

Stage 2: Secondary Prevention - Specific DAP models	Dispute Resolution Boards (DRBs)	Dispute Adjudication Boards (DABs)/ Dispute Adjudication and Avoidance Board (DAABs)	Dispute Resolution Advisor (DRAs)
Definition/ Composition (Gerber and Ong, 2012)	A panel of <u>three</u> independent third party experts, appointed by parties at the commencement of the project. Utilises <u>technical knowledge</u> regarding <i>type of construction</i> performed and <i>expertise</i> to resolve issues of <u>contractual interpretation</u> and <u>dispute resolution</u> .	A panel of <u>three</u> independent reviewers who are <i>experienced, respected and impartial</i> , appointed by parties at commencement of project (CI 21.1 FIDIC, 2017). Kept abreast of site developments through <u>regularly scheduled site visits</u> at <i>quarterly intervals</i> ; and encourages <u>dispute resolution at job level</u> .	DRA is an independent individual (cf. three-person panels in both DRBs and DABs), appointed at commencement of project to monitor contract from <i>commencement</i> to <i>completion</i> . Role limited to being a <u>facilitator</u> (maintain open communication between parties) and <u>advisor</u> (recommending most appropriate form of ADR – <i>mediation, short form arbitration</i>) to take place during course of project.
Appointment & Remuneration of members	Each contracting party appoints one, and the two directly involved parties will elect the chair (someone that <i>both</i> parties have confidence in). DRB members jointly remunerated by contracting parties (cf. Superintendent & perceived bias because paid by owner). However, in reality owner pays for it all because reimburses contractor; but each party directive invoices DRB members; while costly, should be seen as ‘value for money’ insurance against litigation and arbitration	Contracting parties or 3 rd party entities can appoint DAB members (CI 2.2 FIDIC, 2017) DAB members jointly remunerated by contracting parties	DRA is jointly chosen and appointed by contracting parties
Case for DAP model	(1) Creature of K : Made on parties’ own terms; however no regulatory framework to provide guidance on <i>how</i> it should work (2) Clear signal of commitment to avoid disputes ; (3) ‘Real time’ dispute resolution to prevent deterioration of working relationships; (4) Confidential nature : Preserves good site relationships + low chances of bad publicity		
Dispute avoidance role	<ul style="list-style-type: none"> o DRB plays a proactive role <i>issue identification</i> and addressing potential project ‘hot spots’: <ul style="list-style-type: none"> ▪ Remains conversant with project developments through regular site visits and meeting with key project personnel at <i>quarterly intervals</i> (Gerber and Ong, 2011); <ul style="list-style-type: none"> ➢ Witness prevailing technical and physical conditions → overcome difficulties of <i>ex post facto determinations</i> and avoid expense of reconstructing past events (Chapman, 2006) cf. <i>litigation, arbitration mediation</i>; ➢ Encourage open communication about contentious issues by parties with members (Gerber Ong, 2011 citing Altshuler, 2003); ➢ Allows members to be well-positioned to understand project’s unique characteristics and identify conflicts early to help parties avoid disputes; ▪ Availability at regular intervals to confer with parties if necessary; o Presence of DRBs: Clear signal of commitment to dispute avoidance and fair resolution (Duran and Yates, 2000); 	<ul style="list-style-type: none"> o No mention of <i>avoidance</i> or <i>prevention</i> of conflict, with focus on real time resolution (cf. DRBs with express role in dispute avoidance); o DAAB may provide informal advice to provide assistance and/ or resolve any issue/ disagreement that may have arose between parties during performance of contract on joint request of parties (CI 21.3 FIDIC) <ul style="list-style-type: none"> ▪ Occurs on <i>without prejudice</i> basis; ▪ May take place during any meeting, site visit or otherwise, but ▪ Unless agreed otherwise, both Parties must be present at such discussions; o Parties not bound by such informal advice, and DAAB not bound in any future DR process by any informal advice given prior to formal hearings; <ul style="list-style-type: none"> ▪ Nonetheless, there is a concern in future