



# **Dispute Resolution Board Foundation**

**Fostering common sense dispute resolution worldwide**

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## **Guidance on the Use of Dispute Boards in Public Private Partnership (PPP) Projects**

### **Introduction**

The Dispute Resolution Board Foundation (DRBF) is a nonprofit organisation dedicated to promoting the avoidance and resolution of disputes worldwide. In early 2016, a task force was established of DRBF members with experience of public private partnerships (PPPs) across multiple countries worldwide<sup>1</sup>. Its brief was, following on from a similar exercise in the US and Canada<sup>2</sup>, to review and provide guidance on the use of Dispute Boards in public private partnership projects (PPPs) elsewhere in the world, in recognition they are structured and operated very differently outside the US.

In the early 1990's, private finance began to be used in public projects in the US and UK after a long period where such projects were funded by public money. Elsewhere, PPPs in the form of concession arrangements, where the private sector takes over a public body's responsibility to deliver services to the public, have been in existence for over a century.

The benefits of PPPs are that they deliver, for the public sector, projects which they would not be able to afford otherwise. As these projects and the duration of the contracts underpinning them are for a lifetime, parties are incentivised to focus on the sustainability and the life cycle of the project. PPPs are an increasingly popular form of procurement for infrastructure and major development projects, and operate differently in many countries to those in the US and Canada. There is also a belief that risk sharing with a private partner delivers better "value for money" for the public authority and the public.

PPPs can take different forms and are at various stages of development in many countries. As far as form is concerned there are two main types - the concession arrangement, where the provider of the public service is paid by the user, and the availability-based arrangement where the public body pays the private company a fee for providing the asset or service. These are described in more detail below. In Northern Europe, the availability-based PPP is well known and the concession arrangement is not. In Continental Europe the concession arrangement is the most familiar. This is

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<sup>1</sup> A working group consisting of Lindy Patterson; Marc Frilet; Serge Bodart; Arent van Wassenaeer, and Paul Karakezi was formed. Amongst them they have experience of PPPs in UK; North, South and Eastern European countries and Africa. This group has taken soundings from DRBF members in South America and elsewhere; it has not been possible to obtain all countries' experiences and those who have relevant experience to contribute are encouraged to do so. Comments on the paper can be sent to DRBF Executive Director Ann McGough at [amcgough@drb.org](mailto:amcgough@drb.org).

<sup>2</sup> A paper entitled "[Recommended Best Practices for Use of Dispute Review Boards \(DRBs\) on Public Private Partnership Projects in the US and Canada](#)" was published on July 21, 2015. A copy is available from the DRBF.

also the one most used in South America and in Africa, where they have used concession type arrangements for over 50 years.

This paper looks at the areas of risk or friction points in such projects; how Dispute Boards (DB) might assist, and how these Boards might be introduced into the PPP model in a way that allows them to resolve issues; maintain relationships and avoid formal proceedings.

**What is a PPP?**

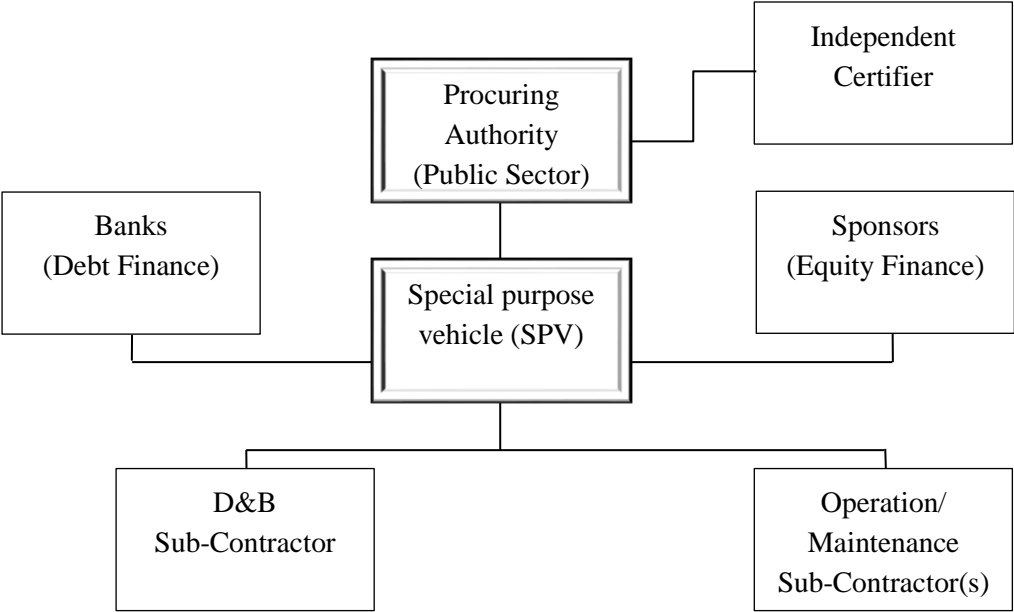
A PPP can be defined as a contract between a public authority or government and a private partner for provision of an asset which the private partner finances; designs, builds or rehabilitates and from which services are delivered to the public. According to the type of PPP, this is paid for by the public authority by means of some form of fee over the lifetime of the contract or from service users’ fees or a combination of both. In summary, it is used where delivery of public services involves private sector investment in infrastructure. The fundamental feature of PPP is the provision of infrastructure and services from that infrastructure by a private entity to or on behalf of a public entity.

