

Briefing document: Conflict Avoidance Boards (CABs): FAQs

What is the origin of CABs?

1. CABs have their origins in the dispute board model. Dispute boards can be classified as Dispute Resolution Boards (DRBs) and Dispute Adjudication Boards (DABs); the former issue non-binding decisions while the latter produce binding decisions. Boards can be *ad hoc* (convening to hear a specific dispute) or standing (running for the duration of a project). CABs originate from the standing dispute board model.
2. Dispute boards originated in the United States construction industry in the 1970s, in response to excessive litigation costs and risks faced by contractors and authorities. Dispute boards went global in 1980 when the World Bank insisted on utilising the model in the construction of the El Cajon Dam and Hydropower Station in Honduras.
3. As of a decade ago, dispute boards have been used internationally in over 2,000 major projects.¹ They are widely used in North America, South America and Asia, and widely utilised outside of construction and infrastructure including R&D, intellectual property, production sharing and shareholder agreements.² They are used as standard practice by various US government departments, including CalTrans and the Departments of Transportation for Colorado, Florida, Idaho and Virginia.³
4. What makes CABs an improvement on the older model is they now seek not only to resolve conflicts, but to also prevent them from occurring. The previous generation of disputes boards had limited scope, seeking to swiftly resolve formal conflicts but serving little or no dispute avoidance function.
5. Dispute avoidance became a particularly hot topic with the global rise of PPP procurement methods, where multiple interfaces between contractors raises the likelihood of disputes. Dispute avoidance is widely recognised as one of the key areas of future growth in project delivery and construction law. In a world where projects are increasingly complicated to deliver, dispute avoidance has been recognised as a key point where investments can be made to save project time, costs and relationships.

How are CABs established?

6. Conflict Avoidance Boards (CABs) are established via contracts rather than through legislation. However, some funders (such as the World Bank and all major development banks) require dispute boards as standard in projects over a certain value. Similarly, some jurisdictions

¹ Michael T. Kamprath, 'The Use of Dispute Resolution Boards for Construction Contracts', *The Urban Lawyer*, Vol.46(4), p.809

² Robert Lopez and Alberto Amara, 'Comparison of Dispute Boards and Statutory Adjudication in Construction', *Proceedings of the Institution of Civil Engineers—Management, Procurement and Law*, Vol.171 (2), p.155

³ Michael T. Kamprath, 'The Use of Dispute Resolution Boards for Construction Contracts', *The Urban Lawyer*, Vol.46(4), p.808

encourage their usage via legislation or require all contractors on a project to work with a board.

7. Due to Statutory Adjudication in the construction industry, dispute boards work under a slightly different model to fit with UK legislation. A CAB can be established by itself to provide dispute avoidance, or in some cases is utilised alongside a separate board providing binding Statutory Adjudication, as access to SA is a legal requirement in the UK construction industry.

How are board members selected?

8. On a typical 3-member CAB, each party selects a wing member of the panel, with a third member (acting as chairman) either appointed directly by the parties or by the parties' board choices. However, this model is sometimes turned on its head, with parties agreeing a chairman, who then appoints wing members.
9. Parties typically have the right to lodge reasonable objections over the other party's selection, as appointments must be independent and seen to be so. Standard reasons for disqualification include an individual having worked previously for either of the parties, and in some major international projects nationality can also be a factor.
10. Many institutions have lists of qualified dispute board members which can be consulted for the selection of appointments and are also willing to act as appointing bodies. Some contracts name an institution such as FIDIC, CI Arb, the ICC, ICE, DRBF or the AAA as a default nominating authority in case of disagreements or when CABs are established in advance of the awarding of contracts. CAB panellists will typically also be members of various industry representative groups such as CI Arb, ICE or RICS, carrying requirements around standards and professional ethics.

What forms can CABs take?

11. The establishment of CABs via contracts rather than directly through legislation also carries a key benefit in the potential for flexibility around the scale and makeup of the board. Tailoring size and expertise to the project carries benefits for the quality of engagement and ensures value for money.
12. Dispute boards were initially developed for use in very high-value projects, but over time users experimented with the model so as to allow the benefits to be enjoyed on a wider range of projects. CABs can be configured to suit a wide variety of projects:
 - a. On smaller projects where the expense of a full board cannot be justified, CABs can be **run instead with a single trusted professional**. Both World Bank and FIDIC conditions encourage the use of one-person dispute boards for lower-value contracts.⁴

⁴ Peter HJ Chapman, 'The Use of Dispute Boards in Major Infrastructure Projects', *Turkish Commercial Law Review*, Vol.1, No.3, October 2015, p. 224