proceedings regarding same matter that not just about presenting <i>merits</i> of argument, but having to change DAAB’s mind about what they had previously indicated at informal meetings (i.e. where DAAB had given informal advice on how problem can be resolved); 	<ul style="list-style-type: none"> o DRA attempts to change <u>traditional adversarial culture</u> on construction sites through two distinct stages: (1) Pre-contract phase: DRA is an independent consultant (different from DRA in construction phase) <ul style="list-style-type: none"> ▪ Educate on effective use of DRA to <i>avoid</i> and <i>resolve</i> disputes → provides parties with confidence that everyone committed to dispute avoidance, possibly result in lower tenders; ▪ Takes on competitive dialogue model by ensuring that parties understand the <i>nature</i> and <i>full requirements</i> of project, and <i>potential complexities</i> that might arise; ▪ Separate interviews (of owner, designated project manager, designer, other consultants, head contractor) conducted by consultant on parties’ views on project ‘hot spots’ and proposed contractual machinery for resolving disputes → culminate in a <i>report</i> identifying <i>likely areas of dispute</i>, and <i>parties’ views on risk allocation</i>; ▪ Consultant might recommend a reallocation of key areas of risk, or any modifications to proposed construction contract

	<ul style="list-style-type: none"> ▪ Promotes atmosphere of trust necessary for <u>effective</u> and <u>open communication between parties</u>; ▪ Changes in parties' behaviour to maintain credibility in front of esteemed members of the industry; more likely to adopt more credible positions and not bring vexatious actions; ○ Approach can take the form of – <ul style="list-style-type: none"> ▪ Encouraging parties to <u>identify potential project 'hot spots'</u>; ▪ Encourage senior project personnel to prepare <u>joint presentation</u> outlining <i>potential claims and dispute</i>, and <i>proposed solutions to outstanding issues</i> → lay foundation for positive working relationship, collaboration and cooperation; ▪ Encourage parties to <u>refer conflict to DRB</u> for resolution in timely manner; 	<p>→ arguably <u>not best practice</u>, but perhaps a <i>step in the right direction</i>?</p>	<p>(2) Construction phase: DRA is an independent expert (experienced in <i>particular</i> type of construction)</p> <ul style="list-style-type: none"> ▪ Required to be <u>familiar</u> with project and participants through <u>regular site visits</u> and <u>meetings</u> at <i>monthly intervals</i>; ▪ Permitted to <u>communicate with parties on ex parte basis</u> (cf. other DAPs): <ul style="list-style-type: none"> ➢ Would not violate principles of <u>due process</u> and <u>fundamental fairness</u> because DRAs <u>never</u> involved in evaluating merits of the dispute; ➢ Necessary for deciding on appropriate form of dispute resolution for the particular dispute → allows them to gain insight on parties' views that they might not be inclined to share on open forum
<p>Dispute resolution role</p>	<ul style="list-style-type: none"> ○ DRB provides '<u>real time</u>' dispute resolution system for unavoidable disputes (Gerber and Ong, 2011); <ul style="list-style-type: none"> ▪ Proximity of <i>hearing to dispute</i> is crucial: prevents unresolved conflicts from festering into <u>severely strained working relationships</u> and <u>entrenched positions</u> and <u>drain on financial resources</u> → keeps hostilities to a <i>minimum</i> and preserves good working relationship (Gerber and Ong, 2011) ○ Takes the form of – <ul style="list-style-type: none"> ▪ Parties <i>formally</i> referring dispute for <u>formal DRB hearing</u> (more like a <i>site-meeting</i> cf. trial) after exhausting negotiations; ▪ Both parties afforded opportunity to explain their position regarding matters in dispute, can bring forward correspondence and other materials to assist DRB in conclusion (Gerber and Ong, 2011) i.e. more <i>inquisitorial</i> than adversarial, focuses on finding truth; ▪ DRB issues <u>non-binding recommendation</u> within short time frame, drafted to convince both parties to accept <u>merit-based</u> recommendations (DRBF Manual); <ul style="list-style-type: none"> ➢ <u>Non-binding</u> nature: Supports, rather than supplants