Typical sectors which use the PPP model are energy; transport, such as ports, airports, tunnels, highways bridges and railways; water and sanitation; and urban services including accommodation based projects in education, sport, health, and prisons. As stated above, there are two principal models of PPP.

The first is referred to as an availability-based PPP and the second, a concession PPP.

**Availability-Based PPP**

The diagram below identifies an availability-based PPP structure.



This has the following basic features:

- The private sector party contracting with the public sector will normally be a limited company set up specifically for the project by its funders/shareholders known as a Special Purpose Vehicle (SPV). It is also called the “project company.”
- The SPV is required to design, construct, rehabilitate, operate, and maintain infrastructure or an asset which is the basis of a public service.

- The SPV will use **private finance** to fund the upfront construction costs. The usual split is around 80:20 to 90:10 in favour of private debt, with the smaller percentage coming from private equity from SPV members. In less developed countries this may come from multilateral banks such as The World Bank, other international funding agencies, or development agencies.<sup>3</sup>
- The SPV will be paid a periodic fee (the service fee or availability fee) by the public authority from the point at which the contracted asset is available for use. This is often called the availability fee. This will include principal and interest payments on the debt, a return to the private sector shareholders and an amount for the services delivered.
- The SPV's only income is the availability fee. This is paid according to the extent that the asset is available for use or services provided in accordance with contractually agreed service levels.

The services will be provided against an output specification rather than an input specification. The output specification will have measurable standards against which performance is assessed with a right to apply deductions/penalties where these standards are not met. These deductions are usually taken from the availability fee.<sup>4</sup>

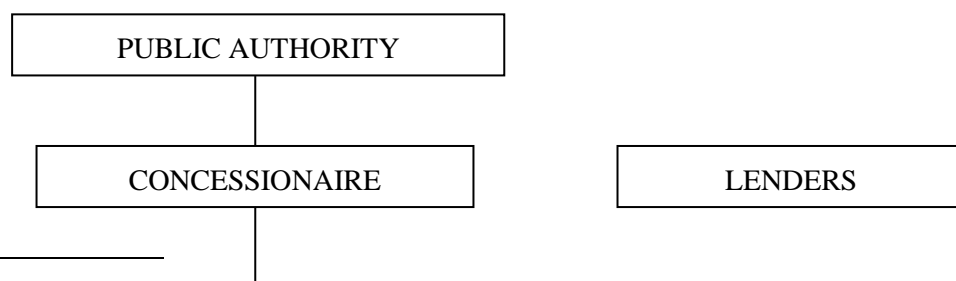
The SPV will enter into a contract or series of contracts (which are sub-contracts in effect) with the design and build contractor and the operator of the asset. These contracts sub-contract most of the risks which the SPV has assumed from the public authority to these parties and in turn any deductions in payment made by the public authority. That “pass through” or sub-contracting of risk will be insisted upon by any lenders to the project. Historically the sub-contracting of the services was to more than one company with a separation of services between, for example, hard services (such as maintenance of fabric and structure); soft (cleaning, security etc.) services and lifecycle (replacement of parts of the asset in accordance with its life cycle).

Multiple interfaces have the potential to produce disputes and therefore constitute a risk to the project. The trend in more mature markets is for the sub-contractors to jointly assume such risks with any issues as to where ultimate responsibility arises remaining between them rather than with the SPV. Alternatively the SPV may sub-contract all services to only one services provider.

The aim of the public body throughout is to divest itself of all risk in this structure to the SPV. The aim of the SPV is to divest as much risk as possible to the sub-contractors.

### Concession PPP

The diagram below indicates a concession type arrangement.



<sup>3</sup> It is recognised that in countries where PPP is a new concept, private investors will be unlikely to fund construction and operation unless the economic and financial business case is strong and the investment climate sufficiently mature. For example, where the returns on investment are difficult to assess or where the risks are perceived to be too high, consideration is being given to “blended finance” where public funds, for example from the multilateral development banks, might provide the first layer of finance which gives the private sector confidence to invest themselves.

<sup>4</sup> An example is the construction of solar farms in north east Thailand where the IFC in 2011 provided an \$8m commercial loan blended with a low interest loan from CTF, a climate investment fund backed by several governments. This gave the local banks confidence to lend a further \$14m. By 2015 the company had attracted \$800m of investment with all but the original loan from private funders.

