retainer fee when fixing the fees of the Dispute Board members.
- According to the Institutions surveyed, the most common value for a Dispute Board's retainer fee is between \$50,001 and \$75,000 per year.
- Institutions indicated that they did not commonly establish the Dispute Board fees based on hourly rates.
- According to the Institutions surveyed, the most common value for a Dispute Board's daily fee is between \$0 and \$2,000 per day.

Annex B: Summary of key findings

- 50% of Institutions reported that they most commonly established that the Dispute Board members have the same fees.
- 54% of Institutions offer the service of deciding challenges against the appointment or continuation of services of a Dispute Board member, either for a separate fee or a fee included in the administrative costs.
- Institutions reported that they decided four challenges against the nomination or continuation of services of Dispute Board members during the six-year period covered by the survey (2018-23), with one being raised against a chair or single member of a Dispute Board, and the other three being brought against other Dispute Board members.
- Institutions reported that the lack of impartiality or independence arising during the Dispute Board process was the most common reason for challenges to the appointment (or the continuation of the services) of a Dispute Board member.
- 31% of Institutions offer the service of reviewing a decision issued by a Dispute Board, either for a separate fee or a fee included in the administrative costs.
- The Institutions surveyed reported that there was only one request for the review of a decision of a Dispute Board during the six-year period covered by the survey (2018-23).
- Aspects of the Dispute Board process with which Funders were most involved include dispute negotiations, the costs of hiring external counsel and experts, the appointment of Dispute Board members, and financing any additional costs.
- 75% of Funders found Dispute Boards very useful in avoiding disputes.
- 75% of Funders indicated that they were neither satisfied nor dissatisfied with the average duration of the Dispute Board process.
- 50% of Funders indicated that they were neither satisfied nor dissatisfied with the average cost of the Dispute Board process.

Miscellaneous

- 58% of Individuals believe that the construction industry could benefit from an international convention facilitating the circulation and enforcement of Dispute Board decisions.
- 63% of Entities believe that the construction industry could benefit from an international convention facilitating the circulation and enforcement of Dispute Board decisions.
- 92% of Institutions believe that the construction industry could benefit from an international convention facilitating the circulation and enforcement of Dispute Board decisions.
- 50% of Funders believe that the construction industry could benefit from an international convention facilitating the circulation and enforcement of Dispute Board decisions.

Funders

- Funders reported that, out of 2,464 Projects reported over the course of six years (2018-23), 76.7% (1,891) of those Projects included Dispute Boards. Of those, 73.9% (ie 1,397) were standing Dispute Boards, and 26.1% (ie 494) were ad hoc Dispute Boards.
- 100% of Funders reported having a rule or policy for including a Dispute Board in all or certain Projects in which they were involved.
- 75% of Funders indicated that they discussed the inclusion of a Dispute Board in the contract but then decided not to include it. According to 67% of Funders, the main reason for that decision is the cost of a Dispute Board.
- Funders reported that, out of 1,891 Dispute Boards, 90% were constituted based on provisions contained in standard forms of contract.
- 100% of Funders indicated that they were not commonly involved in the negotiation of the Dispute Board agreement.
- 50% of Funders prefer that the finding of the Dispute Board be binding on the parties.
- 75% of Funders prefer Dispute Boards composed of three members.
- 75% of Funders prefer standing Dispute Boards, either administered by an Institution or directly by the Dispute Board members.
- 50% of Funders indicated that they were sometimes involved in the Dispute Board's procedure, and the other 50% indicated that they were only rarely involved in the Dispute Board's procedure.

Annex C: Acknowledgements

The Research Team would like to express its gratitude to the following individuals for their valuable contributions to the completion of this report.

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THE DICKSON POON SCHOOL OF LAW

CENTRE OF
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RESOLUTION



A Nova Administração Pública por Contratos e o surgimento dos “Dispute Boards” no Brasil

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Sumário: 1. Introdução; 2. Os novos instrumentos de consensualidade no Direito Administrativo Brasileiro; 3. A consensualidade no âmbito dos contratos administrativos; 4. O surgimento dos “Dispute Boards” no Brasil: nova forma de resolução consensual de conflitos na Administração Pública; 5. Considerações finais.

Resumo: O presente artigo tem como objetivo analisar o instituto dos “dispute boards” no contexto das novas formas de solução de conflitos surgidos no âmbito dos contratos administrativos. Para tanto, os autores inicialmente analisam o desenvolvimento das técnicas de consensualidade em contratos celebrados pela Administração Pública no Direito Europeu e Brasileiro. Neste ponto, é feita análise doutrinária a respeito das cláusulas exorbitantes dos contratos administrativos, concluindo-se que tanto na Europa quanto no Brasil há movimento em prol da superação da unilateralidade pela consensualidade em tais contratos. Neste influxo de mudanças é que se incluem os “dispute boards”, ao lado de outros instrumentos de *Alternative Dispute Resolution* – ADR. É feita a análise do surgimento do instituto com sua aplicação no âmbito da construção civil e sua incorporação aos modelos de resolução de conflitos da Administração Pública. No Brasil, é analisada a regulamentação do instituto na Lei Municipal nº 16.873, de 22 de fevereiro de 2018 (Município de São Paulo) e Lei Municipal nº 11.241, de 19 de junho de 2020 (Município de Belo Horizonte), bem como a expectativa de sua previsão na

Lei Nacional de Licitações e Contratos Administrativos. Nas respectivas leis municipais são criados Comitês de Resolução de Disputas, podendo atuar inclusive de forma preventiva à ocorrência de conflitos, o que torna a medida mais efetiva em relação às demais ADRs. No texto, são explicados os modelos possíveis de Comitês de Disputas: o de Revisão (que expede recomendações); o de Adjudicação (que profere decisões a serem ratificadas pelos contratantes) e o misto. Em todos eles, a decisão final é dos contratantes, que podem optar por aceitar a recomendação/decisão ou recorrer ao Poder Judiciário para a solução da controvérsia. Conclui-se, pois, que vem sendo ampliada a adoção dos “Dispute Boards” no Direito Brasileiro e no Direito Europeu e que sua utilização contribui de forma efetiva para a resolução dos conflitos entre contratantes. Além disso, a aplicação dos Dispute Boards colabora com o aumento da consensualidade de que devem se revestir as relações contratuais, tendo plena compatibilidade com a busca do interesse público.

Palavras-chave: *Contratos Administrativos – Resolução de Conflitos – Dispute Boards.*

Abstract: This article aims to analyze the institution of “dispute boards” in the context of new forms of conflict resolution that have arisen in the scope of administrative contracts. To this end, the authors initially analyze the development of consensual techniques in contracts signed by the Public Administration in European and Brazilian law. At this point, a doctrinal analysis is made regarding the exorbitant clauses of administrative contracts, concluding that both in Europe and in Brazil there is a movement in favor of overcoming unilateralism by consensuality in such contracts. This influx of changes includes “dispute boards”, alongside other Alternative Dispute Resolution - ADR instruments. An analysis is made of the emergence of the institution with its application within the scope of civil construction and its incorporation into the models of conflict resolution of the Public Administration. In Brazil, regulation of the institution is analyzed in Municipal Law nº 16.873, of February 22, 2018 (Municipality of São Paulo) and Municipal Law nº 11.241, of June 19, 2020 (Municipality of Belo Horizonte), as well as the expectation of its prediction in the National Law for Bids and Administrative Contracts. In the respective municipal laws, Dispute Resolution Committees are created, which can even act in a preventive way in relation to the occurrence of conflicts, which makes the measure more effective in relation to the other ADRs. In the text, the possible models of Dispute Committees are explained: the Review Committee (which issues recommendations); the Adjudication (which proffers decisions to be ratified by the contractors) and the mixed. In all of them, the final decision rests with the contractors, who can choose to accept the recommendation/decision or resort to the Judiciary to resolve the dispute. It is concluded, therefore, that the adoption of “Dispute Boards” in Brazilian and European Law has been expanded and that their use contributes effectively to the resolution of conflicts between contractors. In addition,

the application of Dispute Boards helps to increase the consensus that contractual relations must take on, being fully compatible with the pursuit of the public interest.

Keywords: *Administrative Contracts – Conflict Resolution – Dispute Boards.*

1. Introdução

O entendimento de que o interesse público há de ser protegido por meio de uma postura agressiva, litigiosa, por vezes unilateral, pautada pelo preconceito de que a convergência com o privado revela incúria com o trato da coisa pública, é tradicionalmente adotado pela Administração Pública no bojo dos seus conflitos.¹ Mas há algum tempo, reconhece-se que a salvaguarda do interesse público não colide com o diálogo e a construção de pontes entre privados e entidades integrantes do aparato estatal.

Em lugar de uma unilateralidade ultrapassada, resquício de características ligadas ao momento de surgimento do Direito Administrativo e à centralidade do ato administrativo, leis mais recentes, orientadas pela doutrina, têm se ocupado de impulsionar a Administração Pública à consensualidade e à participação do privado no processo decisório.

No Direito Europeu, já se vem percebendo maior destaque para os ajustes. Fala-se na nova Administração por contratos ou Estado contratante (Contracting State). Nas palavras de Pedro Costa Gonçalves:

Chegamos ao terceiro período – que se estende até os dias de hoje, tendo-se iniciado há quase meio século –, que se distingue pela forte expansão das regulamentações dirigidas aos contratos públicos e, nos últimos anos, por uma verdadeira generalização do contrato nas relações administrativas.

(...)

Fala-se, com inteiro cabimento, de um novo modelo de Estado, o Estado contratante (Contracting State), que encontra no consenso e no acordo os instrumentos centrais da ação pública.²

¹ Cristiana Fortini, *Solução extrajudicial de conflitos com a Administração Pública: o hoje e o porvir*. Disponível em: <https://www.conjur.com.br/2021-mar-04/interesse-publico-solucao-extrajudicial-conflitos-administracao-publica> Consulta em: 11/03/2021.

² Pedro Costa Gonçalves, *Direito dos Contratos Públicos*. Coimbra: Almedina, 2020, p. 82.

O referido autor, ao tratar da evolução histórica da contratação pública na Europa, destaca que no período do século XIX até a década de 70 havia completa rejeição ao emprego do contrato, partindo-se do pressuposto de que “não faz sentido contratar o que se pode impor.”³ No período mais recente (particularmente nos últimos 50 anos, segundo o autor) têm-se observado a maior incidência de contratos como forma de exercício dos poderes públicos de autoridade. Trata-se de alinhamento com uma ideologia anti-hierárquica, com substituição de mecanismos de “*command-and-control*” pelo diálogo, a negociação e o consenso.⁴

Essa atuação contratualizada da Administração com os particulares pode envolver tanto o acordo substitutivo do ato administrativo unilateral ou a formação de acordo como preparação para a prática de um ato administrativo unilateral.⁵

A busca por ajustes não se resume ao *modus operandi* por meio do qual se executam as atividades estatais. Também no que diz respeito à solução de conflitos entre privados e entes da Administração Pública, percebe-se o crescente incremento das técnicas que enaltecem a consensualidade. Mais

³ “Este período é marcado pela negação ou recusa liminar da aplicação do contrato na esfera da administração de autoridade: a atribuição de uma competência a um órgão da Administração para produzir efeitos jurídicos por decisão unilateral (impor, proibir, mas também autorizar, conceder) afasta a possibilidade do contrato. No exercício dos seu poder de autoridade, o Estado não negocia, afirmava-se, com convicção, por toda a Europa (“*Der Staat pactiert nicht*”, escrevia Otto Mayer, em 1900)”. *Idem*, p. 81.

⁴ “Contra a ideia, já antiga, mas ainda com ilustres defensores, de que “não faz sentido contratar o que se pode impor”, encontra-se hoje consagrado, entre nós e em leis de vários países, o princípio de que a Administração pode utilizar o contrato como forma de exercício de poderes públicos de autoridade. O contrato surge, assim, como uma forma de atuação alternativa ao ato e ao regulamento administrativo ou como um processo que se combina com tais figuras de ação pública unilateral na modelação de relações jurídicas administrativas. Esta utilização do contrato concilia-se com uma “ideologia anti-hierárquica”, a qual, advogando a substituição dos mecanismos de “*command-and-control*”, tem o efeito de alargar o campo de ação do diálogo, da negociação e do consenso”. *Idem*, p. 108.

⁵ “Já no caso de suas relações com os particulares, a Administração Pública concertada possui instrumentos de atuação pactuada, seja em situações em que o acordo com os interessados se formalizará em um contrato substitutivo de um ato administrativo, seja naquelas em que será veiculado em preparação à prática de um ato unilateral, em verdadeira “contratualização do ato administrativo””. Eurico Bittencourt Neto, *Concertação Administrativa Interorgânica. Direito Administrativo e Organização no Século XXI*. São Paulo: Almedina, 2017. p. 253.

atualmente tem ganhado espaço no âmbito do Poder Público as chamadas “*dispute boards*”, método de solução de conflitos contratuais que implica formação de Comitês Técnicos independentes que podem substituir a decisão administrativa unilateral no processo de solução de conflitos contratuais entre Administração-contratante e Empresa-contratada.