negotiation between parties (Gerber and Ong, 2011); 	<ul style="list-style-type: none"> ○ DABs also provide '<u>real time resolution</u>' of conflict (similar to DRBs) ▪ <u>Standing DABs (Dispute Adjudication and Avoidance Board DAABs)</u>: Conversant with site developments through <u>regular site visits</u> and <u>meetings with parties</u> → current model (as per <i>FIDIC 2nd ed</i>, 2017) <ul style="list-style-type: none"> ▪ Parties can refer dispute to board for <u>binding decisions</u> ▪ <u>Ad Hoc DABs</u>: More like an arbitrator, likely to take longer to deliver decision because not familiar with project and parties' relationship dynamics: <ul style="list-style-type: none"> ▪ Parties will need to expend more <i>time, effort</i> and <i>money</i> to ensure ad hoc DAB is adequately informed of <i>all</i> aspects because no prior ongoing involvement with project → less likely for decision to be accepted by parties; no confidence; ○ Takes the form of – <ul style="list-style-type: none"> ▪ Rigid and structured DR process: <i>Writing and time requirements (C1 21.4.3, FIDIC (Red Book), 2017)</i> → more legalistic (cf. DRBs) <ol style="list-style-type: none"> (1) Formal <u>notice of dispute</u> (NOD) must be issued to the DAB by either party → other party then has <u>21 days</u> to respond with position regarding dispute; (2) DAB has <u>84 days</u> to make investigations, conduct hearing (if required) and provide <u>reasoned decision</u>; (3) If either party dissatisfied → give <u>notice of dissatisfaction</u> within <u>28 days</u> – if not, decision becomes <u>final and binding</u> (unless overturned by arbitration) ▪ DAB issuing <u>binding decisions</u> (cf. DRBs' non-binding recommendation) <ul style="list-style-type: none"> ➢ More <u>strictly regulated</u> and <u>formal</u> approach; but may result in <u>delayed involvement and/or decision of DAB</u>, to the detriment of the project(Boucly, 2008) 	<ul style="list-style-type: none"> ○ DRA does <u>not</u> resolve dispute, but instead helps parties choose/ recommends most appropriate form of ADR (<i>mediation, mini-trial, expert determination</i>) while playing <i>no role</i> in evaluating merits to dispute; <ul style="list-style-type: none"> ▪ Risk with DRBs and DABs is that once non-binding recommendation/ binding decision made – losing party will be unhappy; and harder to maintain positive relationships with both parties; ○ Takes the form of – <ol style="list-style-type: none"> (1) Conflict between parties arises: DRA recommends most appropriate form of ADR) → 28 days; <ul style="list-style-type: none"> ▪ Site representatives engage in negotiation, and if resolution cannot be achieved, issue a <u>formal notice of dispute</u> that triggers DRA DR process; (2) Parties participate in ADR → 14 days; <ul style="list-style-type: none"> ▪ Where conflict remains <u>unresolved</u>, DRA then prepares a <u>report</u> (neutral summary) of <i>each party's viewpoint</i> and <i>his/ her recommendations</i>; ▪ Designed to assist <u>senior project personnel</u> to decide on best approach of dispute resolution; (3) Negotiations between senior staff → 14 days; <ul style="list-style-type: none"> ▪ Senior staff = executives <u>not</u> directly involved e.g. Executive Director of the Contractor, Director of Government Department etc. ▪ Where disputants unable to negotiate and arrive at settlement → dispute referred to <u>short-form arbitration</u> ▪ DRA then helps parties to choose a <u>technical arbitrator</u> suitable for the particular dispute

STAGE 3: Tertiary Prevention - Choosing appropriate form of ADR (when dispute arises)

	MEDIATION <i>Facilitated negotiations where parties meet with mediator to explore settlement options</i> (Non-binding) (Facilitative/ Evaluative)	SENIOR EXECUTIVE APPRAISAL (SEA) <i>Panel made up of 1 SE from each side + 1 independent 3rd party; strives to achieve commercial solutions</i> (Enforceable agreement if settlement successful; if not non-binding) (Determinative)	EXPERT DETERMINATION <i>Expert gives authoritative opinion based on his/ her knowledge and experience (cf. exclusively evidence)</i> (Binding/ Non-binding) (Determinative)	EARLY NEUTRAL EVALUATION (ENE) <i>Independent neutral 3rd party analyses facts, evidence and legal merits of dispute to give <u>non-binding</u> evaluation</i> (Determinative)	HYBRIDS <i>Move from facilitative → more evaluative/ determinative models if necessary</i>		