- b. Large multi-contract projects can benefit from the **coordination of a single board covering all contracts**. Panellists can be appointed in advance of contracts being awarded, in consultation with a trusted neutral organisation. For the London 2012 Olympics, ICE and other bodies helped appoint a CAB funded as a project cost, but with contractors splitting the extra cost of any formal referrals.⁵
- c. In some cases parties have seen benefits in having **separate technical and financial panels**, to deal with different aspects of the project. This was the case in the Channel Tunnel Rail Link for a 10 year, \$5 billion concession project in the UK that started in 1998.⁶ A variant of this was used with for the Docklands Light Railway Extension to Lewisham (opened 2000), where the project utilised separate financial and technical panels of 3 professionals apiece, but selected to have them chaired by the same professional.⁷
- d. A variant of the separate boards model is the **utilisation of a group of experts**, from which professionals can be selected for their knowledge of the particulars of a specific area of a contract. Hong Kong Airport Authority used a Disputes Review Group of 7 members plus a convenor to cover all main contracts (totalling around 20), from which a panel of 1 or 3 members (at a referring party's choice) would be selected to hear and determine a referred dispute.⁸ This allows for a wide range of technical expertise to be available.
- e. Some projects have used a **larger panel with a quorate requirement**. The Channel Tunnel had a Disputes Review Board of five people, with a quorum of 3.⁹
- f. A **regional board** can also be established to manage multiple contracts and smaller projects that are overseen by a single authority. The Florida Department of Transportation used a system of Regional Dispute Review Boards to manage separate contracts.¹⁰

How much do CABs cost and what is the evidence of value for money?

- 13. Globally, in almost 10% of construction projects between 8-10% of the total project cost is legal, with 50% of that expended on disputes.¹¹ Dispute avoidance is a growing area of interest

⁵ Peter HJ Chapman, 'The Use of Dispute Boards in Major Infrastructure Projects', *Turkish Commercial Law Review*, Vol.1, No.3, October 2015, p. 228

⁶ *Ibid*, p.224

⁷ *Ibid*, p. 224

⁸ *Ibid*, p. 224

⁹ *Ibid*, p. 224

¹⁰ Michael T. Kamprath, 'The Use of Dispute Resolution Boards for Construction Contracts', *The Urban Lawyer*, Vol.46(4), p.809

¹¹ Donald Charrett, 'Dispute Boards and Construction Contracts', *The Victorian Bar Continuing Professional Development Program* (October 20th 2009), p.16

due to the potential to directly save on legal expenses, and the potential for indirect savings when projects run smoother.

14. A CAB can be seen as an insurance policy, serving the dual purpose of decreasing the likelihood of a dispute and lessening its financial impact through earlier, less legalistic resolution. Board members are typically industry experts experienced in dispute avoidance techniques, rather than lawyers. By including a board as a part of the financial model from the commencement of the project, the cost impact is almost imperceptible.¹²
15. Typically, direct costs for a board consist of a monthly retainer for each member (perhaps 2-3 times their daily fee) and daily fees for site meetings and dispute determinations, as well as reasonable expenses.¹³ A University of Washington study estimated that the costs of a 3-member panel over a 24-month project came to \$47,520 plus travel.¹⁴
16. The Dispute Resolution Board Foundation (DRBF) did a large-scale study of all models of dispute boards globally.¹⁵ Costs were expressed as a ratio to project costs, to take account of differing monetary values and take account of the varying sizes of projects.
17. DRBF's findings are as follows:

Situation:	% of final construction cost
DBs with few disputes	0.05
DBs with many disputes	0.25
Lowest reported cost of a DB	0.04
Highest reported cost of a DB	0.26
Average cost of a DB	0.15

18. Various models of dispute boards were initially used in the 1970s on extremely high value projects, but recent studies show they have become increasingly popular on a range of smaller projects. Globally they are now most frequently found on projects in the \$10-20 million and \$20-40 million ranges.¹⁶
19. A study by Dr Harmon of the use of dispute boards as part of the Boston Big Dig project found that disputes under contracts covered by dispute boards cost \$31,034 per dispute, while those under contracts to be litigated cost an average of \$1.1 million each.¹⁷ However, proving cost

¹² Dispute Resolution Board Foundation, *Guidance on the Use of Dispute Boards in Public Private Partnership (PPP) Projects*, (April 2017), p.11

¹³ *Ibid*, p.15

¹⁴ Michael T. Kamprath, 'The Use of Dispute Resolution Boards for Construction Contracts', *The Urban Lawyer*, Vol.46(4), p.813

¹⁵ *Ibid*, p. 813

¹⁶ Dispute Resolution Board Foundation, *Guidance on the Use of Dispute Boards in Public Private Partnership (PPP) Projects*, (April 2017), p.14

¹⁷ Michael T. Kamprath, 'The Use of Dispute Resolution Boards for Construction Contracts', *The Urban Lawyer*, Vol.46(4), p.814; Kathleen M. Harmon, 'Case Study as to the Effectiveness of Dispute Review Boards on the Central Artery/Tunnel Project', *Journal of Legal Affairs and Dispute Resolution in Engineering and Construction*, Vol.1, Issue 1, (Feb. 2009).

effectiveness of CABs is inherently more difficult, as you must compare the actual costs of a board to unverifiable estimates of likely disputes.