A técnica foi recentemente implantada pelo Município de São Paulo pela Lei nº 16.873, de 2018, e pelo Município de Belo Horizonte por meio da Lei nº 11.241, de 2020. Nela, há previsão da criação do Comitê de Revisão, o Comitê de Adjudicação e o Comitê Híbrido, com o objetivo de emitir recomendação e proferir decisão, conforme o caso, para a solução do conflito contratual. O Comitê é formado de forma heterogênea, com participação de representantes indicados pela Administração, pela empresa-contratada e representantes de ambas as partes. As soluções tomadas por ele podem ter caráter vinculante ou não, conforme o caso. O modelo já é, na essência, utilizado em diversos contratos de Parcerias Público-Privadas, com destaque para a concessão administrativa que envolve a construção e a gestão de atividades diversas no Complexo Prisional em Minas Gerais (clausula 36).⁶ Ali denominada de comissão técnica, a ela se atribuem competências para dirimir divergências técnicas entre as partes. Seus membros, que cumprirão mandato e serão indicados pelas partes (um por cada parte e um terceiro de comum acordo), têm o compromisso de pronunciar-se por meio de parecer. Dissensos entre os integrantes são resolvidos por maioria, cumprindo ao membro que foi indicado de forma convergente pelas partes o voto de minerva.

O contrato ainda aposta na autocomposição a despeito de eventual inconfirmandade de uma das partes com o pronunciamento da comissão técnica. Embora preveja que a não aprovação do parecer autoriza a parte insatisfeita a acionar a arbitragem, o contrato insiste nos diálogos diretos entre as partes, no que ali se convencionou rotular como etapa de “solução amigável”.

⁶ Minas Gerais, *Contrato de Concessão Administrativa para construção e gestão de complexo penal na Região Metropolitana de Belo Horizonte, celebrado entre o Estado de Minas Gerais, por intermédio da Secretaria de Estado de Defesa Social de Minas Gerais, com a interveniência da Secretaria de Estado de Desenvolvimento Econômico e Gestores Prisionais Associados S/A – GPA*. Disponível em: <http://www.ppp.mg.gov.br/images/2020/ Penal/Contrato%20e%20 Extrato%20Publica%C3%A7%C3%A3o%20PPP%20Complexo%20Penal.pdf> Consulta em: 11/03/2021.

Como já dito anteriormente, “*as partes contratantes são mais aptas a encontrar uma solução viável para a controvérsia concreta, razão pela qual deve ser mais valorizada a autocomposição*”, pelo que não devem:

ceder a terceiro estranho à lide a capacidade de resolver um problema que elas próprias poderiam solucionar, houvesse sobretudo menos resistência a uma cultura extrajudicial de resolução de controvérsias. Neste diapasão, além de desprestigiarem a si próprias como hábeis a perseguir um desfecho, inclusive porque são as que mais condições e conhecimento reúnem sobre os episódios, as partes enaltecem a voz de um personagem alheio às nuances e que, por estar até então à margem dos eventos, tem o desafio de primeiro tentar assimilar o ocorrido, para só depois, tentar solucionar a lide. E, ainda, a solução apontada pelo terceiro pode não contentar nenhuma das partes e pode inclusive ser totalmente alheia às necessidades da realidade fática, máxime considerando a complexidade dos contratos de concessão administrativa – comuns ou especiais. Logo, quando as partes em conflito se assenhoram da prerrogativa de edificar elas próprias a solução, a partir da convergência e do entendimento mútuo, ainda que com a relevante contribuição de um terceiro a quem cabe ajudar a pavimentar o caminho, mas sem ditá-lo, opera-se uma significativa alteração no *modus operandi*, de forma abrir mão de uma solução que poderia ser a melhor para ambas as partes, nos termos da teoria do ganha-ganha da autocomposição dos conflitos.⁷

No presente artigo, pretende-se adentrar na análise da figura do “*dispute board*”, com especial atenção às recentes leis publicadas pelos Municípios de São Paulo e Belo Horizonte. Ao final, apresentar-se-ão as críticas para a melhoria do modelo e sua adaptação ao processo administrativo brasileiro.

2. Os novos instrumentos de consensualidade no Direito Administrativo Brasileiro

Os processos decisórios da Administração Pública historicamente foram centralizados em atos administrativos unilaterais. Todavia, percebe-se

⁷ Cristiana Fortini, *Solução extrajudicial de conflitos com a Administração Pública: o hoje e o porvir*. Disponível em: <https://www.conjur.com.br/2021-mar-04/interesse-publico-solucao-extrajudicial-conflitos-administracao-publica>. Consulta em: 10/03/2021.

atualmente a defesa da consensualidade pela doutrina administrativista sob o influxo dos princípios democráticos e da constitucionalização do Direito Administrativo. A Administração está autorizada a lançar mão de decisões concertadas até em atividades em que o poder extroverso se mostra mais presente, à semelhança do que ocorre nos Termos de Ajustamento de Conduta praticados no exercício do poder de polícia em ambiente regulatório e na reação à prática de condutas consideradas corruptas.⁸

Para Fernando Dias Menezes de Almeida, o sentido da substituição da decisão unilateral pelo acordo está exatamente no aproveitamento dos benefícios do contrato no que tange à pacificação social, com base no respeito à confiança que advém da consensualidade. Além disso, segundo o autor, no âmbito da contratualidade é possível se alcançar maior celeridade e eficiência nas medidas almejadas.⁹

Neste cenário, a legislação brasileira vem fomentando a busca da consensualidade no âmbito da Administração Pública. Pode-se encontrar como uma das primeiras referências de solução consensual de conflitos o Termo de Ajustamento de Conduta, inserido na Lei n.º 7.347, de 24 de julho de 1985 (Lei que Institui a Ação Civil Pública) pela Lei n.º 8.078, de 11 de setembro de 1990. Prevê o art. 5.º, § 6.º da citada norma: “§ 6.º Os órgãos públicos legitimados poderão tomar dos interessados compromissos de ajustamento de sua conduta às exigências legais, mediante cominações, que terá eficácia de título executivo extrajudicial”.

No âmbito das Agências Reguladoras também existem acordos substitutivos da sanção. A Lei n.º 9.656, de 3 de junho de 1998 trouxe o “*Termo de Compromisso de Ajuste de Conduta*” em seu art. 29 e 29-A, hipótese em que se admite a suspensão do processo administrativo de penalidade quando a operadora assume determinados compromissos previstos em Lei.

Também no caso do Conselho Administrativo de Defesa Econômica, a Lei n.º 12.529, de 30 de novembro de 2011 (chamada Lei antitruste) instituiu o sistema brasileiro de defesa da concorrência.¹⁰ Ela prevê em seus arts. 86

⁸ Acordos de leniência de que cuidam os artigos 16 e 17 da Lei 12846/13 são importante exemplo.

⁹ Fernando Dias Menezes Almeida, *Contrato Administrativo*. São Paulo: Quartier Latin, 2012, p. 298.

¹⁰ Importante destacar que a Lei n.º 8.884, de 11 de junho de 1994, alterada pela Lei n.º 10.149, de 21 de dezembro de 2000, já estabelecia a possibilidade de celebração de acordos de leniência substitutivos da ação punitiva da Administração: “Art. 35-B. A União, por intermédio da

e 87 o “programa de leniência”, por meio do qual se permite ao Conselho Administrativo de Defesa Econômica (CADE) celebrar acordo de leniência, com a extinção da ação punitiva da administração pública ou a redução de 1 a 2/3 da pena.

Atualmente, é possível identificar mecanismos extrajudiciais de solução adequada de conflitos, que se dividem em dois grandes grupos: (i) auto-compositivos, que envolvem a solução dos conflitos pelas próprias partes, aí incluindo-se a negociação, a conciliação e a mediação. Na negociação, as próprias partes resolvem o conflito entre elas, enquanto na conciliação e mediação há a escolha de um terceiro que contribuirá para o diálogo entre as partes. (ii) heterocompositivos, quando se elegem terceiros para o processo de tomada de decisão, grupo no qual se inclui a arbitragem.¹¹

A arbitragem possui regulamentação na Lei n.º 9.307, de 23 de setembro de 1996, alcançando conflitos envolvendo a Administração Pública a partir da Lei n.º 13.129, de 2015 que envolvam direitos patrimoniais disponíveis. Trata-se, conforme já se viu anteriormente, de técnica de solução de conflito heterocompositiva, por meio da qual as partes elegem um Tribunal Arbitral para decidir conflitos advindos de determinada relação jurídica.¹²

A busca de decisões negociadas, resultantes de autocomposição, nos conflitos envolvendo a Administração Pública é a tônica da Lei n.º 13.140, de 26 de junho de 2015 (que regulamenta a mediação). A referida Lei prevê em seu art. 32 a criação de câmaras de prevenção e resolução de conflitos, as quais possuem as seguintes atribuições:

I – dirimir conflitos entre órgãos e entidades da administração pública;

SDE, poderá celebrar acordo de leniência, com a extinção da ação punitiva da administração pública ou a redução de um a dois terços da penalidade aplicável, nos termos deste artigo, com pessoas físicas e jurídicas que forem autoras de infração à ordem econômica, desde que colaborem efetivamente com as investigações e o processo administrativo e que dessa colaboração resulte: I – a identificação dos demais co-autores da infração; e II – a obtenção de informações e documentos que comprovem a infração noticiada ou sob investigação.” Brasil, Lei n.º 8.884, de 11 de junho de 1994 (revogada). Disponível em: http://www.planalto.gov.br/ccivil_03/LEIS/L8884.htm Consulta em: 10/03/2021.

¹¹ Neste sentido: Adriana Goulart Sena, *Formas de resolução de conflitos e acesso à Justiça*. Disponível em: https://www.trt3.jus.br/escola/download/revista/rev_76/Adriana_Sena.pdf Consulta em: 28/03/2021.

¹² Brasil, Lei n.º 9.307, de 23 de setembro de 1996. Disponível em: http://www.planalto.gov.br/ccivil_03/Leis/L9307.htm Consulta em: 20/03/2021.

II – avaliar a admissibilidade dos pedidos de resolução de conflitos, por meio de composição, no caso de controvérsia entre particular e pessoa jurídica de direito público;

III – promover, quando couber, a celebração de termo de ajustamento de conduta.¹³

Neste mesmo sentido, a Lei nº 13.655, de 25 de abril de 2018, a qual fez significativas alterações na Lei de Introdução às Normas do Direito Brasileiro (Decreto-Lei nº 4.657, de 4 de setembro de 1942), prevê a possibilidade de a Administração celebrar acordo (compromisso) com os interessados para eliminar irregularidade, incerteza jurídica ou situação contenciosa na aplicação do direito público.¹⁴

No ano de 2020, o Centro de Estudos Judiciários (CEJ) do Conselho da Justiça Federal, órgão pertencente ao Superior Tribunal de Justiça, promoveu sua I Jornada de Direito Administrativo, por meio da qual foram editados diversos enunciados a respeito de diversos temas do Direito Administrativo, com a participação da autora do presente artigo, Cristiana Fortini, na condição de Coordenadora Científica de um dos Grupos Temáticos. Dentre eles, destacam-se cinco enunciados que se relacionam mais especificamente com o presente trabalho:

¹³ Brasil, Lei n.º 13.140, de 26 de junho de 2015. Disponível em: http://www.planalto.gov.br/ccivil_03/_Ato2015-2018/2015/Lei/L13140.htm Consulta em: 10/03/2021.

¹⁴ “Art. 26. Para eliminar irregularidade, incerteza jurídica ou situação contenciosa na aplicação do direito público, inclusive no caso de expedição de licença, a autoridade administrativa poderá, após oitiva do órgão jurídico e, quando for o caso, após realização de consulta pública, e presentes razões de relevante interesse geral, celebrar compromisso com os interessados, observada a legislação aplicável, o qual só produzirá efeitos a partir de sua publicação oficial. § 1º O compromisso referido no caput deste artigo:

I – buscará solução jurídica proporcional, equânime, eficiente e compatível com os interesses gerais;

II – (VETADO);

III – não poderá conferir desoneração permanente de dever ou condicionamento de direito reconhecidos por orientação geral;

IV – deverá prever com clareza as obrigações das partes, o prazo para seu cumprimento e as sanções aplicáveis em caso de descumprimento.” BRASIL. *Decreto-Lei nº 4.657, de 4 de setembro de 1942*. Disponível em: http://www.planalto.gov.br/ccivil_03/Decreto-Lei/Del4657.htm Acesso em: 02/07/2019.