					MED-ARB	ARB-MED <i>Most efficient when streamlined</i>	CSP
TIME		Considerable time as compared to other forms of ADR, because requires the ongoing presence/ involvement of Senior Executives from each disputant; depends on how much time given to parties to make presentation outlining position (2–30 days)	Relatively expeditious and inexpensive assessment of facts/ law at the heart of disagreement; Expert gives parties written determination within 14 days after conclusion of hearing/ submissions	Legal practitioner: Has to be very thorough in preparation for presenting client’s case to evaluator; Vic SC: Without prejudice hearing does <u>not</u> exceed half a day (3 – 5 hours) Vic MC: ENE < 3 hours, each party given 60 min to explain their case	Delays reduced by allowing parties to move immediately into binding DR process if mediation does not → settlement;	Considerable time spent to prepare for and conduct both processes	Relatively short, intense period of joint activity to get reliable ‘snap shot’ of likely end result
COST	Least cost intensive , but parties often see it as a stepping stone – requiring more than process utilized to achieve a resolution	Can be quite substantial (cf. other forms of ADR) given time commitment required by senior executives , and lawyers in preparing for these ADR processes o But arguably a worthwhile investment in large, complex construction disputes	Might be <i>relatively</i> cheap while providing guidance on discrete liability questions	Swift and inexpensive means of obtaining views of a judge	Likely to be most expensive because both med and arb are conducted	Disproportionate amount of time & money spent <i>preparing</i> for, and <i>conducting</i> essentially two processes	Can be expensive given time commitment required by senior executives , and lawyers in preparing for these ADR processes
PREDICTABILITY	Facilitative mediation: Least interventionist methods – giving parties more control	Least interventionist methods – Parties retain control over dispute, rather than handing over to lawyers (committed to finding legal remedies over commercial solutions)	Binding ED: Parties do not retain <i>ultimate</i> control on resolution; Non-binding ED: Parties free to <i>accept, reject</i> or <i>use expert opinion as basis</i> for future negotiations				Least interventionist methods – giving parties more control
CREDIBILITY		Negotiation outcomes stem from private negotiations between senior executives (central players) w/o influence from parties’ lawyers to negotiate resolution; 3 rd party (should have knowledge in applicable law and skilled in conducting negotiations) only acts as mediator/ facilitator , and may offer <i>likely outcomes</i>	Lies in hands of parties to pick qualified DM. Neutral third party has <i>expertise in specific area</i> of the dispute → credible, authoritative opinion on disputed technical fact. Expert makes decision based on evidence presented, own inquiries and own knowledge and expertise	While more <i>persuasive</i> if judge because of authority and standing , more efficient and effective if (senior) legal practitioner. Any ENE → within court process, likelihood of obtaining suitable judge is slim i.e. Vickery J TEC List			No neutral third party – lawyers need to work well together to steer the process;
EFFICIENCY (TIME + COST) = SATISFACTORY SOLUTION		Lawyers excluded from negotiating process to avoid turning a business problem into a legal one ; likely to be quite efficient because negotiating parties are well-positioned to make hard commercial decisions & conversant with business; but ultimately rely on parties finding settlement	Relatively expeditious and inexpensive assessment of facts/ law at the heart of disagreement;	Hearing does <u>not</u> exceed half a day, and evaluator may give oral/ written evaluation at conclusion of hearing	Benefit in knowing that there will be a final resolution of the dispute by the end of process; but timing problem	Benefit in knowing that there will be a final resolution of the dispute by the end of process; but timing problem	Relatively short, intense period of joint activity to get reliable ‘snap shot’ of likely end result; but ultimately rely on parties finding settlement