20. A CAB can be seen as an insurance tool, and in the most successful cases projects will demonstrate few disputes. However, through speaking to project managers and board members, qualitative evidence emerges of the cost impact CABs have had in dealing with issues at the earliest stages.

CAB Case Study: 2012 London Olympics

21. In the delivery of infrastructure for the London Olympics, delays were simply not an option. The Olympic Delivery Authority took conflict avoidance seriously from the outset, recognising the potential of disputes to derail the entire project.
22. The Olympic Delivery Authority therefore decided to establish CABs in advance of appointing contractors. Independent bodies including ICE helped appoint expert panellists. Work was procured with contracts requiring disputes to be referred to the panels. The standing boards were funded as a project cost, but with contractors splitting the extra cost of any formal referrals.¹⁸
23. Two separate boards were established. The first board provided dispute avoidance while the second delivered Statutory Adjudication, a swift and binding ADR process used in the UK construction industry. The system of two panels was found particularly appropriate as conflict avoidance could be conducted unencumbered by process.

CAB Case Study: Network Rail

24. Network Rail trialled a system of Dispute Avoidance Panels (DAPs) as part of a £25bn programme of upgrades starting in 2014, following consultation with their Commercial Directors' Forum (CDF). Costs for their DAP are split equally between the parties to the contract.
25. The three/four panellists produce an observations report following each site visit, highlighting areas of concerns for leadership to deal with. Network Rail considered the project a success, with contractors requesting the continuation of the scheme after the trial. Network Rail are continuing to explore the potential of CABs for their projects.

Further UK CAB examples

26. UK industry leaders in the construction sector recognise that conflict avoidance is essential for the delivery of infrastructure projects in the future. This coalition is supported by a steering group consisting of CI Arb, RICS, ICE, ICC, RIBA, DRBF, ICES, TfL and Network Rail.

¹⁸ Peter HJ Chapman, 'The Use of Dispute Boards in Major Infrastructure Projects', *Turkish Commercial Law Review*, Vol.1, No.3, October 2015, p.228

Organisations that choose to sign the pledge demonstrate their commitment to embedding conflict avoidance into their practices.

27. CABs and variations of the model have been introduced into further projects, including:
- g. **Crossrail** have used a Conflict Avoidance Panel (CAP) since 2014, which was inserted into contracts post commencement in conjunction with ICE.
 - h. **Transport for London (TFL)** uses the Conflict Avoidance Process (CAP), embedded in their contracts for the refurbishment of the London Underground. They are a member of the Conflict Avoidance Pledge Coalition Steering Group.
 - i. **The Channel Tunnel Rail Link** utilised a system of two panels for a 10-year, \$5 billion concession project in the UK that started in 1998.¹⁹

Buy-in and challenging of dispute board decisions

28. The dispute board model has been utilised globally on many major infrastructure projects, with a high rate of success. The buy-in enjoyed by the model consisting of an independent and expert board means recommendations—even when non-binding—are rarely challenged.
29. In 72% to 85% of cases, parties accept the decision of dispute boards.²⁰ The Cooperative Research Centre found that 97% of dispute board decisions were either accepted or de-escalated down to settlement negotiations.²¹ Some prominent examples include:
- j. The **Ertan China Hydroelectric Plant** utilised a dispute board in a \$5000m construction project from 1991-2000, commissioned by the Chinese State Organisation as an international joint venture. This board engaged purely in dispute resolution, issuing non-binding recommendations. However, of the 40 disputes referred to the board, none were escalated to arbitration.²²
 - k. **The Hong Kong Airport** (\$15,000 million construction project) used a bespoke DAB structure with 22 main contracts subject to a board, consisting of a convenor and six panellists of various backgrounds, selected with the Contractor's Association in advance of the awarding of contracts. Parties' positions were represented by

¹⁹ Peter HJ Chapman, 'The Use of Dispute Boards in Major Infrastructure Projects', *Turkish Commercial Law Review*, Vol.1, No.3, October 2015, p.224

²⁰ Dante Figueroa, 'Dispute Boards for Infrastructure Projects in Latin America: A New Kid on the Block', *Dispute Resolution International*, Vol.11 (2), (October 2017), p.151

²¹ Robert Lopez and Alberto Amara, 'Comparison of Dispute Boards and Statutory Adjudication in Construction', *Proceedings of the Institution of Civil Engineers—Management, Procurement and Law*, Vol.171 (2), p.71

²² The Dispute Resolution Board Foundation, *The Use of Dispute Boards in Public-Private Partnership Transactions: The Dispute Board in Practice* (2013).



engineers and decisions were binding in the interim, with one of the six that went to the board continuing to arbitration.²³

- I. **The Rio Parana Dam Expansion** (\$5,500 million project) in Argentina from 2003-2006 utilised a DAB. Eight formal disputes were referred to the board, with none going on to arbitration or litigation. Their board also resolved community disputes relating to the project and advised on several other disputes without formal hearings.²⁴

²³ *Ibid*

²⁴ *Ibid*