- a) O enunciado nº 10 estabelece que a Administração Pública pode, por meio de Termo Aditivo, incluir em seus contratos administrativos instrumentos extrajudiciais de resolução de resolução e conflitos, tais como mediação, arbitragem e dispute boards;¹⁵
- b) A respeito da arbitragem, reconheceu-se por meio do Enunciado nº 15 a necessidade de sua publicidade por força do que dispõe a Lei nº 12.527, de 2011;¹⁶ o enunciado nº 18, por sua vez, reconhece a possibilidade de utilização da arbitragem ainda que omito o Edital da Licitação que deu origem ao respectivo contrato administrativo;¹⁷ e o enunciado nº 39 fixa o entendimento de que a indicação e a aceitação de árbitros pela Administração Pública não depende de seleção pública formal, embora dependam de fundamentação prévia e por escrito.¹⁸
- c) No que tange às controvérsias surgidas quanto ao equilíbrio econômico-financeiro dos contratos, o Enunciado nº 19 reconhece a possibilidade de utilização de meios extrajudiciais de resolução prevenção e resolução de disputas, em especial a mediação, a conciliação, o *Dispute Board* e a arbitragem.¹⁹

¹⁵ “Enunciado 10. Em contratos administrativos decorrentes de licitações regidas pela Lei n. 8.666/1993, é facultado à Administração Pública propor aditivo para alterar a cláusula de resolução de conflitos entre as partes, incluindo métodos alternativos ao Poder Judiciário como Mediação, Arbitragem e Dispute Board.” BRASIL. *Conselho da Justiça Federal. I Jornada de Direito Administrativo. Enunciados Aprovados*. Disponível em: https://www.cjf.jus.br/cjf/corregedoria-da-justica-federal/centro-de-estudos-judiciarios-1/publicacoes-1/cjf/corregedoria-da-justica-federal/centro-de-estudos-judiciarios-1/publicacoes-1/Jornada%20de%20Direito%20Administrativo%20-%20Enunciados%20aprovados/?_authenticator=f147b8888b42ee73c25f9f3ea6258093fadd0b5a Consulta em: 20/03/2021.

¹⁶ “Enunciado 15. A Administração Pública promoverá a publicidade das arbitragens da qual seja parte, nos termos da Lei n. 12.527/2011 (Lei de Acesso à Informação).” Idem.

¹⁷ “Enunciado 18. A ausência de previsão editalícia não afasta a possibilidade de celebração de compromisso arbitral em conflitos oriundos de contratos administrativos.” Idem.

¹⁸ “Enunciado 39. A indicação e a aceitação de árbitros pela Administração Pública não dependem de seleção pública formal, como concurso ou licitação, mas devem ser objeto de fundamentação prévia e por escrito, considerando os elementos relevantes.” Idem.

¹⁹ “Enunciado 19. As controvérsias acerca de equilíbrio econômico-financeiro dos contratos administrativos integram a categoria das relativas a direitos patrimoniais disponíveis, para cuja solução se admitem meios extrajudiciais adequados de prevenção e resolução de

Veja-se que os enunciados fazem referência expressa à possibilidade de adoção das técnicas extrajudiciais de resolução de disputas no Brasil, tanto aquelas para as quais já há legislação específica (mediação e arbitragem) quanto em relação ao Dispute Board, instrumento do qual trata o presente artigo.

O surgimento de tais instrumentos legais que prestigiam a consensualidade na resolução conflitos harmoniza-se ao movimento de releitura do Direito Administrativo, destacando-se a consensualidade como importante avanço à postura unilateral. Se assim acontece até mesmo em ambientes tão carregados de poderes extrovertidos, não pode e não deve ser diferente na esfera contratual.

3. A consensualidade no âmbito dos contratos administrativos

Na linha do que se adota na França e Espanha,²⁰ a legislação brasileira divide os contratos da Administração entre contratos administrativos e contratos de direito privado da Administração. No que tange ao contrato administrativo, a doutrina tradicional o conceitua como aquele celebrado pela Administração Pública e regido por um regime jurídico administrativo. Ou seja: a presença de um regime jurídico administrativo que outorga à Administração prerrogativas especiais. Tais prerrogativas se sustentam na ideia de supremacia do interesse público sobre o privado, presente também nas relações contratuais travadas pelo Estado.

controvérsias, notadamente a conciliação, a mediação, o comitê de resolução de disputas (Dispute Board) e a arbitragem.” Idem.

²⁰ Neste sentido: “O direito francês e, por influência sua, nosso Direito circularam por rumos singulares nessa matéria. À diferença de outros Direitos, que ajustaram pacificamente o grosso da contratação dos entes públicos nas regulações comuns do Direito privado, encomendadas ao julgamento dos tribunais ordinários, a solução francesa veio partir em dois o campo em discussão: uma parte dos contratos da Administração se qualifica, com efeito, de privados e se atribui seu conhecimento à jurisdição ordinária; a outra, em troca, fica adstrita à jurisdição contencioso-administrativa, de onde concluir-se-á derivativamente que sua regulação é objeto do Direito Administrativo substantivo e não do Direito civil; são os chamados “contratos administrativos”. Eduardo García de Enterría/Tomás-Ramón Fernandez, *Curso de Direito Administrativo*. São Paulo: Editora Revista dos Tribunais, p. 598.

As ditas cláusulas exorbitantes possuem previsão na Lei nº 8.666, de 1993 em seu art. 58, que as especifica. Paralelamente, garante-se ao particular contratado o direito ao equilíbrio econômico financeiro do contrato (art. 65, II, d da Lei nº 8.666, de 1993).

Todavia, a existência deste modelo que outorga prerrogativas ao Poder Público vem sendo objeto de críticas por parte da doutrina de Direito Administrativo, tendo em Diogo de Figueiredo Moreira Neto um de seus principais expoentes. O autor defende a consensualidade e a flexibilidade como regras gerais para os contratos celebrados pelo Estado, com a adoção de novos modelos que substituam os “comandos excessivamente padronizados” para adoção de outros que admitam a necessária modulação no caso concreto. Trata-se da adoção de técnicas de flexibilidade discricionária em detrimento da “técnica rígida da vinculação”. Conclui sua crítica defendendo o abandono de “supremacias téticas ou *raisons d’Etat*”, sobretudo nas relações contratuais.²¹

Na verdade, o autor defende o abandono de prerrogativas estabelecidas *a priori*, ou seja, presentes de forma expressa ou tácita em todo e qualquer contrato administrativo. Entende ser conveniente que a legislação deixe a critério da Administração, em cada caso concreto e de maneira motivada, prever a presença de cláusulas que lhe outorguem prerrogativas.

No influxo destas novas concepções que envolvem o prestígio à consensualidade, percebe-se o surgimento de novos modelos de contratação, mais

²¹ A conciliação necessária, para superar as antigas desvantagens, que tanto encarecem a administração pública e favorecem a corrupção em larga escala, de modo a fazê-la enveredar por esses novos promissores caminhos, está, pois, na flexibilização, já que, ante a imensa diversidade de contratos possíveis que são firmados nos inúmeros setores de atividade da administração pública, não é lógico que o administrador público permaneça jungido a comandos excessivamente padronizados que, sobre serem em grande parte anacrônicos, e, desde logo, por serem muito gerais, não admitem a necessária modulação para atender às miríades de circunstâncias próprias de cada contratação. (...) Esta preferência pela escolha da técnica flexível da discricionariedade, em lugar da técnica rígida da vinculação, não encontra qualquer impedimento na legislação brasileira, pois essa imposição da generalização de cláusulas inafastáveis nos contratos administrativos não repousa sobre qualquer assento constitucional, senão que é de previsão meramente legal, nada impedindo, portanto, que o legislador ordinário delegue ao administrador público esta incumbência de avaliar a legitimidade do emprego de qualquer delas, depois de examinadas as hipóteses caso a caso.” Diogo Moreira Neto, *Mutações do Direito Administrativo*. São Paulo: Editora Renovar, 2007, p. 423.

afinados com a consensualidade e participação e que procuram abandonar previsões que outorgam prerrogativas para a Administração. É o caso dos contratos de parcerias público-privadas, de que cuida a Lei nº 11.079, de 2004, em que são previstas garantias em mão dupla e número menor de prerrogativas para a Administração.

Maria Sylvia Zanella Di Pietro, por sua vez, defende a previsão legal de prerrogativas em favor da Administração. Para autora, o conceito de contrato não está vinculado à concepção adotada pelo direito privado, razão pela qual não contraria a teoria geral do direito a existência de modelos próprios na Administração Pública. Assim, é plenamente possível que o Direito Administrativo elabore conceito próprio de contrato administrativo, abrangendo suas várias modalidades, tal como faz o Direito Civil.²²

Por fim, defende a impossibilidade de Administração Pública e particular estarem em situação idêntica no contrato administrativo. Para ela, a Administração sempre se utilizará de prerrogativas que lhe asseguram o cumprimento do interesse público. As cláusulas exorbitantes seriam, pois, essenciais para o desenvolvimento do contrato administrativo.²³

Maria João Estorninho, por sua vez, em sua obra “*Requiem pelo contrato administrativo*” explica que nada há de “exorbitante” na previsão de cláusulas de privilégio para a Administração Pública. Ao expor o tema, explica que também no direito privado é comum a existência de cláusulas de imposição unilateral. Entende que a única exorbitância reside na existência de tais

²² Maria Sylvia Zanella Di Pietro, “Ainda existem os chamados contratos administrativos?”, in Maria Sylvia Zanella Di Pietro/Carlos Vinícius Alves Ribeiro (Organizadores), *Supremacia do interesse público e outros temas relevantes do direito administrativo*. São Paulo: Editora Atlas, 2010, p. 402.

²³ “Acho pouco provável que uma autoridade possa abrir mão, previamente, mediante negociação com o particular, dos poderes de alterar ou de rescindir o contrato unilateralmente, ou dos poderes de fiscalizar e punir. São poderes que, mesmo em caso de omissão no contrato, não podem deixar de ser exercidos se o interesse público o exigir. São poderes irrenunciáveis pela Administração Pública como parte no contrato. Por outras palavras, a flexibilização é possível na definição do objeto do contrato e na forma de execução, mas não no que diz respeito às cláusulas tipicamente exorbitantes”. Maria Sylvia Zanella Di Pietro, “Ainda existem os chamados contratos administrativos?”, in Maria Sylvia Zanella Di Pietro/Carlos Vinícius Alves Ribeiro (Organizadores), *Supremacia do interesse público e outros temas relevantes do direito administrativo*. São Paulo: Editora Atlas, 2010, p. 410.

cláusulas independentemente de previsão legal ou acordo entre as partes, e não na unilateralidade em si.²⁴

A Lei Geral de Licitações e Contratos no Brasil (Lei 8.666/93) prevê cláusulas exorbitantes, que em tese se voltam a salvaguardar o interesse público. Não se pode ignorar que ao enfatizar a tutela do interesse público, as cláusulas exorbitantes, como as que permitem alterações e rescisões unilaterais, podem afugentar a participação em certames ou a elevação dos valores dos contratos, com vistas a compensar a desigualdade da relação. Em qualquer dos casos, prejudica-se o mesmo interesse que se quis proteger.²⁵

A nova Lei de licitações e contratos, que já bate à porta, mantém cláusulas exorbitantes apresentando alguma suavização, com vistas a conferir ao particular maior conforto e maior segurança para participar das licitações.²⁶

Fato é que o atual ambiente dos contratos administrativos no Brasil ainda não é amigável para os acordos e para a consensualidade. A Lei nº

²⁴ “Colocada a questão desta forma é fácil concluir que só em relação a este último aspecto se verificam divergências entre o regime jurídico privado e o do contrato administrativo. O único aspecto que pode ainda eventualmente ser considerado exorbitante, em relação ao Direito Privado, já não é a possibilidade de introduzir modificações às cláusulas contratuais, nem sequer a faculdade de o realizar de forma unilateral, mas apenas o facto de a Administração o poder fazer independentemente de previsão legal ou acordo das partes. A este problema voltarei posteriormente mas quero, desde já, chamar a atenção para o facto de a doutrina associar sempre este “jus variandi” aos contratos administrativos de colaboração subordinada e de longa duração. Afirmando que é com fundamento nesse pacto de colaboração do particular e devido ao facto de a execução do contrato ser prolongada no tempo e, assim, sujeita às mais variadas vicissitudes, que se justifica a atribuição à Administração de tal prerrogativa. Ora, é precisamente nesses mesmos casos, de contratos de execução prolongada no tempo e nos quais uma das partes se compromete a colaborar com a outra através de um pacto de subordinação, que a própria lei civil também prevê a possibilidade de imposição unilateral de modificações às cláusulas contratuais.” Maria João Estorninho, *Requiem pelo contrato administrativo*. Coimbra: Almedina, 2003, p. 138.

²⁵ Cristiana Fortini/Juliana Almeida Picinin, *Pagamento antecipado por bens adquiridos pelos órgãos públicos na pandemia*. Disponível em <https://www.jota.info/opiniao-e-analise/artigos/pagamento-antecipado-por-bens-adquiridos-pelos-orgaos-publicos-na-pandemia-16042020>. Consulta em: 28/03/2021.

²⁶ Cristiana Fortini/Caio Mário Lana Cavalcanti, *O pagamento: aspectos favoráveis ao contratado no Projeto de Lei nº 4.253/2020*. Disponível em: https://www.zenite.blog.br/wp-content/uploads/2021/02/Pagamento_PL4253_2020_CaioCavalcanti_CristianaFortini.pdf Consulta em: 28/03/2021.

8.666, de 1993 pouco ou nada contém em matéria de consensualidade. A natureza de contrato de adesão e a alta regulação da Lei quanto às cláusulas que devem estar contidas no contrato reduzem o espaço de negociação. Até mesmo a cláusula econômica já é lançada na minuta contratual. Assim, falar-se em negociação no momento que antecede o contrato administrativo clássico no Brasil é desafiador. Há situações que audiências públicas são legalmente exigidas na fase de preparação do certame, mas as manifestações privadas podem ser refutadas motivadamente. Também não se pode ignorar que aqui ou acolá se utilizam Procedimentos de Manifestação de Interesse, quando, então, se amplifica a colaboração privada na estruturação da licitação.²⁷ A regra, todavia, é a construção de editais e contratos nos gabinetes.

No âmbito das cláusulas exorbitantes, a questão se torna ainda mais delicada. O art. 58 estabelece que tais cláusulas obrigatoriamente devem estar contidas nos contratos administrativos celebrados pela Administração. Trata-se, pois, de ambiente que, embora contratual, é extremamente adverso para a prática de negociações.

Em crítica a esse modelo, Floriano de Azevedo Marques Neto destaca que entre as tendências do novo modelo que se espera da contratação pública está:

- (i) maior deslocamento da norma da lei para o contrato, na medida em que as leis reitoras de contratos do poder público deleguem para o contrato a normatização concreta em cada negócio jurídico; (ii) maior margem de consensualidade, inclusive na estipulação de cláusulas contratuais no âmbito de uma fase pré-contratual de negociação entre o adjudicatário do certame prévio e o Poder Público;²⁸

Na linha do que defende o autor, o contrato administrativo cumpriria melhor o seu papel se a regulação legal fosse flexibilizada, deixando-se para a fase pré-contratual a negociação de alguns aspectos do contrato que

²⁷ Cristiana Maria Fortini Pinto Silva/Mariana Bueno, *De adversários a parceiros: o Procedimento de Manifestação de Interesse como instrumento de cooperação no tradicionalmente inóspito cenário das licitações públicas*. 1.ª ed. BH: CONPEDI, 2015, v. 1, pp. 145-175.

²⁸ Floriano de Azevedo Marques Neto, “Do contrato administrativo à administração contratual”, *Revista do Advogado*, ano XXIX, dezembro de 2009, n.º 107, pp. 74-81.

poderiam ser mais bem adaptadas ao caso concreto, com maior aderência ao caso concreto. Certamente esse novo modelo garantiria maior eficiência às contratações públicas.

É o que se percebe, por exemplo, na Lei nº 11.079, de 2004, a qual traz a previsão do compartilhamento de riscos e ganhos econômicos entre parceiro público e privado, conforme prevê o seu art. 5º, III. No mesmo sentido é a previsão do art. 10 da Lei nº 8.987, de 1995, que trata dos contratos de concessões de serviço público. Assim, no caso destes dispositivos e diferentemente do que prevê o art. 65, II, d da Lei nº 8.666, de 1993, transfere-se para o plano contratual a distribuição dos riscos e os mecanismos de recomposição do equilíbrio econômico-financeiro do contrato, numa postura mais afinada com os conceitos de consensualidade. Não se afasta, porém, do modelo de contrato administrativo com incidência de cláusulas exorbitantes e outorga de poderes unilaterais à Administração.

Mais recentemente foi publicada a Lei nº 13.303, de 2016, a qual regulamenta o regime jurídico das empresas estatais. Nela há previsão a respeito do regime jurídico de contratação de tais entidades. Importante inovação no âmbito das normas gerais a respeito de contratos pode ser encontrada na previsão do caput do art. 68, ao estabelecer que ao contrato das empresas estatais deverão ser aplicados “preceitos de direito privado”. A previsão é distinta daquela da Lei nº 8.666, de 1993, que prevê a adoção de preceitos de direito público aos contratos como regra, aplicando-se apenas subsidiariamente preceitos de direito privado.

Já no que tange às mudanças na esfera sancionatória dos contratos administrativos, destaca-se, entre outras, a Lei nº 12.846, de 1º de agosto de 2013 (conhecida como lei anticorrupção), a qual trouxe a previsão da utilização do acordo no processo de responsabilização administrativa e civil das pessoas jurídicas pela prática de atos de corrupção. No art. 16 a Lei prevê o chamado acordo de leniência, instituto aplicável no âmbito administrativo, o qual poderá ser celebrado com as pessoas jurídicas que praticam atos catalogados como corrupção.”.

São mudanças que demonstram a existência de um movimento em prol da superação do modelo de unilateralidade no sentido da consensualidade e da participação nos processos decisórios da Administração.

4. O surgimento dos “Dispute Boards” no Brasil: nova forma de resolução consensual de conflitos na Administração Pública

Ao longo da execução dos contratos administrativos é possível que surjam diversos conflitos entre Administração-contratante e particular-contratado, seja do ponto de vista técnico da execução ou quanto à vida financeira do contrato. Quanto mais longa a sua duração e maior a complexidade, mais suscetível a discussões o vínculo. Aliás, mesmo os contratos ordinários podem ter duração mais extensa, seja no âmbito dos serviços de fornecimento exclusivo ou preponderante de mão de obra (os quais podem alcançar até 60 meses quando considerados contínuos), sejam os que possuem como objeto obras públicas. Os contratos de concessão tradicional e os que traduzem parcerias público privadas são ainda mais longevos.

Em situações de conflito contratual, a prática administrativa atual indica a abertura de processo administrativo para que o Gestor Público tome sua decisão, ouvindo-se a empresa-contratada (princípio constitucional da ampla defesa e do contraditório), os técnicos da Administração (fiscais de contrato) e, quando necessário, o setor jurídico. Decisão tomada de forma solitária e unilateral, nos termos do velho Direito Administrativo, avesso às decisões consensuais. O resultado pode levar a uma não aceitação por parte da empresa contratada, gerando dificuldade ou impedimento de continuação da relação contratual e atraso na realização de obras, na prestação de serviços públicos e no atendimento das necessidades internas da Administração. Em última análise, o prejuízo acaba chegando ao seu destinatário final: o usuário do serviço público.

Importante considerar que, quando a decisão envolve rompimento do vínculo contratual, os efeitos não se limitam apenas à empresa contratada. A Administração necessitará suprir de uma outra maneira as necessidades públicas remanescentes, vez ou outra pagando mais caro pela nova contratação. Não obtendo êxito, poderá ter que celebrar contrato emergencial até que a nova licitação se ultime. Em se tratando de obra, ela será paralisada até que se obtenha nova contratação, estando sujeita à depredação decorrente de vandalismo e até mesmo à deterioração natural do passar do tempo, gerando novos gastos públicos.

Neste contexto é que instrumentos que buscam não só resolver o conflito contratual, mas por vezes também evitá-lo, devem ser difundidos. Transferir a disputa para o Poder Judiciário ou instância arbitral acaba por tão somente

estender a discussão do conflito. É fato que a arbitragem, a mediação e a conciliação são avanços percebidos no ordenamento jurídico brasileiro como meios extrajudiciais de solução de conflitos. Porém, pressupõem o litígio já constituído. Ou seja: há um processo decisório no âmbito administrativo, em que o Poder Público indefere o requerimento formulado por uma dada empresa-contratada (ou defere parcialmente) e, inconformada, a empresa recorre a uma tentativa de decisão negociada (mediação), arbitral ou até mesmo judicial para a solução do conflito. Situação idêntica ocorre quando há resistência à sanção aplicada.

Entendemos urgente o emprego de instrumentos consensuais de prevenção e solução de conflitos ainda durante a execução contratual, contando com representantes de contratante e contratado na tomada de decisões. É com este objetivo que surgem os “*dispute boards*”.

Os “*dispute boards*” buscam evitar o litígio ou tratar o conflito ainda durante a execução contratual. Este aspecto o diferencia dos demais meios adequados de solução de conflito, visto que tanto no caso dos meios de autocomposição (negociação, mediação e conciliação) quanto nos meios de heterocomposição de conflitos (arbitragem), os “*dispute boards*” pressupõem atuação antes da constituição do conflito.²⁹ Trata-se da constituição de um Comitê ou Conselho de especialistas indicados pelas partes para acompanhar a execução contratual e resolver eventuais conflitos surgidos, sendo o único dentre os instrumentos de ADRs (Alternative Dispute Resolution) que é constituído e permanece em funcionamento durante toda a execução do contrato. Se caracterizam como uma tentativa não adversarial de resolução de conflitos surgidos na execução contratual.³⁰ Ao tratar do tema, Renata Faria Silva Lima explica que os Consultores que formam o Comitê ou Conselho se reúnem ao longo da execução contratual para expedir recomendações não obrigatórias (*dispute review boards* – DRB), tomar decisões obrigatórias

²⁹ Neste sentido: Maria João Mimoso/Joana D’Arc Amaral Bortone, “A prevenção de litígios nos contratos de construção: a operatividade dos Dispute Boards”, *Revista da Escola da Magistratura do Estado do Rio de Janeiro*, Maio/Agosto, v. 22, ano 2020, Rio de Janeiro. pp. 301-313.

Disponível em: https://www.emerj.tjrj.jus.br/revistaemerj_online/edicoes/revista_v22_n2/versao-digital/313/ Consulta em: 20/03/2021.

³⁰ Antônio Luís Pereira Sousa, *Dispute Boards*. Disponível em: https://www.institutodeengenharia.org.br/site/wpcontent/uploads/2020/01/TKConsulting.ALPS_.ADRs-DBs.pdf Consulta em: 20/09/2020.

(dispute adjudication boards – DAB) ou exercer ambas as funções (combined dispute boards – CDB).³¹

É indicado que a formação dos referidos Comitês se dê já no momento da assinatura dos contratos, viabilizando que eles façam o acompanhamento de toda a execução contratual. Eles poderão fazer visitas técnicas ao local onde ocorre a execução contratual (canteiro de obras, por exemplo), podendo até mesmo antever problemas, evitando que conflitos se instaurem.³²

Os “dispute boards” possuem origem na indústria dos contratos de construção civil e infraestrutura. Nascem inicialmente com o caráter de recomendação e, em seguida, passam também a admitir a forma de decisões obrigatórias, sendo chamados comitês de adjudicação. O fato do comitê ter atuação durante a execução do contrato e resolver de forma rápida a controvérsia que lhe é colocada foi o fator preponderante que levou a indústria da construção a optar pelo método do “dispute board”, preferindo-o inclusive em relação à arbitragem, já que este último é um processo reativo e que ocorre após os fatos já estarem consolidados.³³ Numa obra, por exemplo, a solução dos conflitos técnicos ou financeiros com agilidade é fundamental para que não haja perda de eficiência e recursos.

Ao tratar do surgimento dos Dispute Boards, Érica Miranda dos Santos Requi comenta:

³¹ Renata Faria Silva Lima, “Contratos Administrativos – mecanismos privados para resolução de disputas”, in Onofre Alves Batista Júnior/Sirlene Nunes Arêdes/Federico Nunes de Matos. *Contratos Administrativos. Estudos em homenagem ao Professor Florivaldo Dutra de Araújo*. Belo Horizonte: Editora Fórum, 2014, p. 275.

³² “A existência do comitê, bem como as suas regulares visitas às obras, agiliza também a comunicação entre as partes, potencializando que estas recebam informações sobre o progresso dos trabalhos e, quiçá, sobre os potenciais problemas que se adivinham. Além disso, incentivam a resolução das questões contenciosas em relação à construção, antes mesmo que se formalize uma disputa real”. Maria João Mimoso/Joana D’Arc Amaral Bortone, “A prevenção de litígios nos contratos de construção: a operatividade dos Dispute Boards”, *Revista da Escola da Magistratura do Estado do Rio de Janeiro*, Maio/Agosto, v. 22, ano 2020, Rio de Janeiro, pp. 301-313. Disponível em: https://www.emerj.tjrj.jus.br/revistaemerj_online/edicoes/revista_v22_n2/versao-digital/313/ Consulta em: 20/03/2021.

³³ Antônio Luís Pereira Sousa, *Dispute Boards*. Disponível em: https://www.institutodeengenharia.org.br/site/wpcontent/uploads/2020/01/TKConsulting.ALPS_.ADRs-DBs.pdf Consulta em: 20/09/2020.

o caso mais emblemático que marca o surgimento de um dispute board, foi a obra do túnel de Eisenhower, no Colorado, no ano de 1975, quando se confirmou a eficácia da instituição do dispute board para acompanhar a execução do projeto de construção. A partir dos anos 90, passou a ser obrigatória a adoção de dispute boards regidos pelas normas publicadas pela Fédération des Ingénieurs-Conseils – FIDIC nos contratos de construção financiados pelo Banco Mundial, o que propagou a utilização do instituto.³⁴

Em 2006, os “*Dispute Boards*” surgem no Brasil pela primeira vez em São Paulo, na Companhia do Metropolitano de São Paulo para construção da Linha 4 – Amarela. Em seguida, também foi utilizado na PPP da Linha F (12 – Safira) da CPTM. Segundo Antônio Luís Pereira de Sousa, essa técnica é muito difundida em contratos financiados pelo Banco Mundial e pelo Banco Interamericano de Desenvolvimento – BID, inclusive em muitas hipóteses como requisito que deve estar contido nos editais e contratos que se referam a obras por eles financiadas.³⁵ Deste modo, trata-se de assunto que está a merecer a atenção urgente do Direito Administrativo Brasileiro.

No âmbito do ordenamento jurídico brasileiro, não há uma Lei Nacional que trate do assunto. Dentre as técnicas existentes de ADR (Alternative Dispute Resolution), estão reguladas no Brasil: (i) a arbitragem, por meio da Lei nº 9.307, de 23 de setembro de 1996, a qual admite expressamente seu uso em conflitos que envolvam a Administração Pública, desde que se trata de direitos disponíveis (art. 1º, §§ 1º e 2º); (ii) a mediação, por meio da Lei nº 13.140, de 26 de junho de 2015, a qual prevê a possibilidade de criação de Câmaras de prevenção e resolução administrativa de conflitos; (iii) a possibilidade de celebração de Termo de Compromisso entre Administração Pública e particulares para solucionar de forma consensual eventuais controvérsias, conforme art. 26 do Decreto-Lei nº 4.657, de 4 de setembro de 1942 (alterado pela Lei nº 13.655, de 25 de abril de 2018). Também o Código de Processo Civil estabelece como premissa do direito processual brasileiro

³⁴ Érica Miranda dos Santos Requi, “Dispute Boards nos contratos administrativos”, in Cristiana Fortini/Gabriela Verona Pércio, *Inteligência e inovação em contratação pública*. Belo Horizonte: Editora Fórum, 2021.

³⁵ Antônio Luís Pereira Sousa, *Dispute Boards*. Disponível em: https://www.institutodeengenharia.org.br/site/wpcontent/uploads/2020/01/TKConsulting.ALPS_.ADRs-DBs.pdf Consulta em: 20/09/2020.

a solução consensual dos conflitos por meio da conciliação, mediação “e outros métodos de solução consensual de conflitos”, conforme estabelece seu art. 3º, § 3º.³⁶

No âmbito dos contratos administrativos, a legislação sobre o tema ainda é muito incipiente. A Lei nº 8.666, de 1993 é silente quanto à solução de conflitos durante a execução de contratos administrativos. Já a Lei de Concessões de Serviços Públicos, Lei nº 8.987, de 1995 prevê, em seu art. 23-A, a aplicação de “*mecanismos privados para resolução de disputas decorrentes ou relacionadas ao contrato, inclusive a arbitragem*”.³⁷ No mesmo sentido, a Lei de Parcerias Público-privadas, Lei nº 11.079, de 2004, a qual estabelece em seu art. 11, III, a possibilidade de “*emprego dos mecanismos privados de resolução de disputas, inclusive a arbitragem, a ser realizada no Brasil e em língua portuguesa*”.³⁸

Importante destacar que ambas as Leis (8.987/1995 e 11.079/2004) não reduzem os mecanismos privados de resolução de disputas apenas à arbitragem, uma vez que utilizam a expressão “inclusive a arbitragem”.

O Brasil aguarda para os próximos dias a edição da nova Lei geral de Licitações e Contratos que

incorpora expressamente o que incorretamente ali se rotulam como “meios alternativos de soluções de controvérsias”, expressão que ainda consagra nas entrelinhas a via judicial como caminho principal. O art. 150 do PL faz alusão à conciliação, mediação e arbitragem, sem a eles se exaurir, repetindo no parágrafo único o que já se sabe: as controvérsias devem se relacionar a direitos patrimoniais disponíveis, tais como o restabelecimento do equilíbrio econômico-financeiro do contrato, ao inadimplemento de obrigações contratuais por quaisquer das partes e ao cálculo de indenizações. Vale mencionar que a parte do PL reservada à extinção dos contratos faz referência aos comitês de resolução de disputas

³⁶ “Art. 3º Não se excluirá da apreciação jurisdicional ameaça ou lesão a direito. § 1º É permitida a arbitragem, na forma da lei. § 2º O Estado promoverá, sempre que possível, a solução consensual dos conflitos. § 3º A conciliação, a mediação e outros métodos de solução consensual de conflitos deverão ser estimulados por juízes, advogados, defensores públicos e membros do Ministério Público, inclusive no curso do processo judicial.” BRASIL. Lei nº 13.105, de 16 de março de 2015.

³⁷ Brasil, Lei nº 8.987, de 13 de fevereiro de 1995. Disponível em: https://www.planalto.gov.br/ccivil_03/LEIS/L8987cons.htm Acesso em 19/09/2020.

³⁸ Brasil, Lei nº 11.079, de 30 de dezembro de 2004. Disponível em: http://www.planalto.gov.br/ccivil_03/_Ato2004-2006/2004/Lei/L11079.htm Acesso em: 19/09/2020.

como *locus* para se consensualizar a extinção amigável e também a decisão arbitral, em decorrência de cláusula compromissória ou compromisso arbitral, evidentemente em situação de divergência entre as partes.³⁹

Mas não será a primeira lei a abordar o tema.

No âmbito do Município de São Paulo o “*Dispute Boards*” foi regulamentado pela Lei Municipal nº 16.873, de 2018, que regulamenta a instalação de Comitês de Prevenção e Solução de Disputas em contratos administrativos continuados e celebrados pela Prefeitura de SP.

Na mesma linha, o Município de Belo Horizonte sancionou a Lei nº 11.241, de 19 de junho de 2020, a qual tem como objetivo regulamentar “*a utilização de Comitê de Prevenção e Solução de Disputas para prevenir e para solucionar conflito relativo a direito patrimonial presente em contrato administrativo de execução continuada*”.

Devem ser saudadas as iniciativas municipais, que encontram inspiração nas ideias de consensualidade e participação na tomada de decisões administrativas, cujas premissas teóricas já foram traçadas no presente trabalho. Passamos a tratar de pontos das referidas Leis Municipais que merecem maior elucidação.

Análise da competência legislativa dos Municípios sobre o assunto

De início, cumpre-nos analisar a constitucionalidade das referidas leis sob o prisma da competência legislativa. A Constituição da República de 1988 atribui à União a competência para legislar sobre normas gerais de licitações e contratos administrativos.⁴⁰ O conceito de norma geral é conceito jurídico indeterminado e, conforme leciona Marçal Justen Filho, deve ser analisado

³⁹ Cristiana Fortini, “Solução extrajudicial de conflitos com a administração pública: o hoje e o porvir”. Disponível em: <https://www.conjur.com.br/2021-mar-04/interesse-publico-solucao-extrajudicial-conflitos-administracao-publica> Consulta em: 10/03/2021.

⁴⁰ “Art. 22 (...) XXVII – normas gerais de licitação e contratação, em todas as modalidades, para as administrações públicas diretas, autárquicas e fundacionais da União, Estados, Distrito Federal e Municípios, obedecido o disposto no art. 37, XXI, e para as empresas públicas e sociedades de economia mista, nos termos do art. 173, § 1º, III;” Brasil, Constituição da República Federativa do Brasil. Disponível em: https://www.planalto.gov.br/ccivil_03/Constituicao/Constituicao.htm Acesso em 30/08/2020.

à luz das características da norma disciplinada. Ao estabelecer que a União deve legislar sobre normas gerais, o Constituinte mantém a autonomia dos demais entes federados para criarem normas especiais a respeito do tema, desde que não contrariem a norma geral. Neste caso, o que se percebe é que os Municípios de São Paulo e Belo Horizonte ocuparam o espaço político-legislativo que lhe foi reservado, ao eleger um percurso diverso para a solução de eventuais conflitos decorrentes da avença.

A respeito da suplementação da legislação federal, José Afonso da Silva esclarece que a Constituição outorgou expressamente aos Municípios a competência para suplementar a legislação federal e a estadual no que couber. Assim, cabe ao Município dispor de forma suplementar sobre matérias constantes do art. 24 da Constituição da República (competência concorrente) e, também, sobre as matérias a que se atribui competência da União para legislar sobre normas gerais.⁴¹ É o que se pode interpretar do art. 30, inciso II do texto Constitucional.⁴²

Aliás, se partirmos do pressuposto de que o “dispute boards” são uma técnica de decisão administrativa, a se relacionar ao tema do procedimento administrativo e não à matéria de licitações e contratos, sequer se estaria no âmbito da competência geral da União para legislar sobre normas gerais, uma vez que a competência nesta matéria é de cada ente federado, considerando-se a autonomia administrativa de cada um deles. Desse modo, sob qualquer das duas perspectivas, seja considerando a legislação sobre “dispute boards” como norma de contrato administrativo ou considerando-a como norma de decisão administrativa (processo administrativo), não se reconhece qualquer inconstitucionalidade.

Dos assuntos passíveis de serem atribuídos ao Comitê de Prevenção e Solução de Disputas

A lei sinaliza a possibilidade (e não a obrigatoriedade) de instituição pelos órgãos e entidades da Administração Municipal Direta e indireta do chamado “Comitê de Prevenção e Solução de Disputas”. Tal comitê tem como

⁴¹ José Afonso da Silva, *Curso de Direito Constitucional Positivo*. São Paulo: Malheiros, 2007, p. 504.

⁴² “Art. 30. Compete aos Municípios: (...) II – suplementar a legislação federal e a estadual no que couber;”

objetivo apreciar e solucionar conflitos surgidos na execução de contratos administrativos.

A primeira demarcação objetiva feita pelas Leis em comento (dos Municípios de São Paulo e Belo Horizonte) é que o Comitê somente pode apreciar conflitos relativos a direito patrimonial. A limitação da aplicação da técnica de decisão criada pela Lei tem como objetivo vincular as decisões às questões econômicas que envolvem o contrato, impedindo que seja aplicada nos casos de sanção administrativa, apuração de descumprimentos contratuais, autorizações para subcontratar o objeto do contrato, bem como outras que não tenham ligação com o interesse patrimonial das partes.

Enquadram-se no conceito de direito patrimonial a ser submetido à análise do Comitê questões contratuais como, a título de exemplo, reequilíbrio econômico-financeiro do contrato, pedidos de indenização por despesas extracontratuais, pedidos de correção monetária em razão de atraso no pagamento pela Administração e até mesmo possíveis indenizações que devam ser cobradas pela Administração-contratante das empresas-contratadas. Trata-se de questões complexas e que demandam conhecimento técnico e jurídico especializado para a tomada de decisão, sendo que a decisão colegiada, composta por representantes de ambas as partes (como se verá adiante) se mostra adequada para solucionar esses conflitos patrimoniais.

Há, neste ponto, diferença entre a Lei nº 16.873, de 22 de fevereiro de 2018, do Município de São Paulo, a qual prevê que tais Comitês somente poderão ser formados para tratar de “direitos patrimoniais disponíveis”, enquanto a Lei nº 11.241, de 19 de junho de 2020, do Município de Belo Horizonte se limita a falar em “direitos patrimoniais”. Neste ponto, a Lei do Município de São Paulo repete a redação da Lei de Arbitragem, a qual limita sua incidência para direitos patrimoniais disponíveis,⁴³ enquanto a Lei do Município de Belo Horizonte não faz distinção entre direitos patrimoniais disponíveis ou indisponíveis.

Por óbvio, não se pode dizer que a Lei do Município de Belo Horizonte, ao não fazer a distinção entre direitos patrimoniais disponíveis ou indisponíveis,

⁴³ “Art. 1º (...) § 1º A administração pública direta e indireta poderá utilizar-se da arbitragem para dirimir conflitos relativos a direitos patrimoniais disponíveis.” BRASIL. Lei nº 9.307, de 23 de setembro de 1996. Disponível em: http://www.planalto.gov.br/ccivil_03/Leis/L9307.htm Consulta em: 20/09/2020.

violaria a Lei nº 9.307, de 1996 (Lei de Arbitragem), já que o que prevê a Lei Municipal não é técnica de arbitragem, bem como não está sendo delegada a terceiro o processo de tomada de decisão. O que a Lei pretende é buscar uma decisão colegiada consensual, e não a delegação do poder de decidir. Também não se está diante nem mesmo de negociação ou composição de conflito, da forma como prevê a Lei nº 13.140, de 26 de junho de 2015, mas sim de criação de uma nova instância decisória. Por outro lado, cabe-nos indagar se direitos patrimoniais indisponíveis poderiam ser objeto de análise pelo referido Comitê, logo que a lei não fez tal distinção.

Primeiramente, é ponto pacífico, até pela autorização constante da Lei de Arbitragem, a possibilidade de utilização de técnicas de ADR (Alternative Dispute Resolution) no que tange a direitos patrimoniais públicos disponíveis. Importante destacar que os “dispute boards” não são técnicas de negociação ou transação administrativa, mas sim um método alternativo de solução de disputas em que a decisão do Gestor Público (unilateral) é substituída por um Comitê Técnico (formado por representantes de ambas as partes). Conforme se verá adiante, a manifestação deste Comitê poderá ser de duas naturezas: (i) de recomendação quando então não obriga as partes, podendo o litígio ser submetido ao Poder Judiciário ou Tribunal Arbitral; (ii) obrigatória, quando ainda assim podem não contar com a concordância das partes e ser submetida à instância judicial ou arbitral. Ou seja: independentemente da decisão tomada pelo Comitê, ela será submetida a um “referendo” da Administração e, se for o caso, pode ser revista pelo Poder Judiciário ou Tribunal Arbitral (este último somente podendo atuar em caso de direito indisponível). Se há sempre a necessidade da recomendação ou decisão do Comitê ser submetida a referendo do órgão-contratante, bem como revista pelo Poder Judiciário, não haveria nenhum impedimento para que se tratasse de direito patrimonial indisponível. Em última instância é a própria Administração que está decidindo, ainda que no formato de mero referendo em relação ao parecer dado pelo Comitê, já que em nenhuma hipótese ela é “obrigada” a acatar a orientação ou decisão.

Outra limitação objetiva promovida pela Lei Municipal nº 11.241, de 2020 (Município de Belo Horizonte) é a sua aplicabilidade apenas para contratos de natureza continuada, retirando de sua esfera de incidência aqueles que se esgotam “em um só ato”. A motivação desta limitação é retirar a incidência dos “Dispute Boards” dos contratos de objeto singelos, como mero

fornecimento ou realização e tarefas simples. Todavia, a conclusão de que contratos que se esgotam “em um só ato” não são passíveis de gerar conflitos complexos parece-nos carecer de respaldo.

Da natureza das decisões do Comitê de Prevenção e Solução de Disputas

As Leis em comento, do Município de São Paulo e de Belo Horizonte, regulam igualmente os poderes conferidos ao Comitê de Prevenção e Solução de Disputas. Ambas criam decisões de 3 (três) naturezas, conforme deverá estar estabelecido no edital e contrato: natureza revisora, adjudicativa ou híbrida. Não há uma opção prévia do legislador por um ou outro.

A técnica de deixar ao critério do Administrador, por meio de decisão discricionária e, obviamente, devidamente motivada, nos parece acertada. Os contratos celebrados pela Administração Pública possuem as mais diversas complexidades, e caberá ao Gestor Público, no caso concreto, estabelecer na minuta do contrato qual seria a hipótese que melhor se amolda ao caso concreto. A ideia de “desregulação” das regras contratuais tem sido defendida por vários doutrinados não só como possível, mas desejável.⁴⁴ Na medida em que se transfere para o caso concreto a regulação de determinado assunto, permite-se que o tratamento possa se dar de forma mais “customizada”, o que certamente redundará em ganho de eficiência.

O primeiro modelo é inspirado no americano, conhecido como “Dispute Resolution Boards” (DRB).⁴⁵ O comitê é criado com caráter de revisão (cha-

⁴⁴ Neste sentido, posiciona-se Floriano de Azevedo Marques: “Resulta que podemos identificar alguns elementos conformadores dessa nova contratualidade administrativa. Algumas tendências já podem ser notadas, a saber: (i) maior deslocamento da norma da lei para o contrato, na medida em que as leis reitoras de contratos do poder público deleguem para o contrato a normatização concreta em cada negócio jurídico; (ii) maior margem de consensualidade, inclusive na estipulação de cláusulas contratuais no âmbito de uma fase pré-contratual de negociação entre o adjudicatário do certame prévio e o Poder Público”. Floriano de Azevedo Marques, “Do contrato administrativo à administração contratual”, *Revista do Advogado*, Ano XXIX, Dezembro de 2009, n.º 107, pp. 74-82.

⁴⁵ Maria João Mimoso/Joana D’Arc Amaral Bortone, “A prevenção de litígios nos contratos de construção: a operatividade dos Dispute Boards”, *Revista da Escola da Magistratura do Estado do*

mado nas leis brasileiras Comitê Revisor ou Comitê por revisão) e proferirá recomendações, as quais não possuem, em princípio, caráter vinculantes para as partes. No caso da Lei nº 16.873, de 2018, do Município de São Paulo, estabeleceu-se apenas que a decisão não tem caráter vinculante, tratando-se de mera recomendação. Já no que tange à Lei nº 11.241, de 19 de junho de 2020, do Município de Belo Horizonte, foram estabelecidas duas possibilidades:⁴⁶ caso nenhuma das partes notifique a outra sobre a insatisfação com a recomendação, ela passa a ser vinculativa e final, valendo como decisão e devendo ser cumprida integralmente. Por outro lado, se uma das partes não estiver satisfeita com a decisão, deverá notificar a outra parte no prazo de 30 dias, hipótese em que o litígio poderá ser submetido à jurisdição arbitral ou judicial.

Em ambas os casos, seja no que tange à Lei Municipal de São Paulo ou de Belo Horizonte, a decisão final é individual das partes, já que se trata apenas de uma recomendação. Todavia, é importante destacar que, com fundamento no princípio republicano da motivação, a decisão pela eventual rejeição da recomendação deverá ser feita de forma motivada. Por ter natureza de recomendação, não tem, por óbvio, caráter vinculante, mas por se tratar de recomendação expedida por Comitê constituído de comum acordo entre as partes, com membros técnicos indicados por cada uma das partes, deve ser devidamente apreciada e, se for o caso, adequadamente contestada com fatos e fundamentos. Não se admitiria o não acolhimento da recomendação sem a devida motivação, uma vez que o Comitê criado tem previsão contratual, sendo inclusive contratualmente remunerado.

Andou bem o Município de Belo Horizonte ao definir na Lei nº 11.241, de 2020, prazo para que as partes se manifestem sobre a aceitação ou não da recomendação (prazo de 30 dias contados do recebimento da recomendação).⁴⁷ A Lei prevê que o silêncio das partes representa aceitação.

Rio de Janeiro, Maio/Agosto, v. 22, ano 2020, Rio de Janeiro, pp. 301-313.

Disponível em: https://www.emerj.tjrj.jus.br/revistaemerj_online/edicoes/revista_v22_n2/versao-digital/313/ Consulta em: 20/03/2021.

⁴⁶ Regulação idêntica para ambas as leis comentadas.

⁴⁷ “Art. 2º (...) § 1º Ao Comitê de Revisão é conferido o poder de emitir recomendações não vinculantes às partes em litígio, considerando-se que: I – qualquer partes que não esteja satisfeita com uma recomendação deverá, nos 30 (trinta) dias seguintes ao seu recebimento,

Trata-se de raríssima previsão legal (acertada, a nosso ver) de aceitação tácita para o silêncio da Administração, na esteira do que os autores já defenderam em outra ocasião.⁴⁸ Prevê também a Lei do Município de Belo Horizonte que a não aceitação da recomendação por uma das partes pode abrir a possibilidade de o litígio ser submetido ao Poder Judiciário ou instância arbitral.

Outra possibilidade é criação do comitê de adjudicação, inspirado no modelo europeu denominado “*Dispute Adjudication Boards*” (DAB).⁴⁹ A ele é conferido o poder de decisão vinculante em litígios oriundos de contrato administrativo. A diferença entre ele e o Comitê Revisor é que o Comitê de Adjudicação emite decisão que vincula as partes de imediato. Ocorre que mesmo no caso das decisões tomadas pelo Comitê de Adjudicação ainda é possível que o caso seja questionado junto a instância arbitral e judicial. É o que prevê o art. 2º, parágrafo único da Lei nº 16.873, de 2018,⁵⁰ do Município

notificar a outra parte e o comitê sobre sua insatisfação, hipótese em que o litígio em questão poderá ser submetido à jurisdição arbitral ou judicial; II – caso nenhuma das partes notifique a outra sobre sua insatisfação com a recomendação conforme disposto no inciso I deste parágrafo, essa recomendação passará a ser vinculativa e final para as partes, devendo, então, ser cumprida imediatamente.” Município de Belo Horizonte, Lei nº 11.241, de 19 de junho de 2020. Disponível em: <https://www.cmbh.mg.gov.br/> Acesso em 30/08/2020.

⁴⁸ Neste sentido, já se manifestaram os autores do presente artigo: “Assim, defendemos, em prol do interesse do particular, que não pode ser aniquilado pelo interesse público primário, que a falta de resposta seja compreendida como silêncio positivo. A inação deve ser entendida como recepção ao pleito, de maneira a tornar desnecessária a interferência judicial”. Cristiana Fortini/ Felipe Alexandre Santa Anna Mucci Daniel, “O silêncio administrativo: consequências jurídicas no Direito Urbanístico e em matéria de aquisição de estabilidade pelo servidor”, *Fórum Administrativo – Direito Público*. Belo Horizonte, ano 6, n. 64, pp. 7394-7402, jun. 2006.

⁴⁹ Maria João Mimoso/Joana D’Arc Amaral Bortone, “A prevenção de litígios nos contratos de construção: a operatividade dos Dispute Boards”, *Revista da Escola da Magistratura do Estado do Rio de Janeiro*, Maio/Agosto, v. 22, ano 2020, Rio de Janeiro. P. 301 – 313. Disponível em: https://www.emerj.tjrj.jus.br/revistaemerj_online/edicoes/revista_v22_n2/versao-digital/313/ Consulta em: 20/03/2021.

⁵⁰ “Art. 2º (...) II – ao Comitê por Adjudicação é conferido o poder de emitir decisões contratualmente vinculantes às partes em litígio; (...) Parágrafo único. As decisões emitidas pelos Comitês com poderes de adjudicação poderão ser submetidas à jurisdição judicial ou arbitral em caso de inconformidade de uma das partes”. Município de São Paulo. Lei nº 16.873, de 22 de fevereiro de 2018. Disponível em: <http://legislacao.prefeitura.sp.gov.br/leis/lei-16873-de-22-de-fevereiro-de-2018> Acesso em: 15/09/2020

de São Paulo e a o art. 2º, § 2º, II da Lei nº 11.241, de 2020, do Município de Belo Horizonte.⁵¹

Percebe-se que em ambas as leis municipais houve a intenção do legislador em diferenciar o comitê que recomenda do comitê que decide. No caso do primeiro, sua “recomendação” não tem caráter decisões e não tem aplicabilidade imediata para as partes, a não ser que ambas adiram à aludida recomendação. No caso do segundo, porém, há uma decisão tomada pelo comitê de adjudicação, a qual tem aplicabilidade imediata para ambas as partes. Acaso alguma das partes discorde desta decisão, deverá recorrer ao Poder Judiciário ou instância arbitral.

Portanto, no âmbito do Comitê Revisor, após a recomendação, duas soluções são possíveis: (i) aceitação por ambas as partes da recomendação, o que torna a controvérsia decidida no âmbito contratual, obrigando-se ambas as partes a cumprir a recomendação; (ii) uma das partes (Administração-contratante ou empresa contratada) discorda da recomendação, subsistindo, assim, o conflito contratual. Se é a Administração a discordante, ela deve proferir decisão devidamente motivada que substitua a recomendação do Comitê de Revisão, a qual pode ser impugnada judicialmente; se é a empresa a discordante, a Administração também terá o dever de tomar decisão no caso concreto, cabendo à empresa submeter o assunto às instâncias judiciais ou arbitrais.

No que tange ao Comitê de Adjudicação, por outro lado, há diferença importante: o Comitê efetivamente decide a controvérsia, a qual já possui validade. Aquele que dela discorda poderá recorrer às instâncias judiciais e arbitrais cabíveis; porém, diferentemente do que ocorre com o Comitê revisor, a decisão já está tomada. O que se abre para a empresa-contratada ou até mesmo para a Administração-contratante é a possibilidade de submeter o conflito à apreciação judicial ou arbitral. Observa-se que as leis (dos Municípios de São Paulo e Belo Horizonte) conferem efeito

⁵¹ “Art. 2º (...) § 2º Ao Comitê de Adjudicação é conferido o poder de emitir decisões contratualmente vinculantes às partes em litígio, considerando-se que: I – a decisão vincula e é obrigatória para as partes desde o seu recebimento; II – qualquer parte que não esteja satisfeita com a decisão emitida deverá, nos 30 (trinta) dias seguintes ao seu recebimento, notificar a outra parte e o comitê sobre sua insatisfação, hipótese em que o litígio poderá ser submetido à jurisdição arbitral ou judicial;” Município de Belo Horizonte. Lei nº 11.241, de 19 de junho de 2020. Disponível em: <https://www.cmbh.mg.gov.br/> Acesso em 30/08/2020.

imediatamente à decisão proferida pelo Comitê de Adjudicação. Logo, ainda que a questão seja levada à instância arbitral ou judicial, ela já deverá ser cumprida até que sobrevenha decisão (judicial ou arbitral) em sentido oposto.

Em crítica ao modelo dos Comitês de Adjudicação, Renata Faria Silva Lima demonstra preocupação com o caráter vinculante das suas decisões. A autora destaca que diferentemente da arbitragem, para a qual há previsão legal para sua obrigatoriedade, não haveria instrumento legal específico para obrigar quanto à executoriedade dessas decisões do “*Dispute Board*”, as quais a autora denomina como “não judiciais”.⁵²

Mas, havendo, como há, para os Municípios de São Paulo e Belo Horizonte, previsão legal específica, não há nenhuma incompatibilidade com o ordenamento jurídico. Pelo contrário: como o objetivo do instituto é garantir maior agilidade na solução das controvérsias oriundas da execução de contratos administrativos, é desejável que as decisões do Comitê tenham caráter vinculante e não apenas de recomendação. Ficará, todavia, a critério da Administração a escolha por um ou outro modelo, se a lei aplicável prever a dupla possibilidade.

Trata-se de decisão (ou recomendação) que pode substituir a decisão administrativa, havendo, porém, a possibilidade de judicialização, como ambas as leis deixam claro, caso haja discordância de alguma das partes.

A propósito, os “*Dispute Boards*” distinguem-se dos Tribunais Arbitrais em especial porque a sentença arbitral é catalogada como título executivo extrajudicial. Concordando ou não com a sentença arbitral, não cabe às partes

⁵² “Contudo, a aplicabilidade aos contratos públicos firmados no Brasil dos DBs dotados de poder para emitir decisões vinculativas merece reflexão. Isso porque, diferentemente do que ocorre com as decisões exaradas em sede de arbitragem, cuja obrigatoriedade no cumprimento é prevista em expressa disposição legal, contida no art. 31 do diploma nº 9.307/96, não há instrumento legal específico que assegure a executoriedade dessas outras decisões finais não judiciais provenientes dos demais mecanismos privados para solução de disputas, aí incluídos os comitês de solução de controvérsias ou *dispute boards*. Assim, uma cláusula que estabeleça ser final a decisão de um *dispute board* poderia ser tomada como incompatível com o ordenamento jurídico brasileiro, em especial, com o princípio da legalidade que rege a Administração Pública”. Renata Faria Silva Lima, “Contratos Administrativos – mecanismos privados para resolução de disputas”, in Onofre Alves Batista Júnior/Sirlene Nunes Arêdes/Federico Nunes de Matos, *Contratos Administrativos. Estudos em homenagem ao Professor Florivaldo Dutra de Araújo*. Belo Horizonte: Editora Fórum, 2014, p. 277.

rediscuti-la no âmbito judicial (exceto nos casos de nulidade da sentença arbitral estabelecidos pela Lei nº 9.307, de 1996).⁵³

Da mesma forma, há previsão neste sentido para a mediação, já que a Lei nº 13.140, de 2015 em seu art. 20, parágrafo único estabelece que o termo final de mediação mediante acordo tem natureza de título executivo extrajudicial,⁵⁴ até pela concordância expressa de ambas as partes com o acordo.

No caso dos “Dispute Boards”, a decisão proferida pelo Comitê de Adjudicação não tem natureza de título executivo extrajudicial, considerando os contornos das leis aqui referidas. A ele podem aderir, voluntariamente, Administração-contratante e empresa-contratada. Caso discordem, poderão rediscutir o mérito da decisão judicialmente (e não apenas eventual nulidade, conforme se dá com a arbitragem).

Importante destacar ainda que ambas as Leis (do Município de São Paulo e do Município de Belo Horizonte) preveem também a criação do chamado “Comitê Híbrido”, o qual poderá emitir tanto recomendações (Comitê de Revisão) ou decisões terminativas (Comitê de Adjudicação). Neste caso, deverá o contrato regular as hipóteses em que o Comitê atuará com uma ou outra competência.

⁵³ “Art. 32. É nula a sentença arbitral se: I – for nula a convenção de arbitragem; II – emanou de quem não podia ser árbitro; III – não contiver os requisitos do art. 26 desta Lei; IV – for proferida fora dos limites da convenção de arbitragem; VI – comprovado que foi proferida por prevaricação, concussão ou corrupção passiva; VII – proferida fora do prazo, respeitado o disposto no art. 12, inciso III, desta Lei; e VIII – forem desrespeitados os princípios de que trata o art. 21, § 2º, desta Lei.

Art. 33. A parte interessada poderá pleitear ao órgão do Poder Judiciário competente a declaração de nulidade da sentença arbitral, nos casos previstos nesta Lei.” Brasil, *Lei nº 9.307, de 23 de setembro de 1996*. Disponível em: http://www.planalto.gov.br/ccivil_03/Leis/L9307.htm Consulta em: 11/03/2021.

⁵⁴ “Art. 20. O procedimento de mediação será encerrado com a lavratura do seu termo final, quando for celebrado acordo ou quando não se justificarem novos esforços para a obtenção de consenso, seja por declaração do mediador nesse sentido ou por manifestação de qualquer das partes.

Parágrafo único. O termo final de mediação, na hipótese de celebração de acordo, constitui título executivo extrajudicial e, quando homologado judicialmente, título executivo judicial.” Brasil, *Lei nº 13.140, de 26 de junho de 2015*. Disponível em: http://www.planalto.gov.br/ccivil_03/_Ato2015-2018/2015/Lei/L13140.htm Consulta em: 11/03/2021.

Outra relevante inovação trazida pela Lei nº 11.241, de 2020, do Município de Belo Horizonte, envolve a previsão de que a recomendação não vinculante do Comitê de Revisão possa ser utilizada como objeto do Termo de Compromisso, o qual é previsto no art. 26 do Decreto-Lei nº 4.657, de 1942 (alterado pela Lei nº 13.655, de 2018):

Para eliminar irregularidade, incerteza jurídica ou situação contenciosa na aplicação do direito público, inclusive no caso de expedição de licença, a autoridade administrativa poderá, após oitiva do órgão jurídico e, quando for o caso, após realização de consulta pública, e presentes razões de relevante interesse geral, celebrar compromisso com os interessados, observada a legislação aplicável, o qual só produzirá efeitos a partir de sua publicação oficial.

Trata-se de instituto alinhado com a ideia de consensualidade do Direito Administrativo. Quando se trata de comitê revisor, a decisão em acatar ou não a recomendação dada por ele é individual de cada uma das partes. O que a Lei então viabiliza com a aludida previsão é que essa decisão se dê de forma consensual entre as partes, reduzindo-se a Termo mediante compromisso baseado no art. 26 do Decreto-Lei nº 4.657, de 1942.

A vantagem de se transformar a recomendação expedida pelo Comitê Revisor em Termo de Compromisso entre as partes é a possibilidade de se fixar por meio do termo “as obrigações das partes, o prazo para seu cumprimento e as sanções aplicáveis em caso de descumprimento” (previsão do art. 26, § 1º, IV do Decreto-Lei nº 4.657, de 1942). Deste modo, a recomendação fixada pelo Comitê de Revisão traduzida no Termo de Compromisso terá regulação mais detalhada quanto ao seu cumprimento e até mesmo as sanções que poderão advir da inadimplência quanto a elas. Trata-se de decisão que deixa de ser apenas individual (acatar ou não a recomendação) e passa a ser consensual (celebração conjunta do Termo de Compromisso), ideia que se encontra condizente com o novo princípio da consensualidade do Direito Administrativo.

5. Considerações finais

O presente trabalho teve como objetivo demonstrar a evolução do Direito Administrativo no que tange às novas formas de solução de conflitos surgidos

durante a execução dos contratos administrativos. A substituição das operações decisórias unilaterais por métodos consensuais de solução de conflitos é a tônica que tem preponderado na doutrina dos contratos celebrados com o Poder Público. A decisão solitária e unilateral adotada pela Administração quando do surgimento de conflitos com a Administração não atende a um Direito Administrativo democrático e participativo.

Instrumentos como conciliação, mediação, já devidamente regulamentados em legislação nacional e direcionados a solucionar conflitos que envolvem a Administração, são ferramentas que se ajustam ao ideário dialogal. Mais recentemente, ganham relevância as discussões em torno dos “Dispute Boards”, inicialmente utilizados diante de exigências de bancos internacionais financiadores de projetos e que ganham crescente atenção da doutrina, bem como surgem de forma esparsa na legislação brasileira. Os pioneiros na regulação do instituto foram os Municípios de São Paulo, em 2018 e Belo Horizonte, em 2020, que instituíram os Comitês de Resolução de Disputas. Tais comitês podem emitir manifestações com natureza de recomendação (Comitês de Revisão), com natureza vinculativa para as partes (Comitês de Adjudicação), ou até mesmo possuírem natureza híbrida (ora expedindo recomendações, ora expedindo decisões vinculativas).

A legitimidade das decisões administrativas e até mesmo a eficiência delas depende da participação dos envolvidos e da formação de consenso, para que o litígio seja resolvido de forma ágil, eficiente e eficaz. Decisões administrativas que geram processos contenciosos longos e morosos são uma das principais causas de paralisação de obras públicas, interrupção da prestação e serviços públicos, tendo como possível consequência a oneração do erário e prejuízo para o cidadão. Naturalmente que a busca por consensualidade e agilidade nas decisões jamais poderá afastar a Administração do interesse público. Porém, os novos instrumentos sobre os quais tratamos no presente trabalho servem para demonstrar que esses conceitos são compatíveis.

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Opinião (/opinion)

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Projeto privilegia o uso de métodos extrajudiciais para prevenção e solução de conflitos.

Por
Ane Elisa
Perez*

Fecha de publicación: 21/06/2020

Etiquetas: Brasil (/taxonomy/term/118)

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[idProposicao=2124888](https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=2124888)) em trâmite na Câmara dos Deputados, se aprovado, será responsável por consolidar um novo marco legal das concessões e parcerias público-privadas (PPPs). Dentre as inúmeras mudanças às quais se propõem os 226 artigos do novo PL, é de se destacar o foco dado aos métodos alternativos de prevenção e de solução de controvérsias, dentre eles, a possibilidade do uso dos comitês de prevenção e resolução de disputas (*dispute boards*).

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O *dispute board*, mecanismo de solução de controvérsias que vem ganhando cada vez mais espaço no país, é formado por um comitê composto de um ou mais profissionais independentes que acompanham, periodicamente, a execução do contrato a fim de resolver, por meio de decisões ou sugestões, determinados atritos que possam surgir entre as partes. Seguindo essa tendência, o PL nº 7.063/17 reconhece a importância do uso dos *dispute boards* e traz uma série de importantes disposições sobre o tema.

Soluções

Quanto ao uso dos *dispute boards*, o PL busca sanar quaisquer dúvidas que porventura pudessem restar quanto ao uso desse comitê para a solução de questões envolvendo o reequilíbrio da avença, uma vez que permite seu uso tanto para a solução de controvérsias de natureza técnica quanto de natureza econômico-financeira.

Além disso, quanto às despesas pelo funcionamento do comitê, o PL optou em permitir que as partes disponham sobre o modo de pagamento no próprio contrato, dando a opção de pagamento antecipado integralmente pela concessionário ou rateado pelas partes. Aqui, contudo, há de se ter uma especial atenção quanto à hipótese de antecipação do pagamento unicamente pela concessionária, a fim de que essa determinação não prejudique ainda mais os *players* do setor.

Também é importante destacar que o PL reconhece a força vinculante das decisões proferidas pelo comitê de prevenção e resolução de disputas, dando-lhe força de título executivo extrajudicial que somente poderá ser desconstituído pela jurisdição estatal ou arbitral. Desse modo, ressalta-se o esforço do projeto de lei em dar efetividade às decisões do *dispute board*, que deixam de ser mera formalidade contratual.

Em suma, é nítido que o Projeto de Lei nº 7.630/17, pretendendo estabelecer um novo marco legal das concessões e PPPs, reconhece e privilegia o uso de métodos extrajudiciais para prevenção e solução de

conflitos nos contratos públicos e traz, por isso, uma consolidação do que já se dispôs anteriormente, por exemplo, na Lei de PPPs (Lei nº 11.079/04) (http://www.planalto.gov.br/ccivil_03/_Ato2004-2006/2004/Lei/L11079.htm) e na Lei de Relicitação (Lei nº 13.448/17) (http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2017/lei/l13448.htm).

Especificamente em relação aos *dispute boards*, não somente possibilita e incentiva a sua utilização como também dá verdadeira efetividade às decisões do comitê, estabelecendo-o como um mecanismo não só alternativo à jurisdição estatal, mas também adequado à prevenção e solução dos mais diversos conflitos que porventura surjam frente à execução de contratos complexos.

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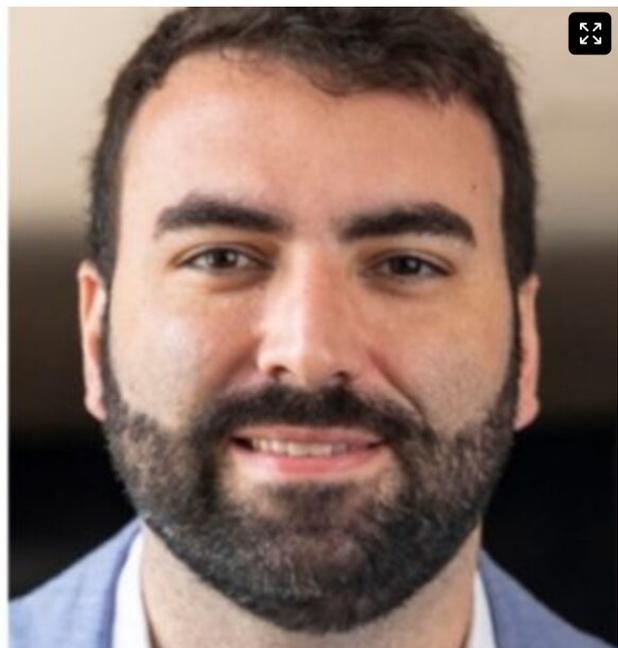
Obras paradas e dispute boards ameaçados

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Por Ane Elisa Perez e Ricardo Medina Salla

25/03/2021 | 08h22 • Atualização: 26/03/2021 | 07h00



Ane Elisa Perez e Ricardo Medina Salla. FOTOS: DIVULGAÇÃO Foto: Estadão

Foi publicado, neste mês, o Decreto nº 60.067/2021, que regulamenta a Lei nº 16.873, de 22 de fevereiro de 2018, que dispõe sobre a adoção dos comitês de prevenção e solução de disputas em contratos de obras públicas e de execução continuada celebrados pela Administração Pública Direta e Indireta do Município de São Paulo.

O Novo Decreto vem no momento em que o Brasil e o mundo buscam, sobretudo no setor de infraestrutura, reduzir as polarizações e promover maior diálogo entre contratado e contratante, com vista a sanar, de modo célere e efetivo, os problemas comumente surgidos em grandes obras.

PUBLICIDADE

Por mais precisos que possam ser os projetos, as empreitadas acabam por esbarrar em imprevistos, achados arqueológicos, variações geológicas, adversidades econômicas, sociais e políticas que afetam a boa execução da obra, e colocam em xeque a relação entre as partes.

E é aí que entram os tais comitês, também conhecidos como Dispute Boards. A instalação desses comitês não só permite a solução quase que imediata de litígios em obras, mas também, e principalmente, a prevenção das mais diversas controvérsias que invariavelmente surgem ao longo dos trabalhos. As obras ganham fluidez e voltam a avançar no ritmo e no orçamento para os quais foram planejadas.

Nesse contexto de gerenciamento de risco e diminuição da insegurança de contratar, e em um cenário no qual as obras públicas e privadas crescem aos montes, insere-se o novo Decreto paulistano, oferecendo uma alternativa ao moroso e burocrático aparato judicial e, até mesmo, à complexidade das arbitragens advindas das contratações públicas do Município de São Paulo.

PUBLICIDADE

Apesar dos muitos pontos positivos trazidos pelo novo Decreto, algumas determinações acabaram deixando a desejar, principalmente a de seu art. 2º, que restringe a utilização dos comitês a contratos com valores iguais ou superiores a R\$ 200 milhões de reais. Trata-se de critério desarrazoado que, além de praticamente engavetar a ferramenta, escapa às principais recomendações internacionais

Para elucidação, o Banco Mundial propõe que os *dispute boards* sejam empregados em contratos com valores abaixo de U\$ 20 milhões dólares. De maneira similar, as orientações da reputada FIDIC (Fédération Internationale des Ingenieurs Conseils), que fornece importantes parâmetros contratuais para as grandes obras de engenharia a nível global, primam pelo uso do *dispute board* em contratos com valores significativamente menores do que o exigido pelo Decreto nº 60.067/2021.

A determinação do Decreto foge inclusive da realidade municipal, onde projetos de considerável relevância para a população paulistana possuem valor bem abaixo da monta exigida pela norma. É o caso, por exemplo, da concessão para recuperação, reforma, requalificação, operação, manutenção e exploração do Mercado Municipal de São Paulo (concorrência nº 001/SMDE/2018) e a concessão para a prestação dos serviços de gestão, operação e manutenção dos Parques Municipais Prefeito Mário Covas e Tenente Siqueira Campos - Trianon (concorrência nº 020/SGM/2020). Ambos deixam de ser elegíveis para a utilização dos *dispute boards* para a prevenção e solução de conflitos. A cidade perde a chance de se valer de um mecanismo extremamente eficiente, e que, há pouco tempo, fez entusiasmar a comunidade com o protagonismo da lei 16.873/2018.

O que se tem, então, é que a disposição do novo Decreto acabará por engessar a utilização dos *dispute boards*, quando, ao contrário, deveria privilegiar a maleabilidade para o emprego efetivo do método nas contratações. O que era para ser uma solução, portanto, parece ser um retrocesso, sobretudo porque a cidade estava próxima de se destacar como exemplo positivo ao país, que sofre com o conhecido caos de obras não-concluídas. Impossível esquecer que, somente em 2018, o Brasil já padecia com pelo menos 12 mil obras paradas, segundo dados do Tribunal de Contas da União.

A cidade de São Paulo não pode deixar a iniciativa de vanguarda esmorecer para, agora, tornar-se antagonista de seu próprio pioneirismo. Os Dispute Boards são muito mais que uma boa alternativa à judicialização dos conflitos de obras. São mecanismos prestam ao máximo atendimento do interesse público, uma vez que beneficiam o empreendimento e, por consequência, contribuem para que a coletividade possa, finalmente, aproveitar dos equipamentos públicos, sem forçá-la a conviver com entulhos custosos.

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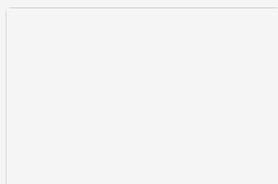
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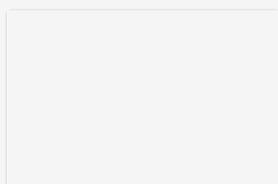


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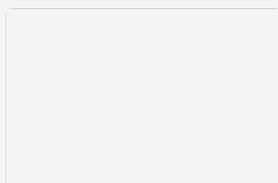
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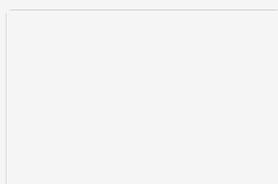
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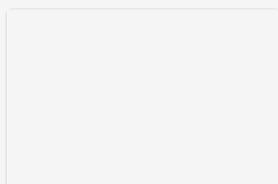
ONG que presta contas ao PCC se reuniu com ministérios da Justiça e Direitos Humanos

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PGR denuncia Léo Índio por tentativa de golpe de Estado no 8 de Janeiro

22/01/2025 | 08h38 | Pepita Ortega



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OPINIÃO

Decisão do TCU sobre o uso de *dispute board* é um retrocesso

■ [Ane Perez](#)

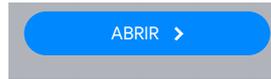
12 de janeiro de 2021, 9h13

O Tribunal de Contas da União (TCU) autorizou, no dia 9 de dezembro, com resolução e aprovação pelo Ministério de



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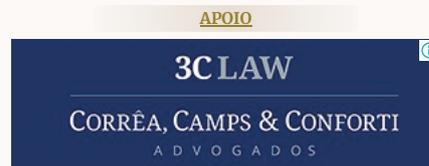


Miritituba, no município de Itaituba (PA), rodovia considerada o principal corredor logístico do eixo norte do país.

A decisão do TCU (processos Nº 016.936/2020-5 e 018.901/2020-4) restringiu, porém, o uso de *dispute boards* — mecanismos alternativos, privados e administrativos nos casos dos contratos públicos, de solução de conflitos, que têm por objetivo auxiliar as partes a gerir os contratos, prevenir litígios intermináveis e dar efetividade à execução dos ajustes — para a solução de eventuais conflitos que surjam no decorrer do contrato, antes que a Agência Nacional de Transportes Terrestres (ANTT) regulamentasse a utilização desse mecanismo em contratos celebrados no âmbito da agência.



Os conselheiros entenderam que o mecanismo do *dispute board* não constaria em lei e não seria regulamentado pela ANTT, o que obstaria o seu uso nas concessões acima mencionadas, já que a lacuna normativa decorrente da ausência de regulamentação poderia causar questionamentos judiciais ou arbitrais por parte da concessionária, o que poderia macular toda a execução contratual. Contudo, ressalta-se que, embora tenham entendido pela não utilização dos *dispute boards*, os conselheiros permitiram o uso, no âmbito dessas mesmas contratações, de outros mecanismos



extrajudiciais, como a arbitragem e a mediação, por exemplo, sob a justificativa de que ambos os mecanismos são regulamentados por leis específicas (Lei 9.307/1996, alterada pela Lei 13.129/2015, Lei 13.140/2015, respectivamente, e Resolução ANTT 5.845/2019).

Também questionaram se o instrumento de resolução de conflitos possui a agilidade necessária, uma vez que o comitê seria instituído de forma *ad hoc*, ou seja, somente quando houvesse um conflito — situação concreta excepcional e complexa — é que seriam recrutados os membros do referido comitê. Acreditam, assim, que tal mecanismo poderia vir a atrasar a solução do conflito. Desse modo, foi estabelecido pelo TCU que somente será aceito o *dispute board* após regulamentação adequada.

Entretanto, a decisão tomada pelo TCU é um retrocesso, conforme apontado pelo próprio ministro Benjamin Zymler, que ponderou que, mesmo que não exista previsão em lei até o momento quanto ao formato exato do *dispute board*, este segue a mesma lógica de outros mecanismos de resolução de conflitos já utilizados e regulamentados. Ademais, a ANTT somente utilizaria o mecanismo depois de estar devidamente regulamentado seu uso pela própria agência.

Como se não bastasse isso, a decisão ainda invade a competência da ANTT em decidir, conforme sua discricionariedade, sobre mecanismos de solução de controvérsias nos contratos por ela firmados.

Quanto ao mérito, mais uma vez, patente o desacerto da decisão dada pelo tribunal, especialmente porque há previsão legal para o *dispute board*, conforme o artigo 23-A da Lei Federal 8.987/1995 e o artigo 190 do Código Civil Brasileiro, o que permite inclusive o uso desse mecanismo em inúmeros outros casos, públicos e privados, como, por exemplo, a implantação da Ferrovia de Integração Centro-Oeste (Acórdão 1.947/2020-TCU-Plenário).

Além disso, a Nova Lei de Licitações, aprovada pelo Plenário do Senado Federal em 10 de dezembro e que pende apenas de sanção pelo presidente da República, mostrou-se completa e expressamente favorável à utilização do comitê de resolução de disputas — ou

dispute board —, ratificando, portanto, o cenário de todo modo positivo para o uso do instituto pela Administração Pública brasileira nos mais diversos tipos de contratos.



Se não bastasse o cenário nacional favorável ao uso dos *dispute boards* nos contratos públicos, o cenário internacional há tempos já proclamou não só a possibilidade de sua utilização, mas também a obrigatoriedade da instituição do comitê em contratos financiados por alguns dos organismos internacionais de fomento, a exemplo do Banco Mundial, o qual exige a adoção de *dispute board* em contratos por ele financiados em valores superiores a 50 milhões de dólares.

Desse modo, é certo que a decisão do TCU é um retrocesso. Enquanto o mundo caminha no sentido do uso de mecanismos eficazes de gerenciamento dos contratos, especialmente os de infraestrutura de execução com complexidade elevada, a exemplo dos contratos de construção e reformas de estádios para a Copa do Mundo de 2014 e do contrato de construção da Linha 4 do Metrô de São Paulo, aqui caminhamos para a eterna cultura da judicialização que dia após dia demonstra que não é o litígio o meio hábil de se dar efetividade aos projetos de infraestrutura no país. Enquanto os órgãos de controle não acompanharem a evolução dos mecanismos efetivos de se garantir exequibilidade aos ajustes públicos, e se prenderem apenas aos seus formalismos, não haverá avanço na consecução dos projetos de infraestrutura no país — estes ficarão eternamente relegados às concepções ilusionistas ultrapassadas do que se pode entender por interesse público.

Ane Perez

é advogada do escritório Manesco, Ramires, Perez, Azevedo Marques Sociedade de Advogados.

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