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## SHAREHOLDERS

In concession PPPs there is delegated to the SPV the full operation of a public service such as a highway; bridge and tunnel operation and maintenance; railways; urban public services; power production; stadium and arenas. The SPV is in direct contact with the end users of the services.

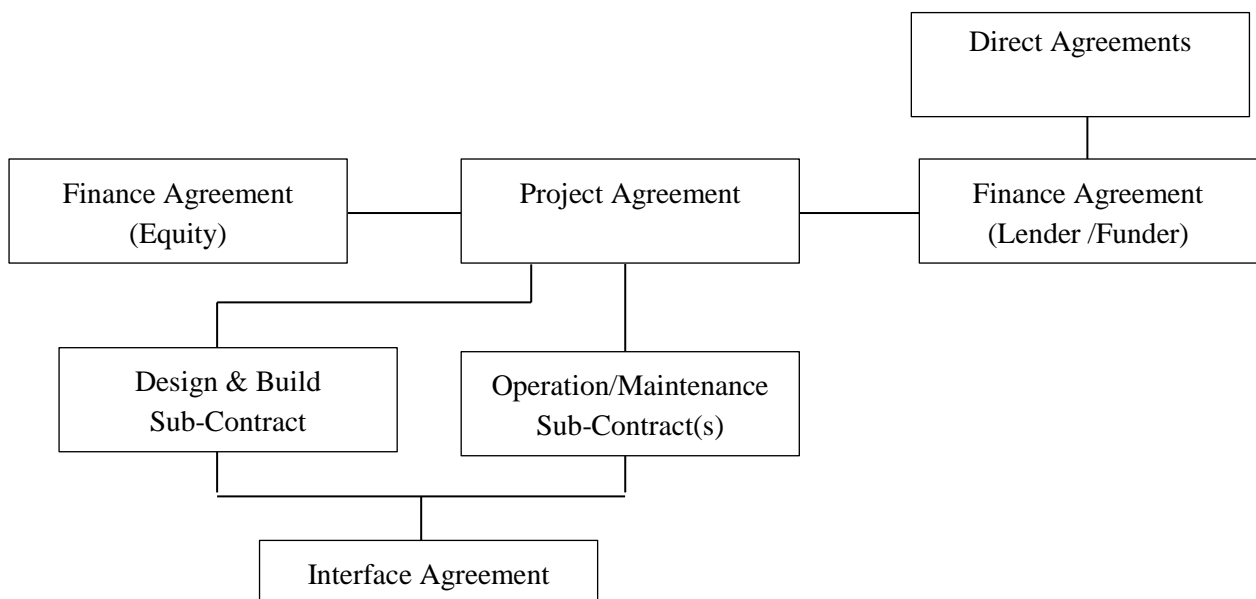
It in turn receives fees from the users of such services from whom it recovers its investment entirely or almost entirely e.g. road tolls. The SPV therefore takes the risk of the sufficiency of such fees to recover and give it a return on its investment. It also takes the risk over the lifetime of the project that it can meet and adapt to the changing demands/needs of the end user, in a way that the availability based PPP does not. In availability-based PPP it is for the public authority to require any changes of service from the SPV and the project agreement and sub-contracts will set out how that will be compensated.

### Typical PPP Contract Framework

Before looking at the risks inherent in these types of PPPs it is useful to understand the typical contractual matrix for each of the above models as the number of parties with interests in a PPP require a greater number of contracts than does a typical design and build or design, build and operate contract.

This form of procurement is more complex than conventional public procurement principally because of the public services that are being delivered, the length of the procurement, and the strong influence that lenders have on allocation of risk in these projects.

The diagram below indicates a typical contract matrix with a number of agreements and therefore interfaces that require to be managed.



The Project Agreement is the head contract between the public authority and the SPV. Its duration will typically be between 20 and 50 years. The design and build obligations within the Project Agreement are sub-contracted by the SPV to the design and build contractor. The service delivery obligations are sub contracted to the operation and/or maintenance sub-contractor. The public

authority has no direct contract with the sub-contractors even although in practical terms it may have significant interface with them once the asset is operational.

The public authority contractually looks to one party for delivery of the services, that is, the SPV. The Project Agreement will set out the standards against which the service delivery is measured, for example, in availability and performance terms. The Project Agreement will provide a mechanism for reductions in payment where these standards are not met. Where the problems are chronic or recurring this can lead to early termination. Where private lenders are involved these reductions will be “passed on” to the sub-contractors. The aim in that situation being that the SPV is “held harmless” so it is not bearing any financial risk.

In some availability-based PPPs, there will be an agreement amongst the sub-contractors, as referred to above, where they jointly assume liability for the reductions<sup>5</sup> and then reallocate such liabilities amongst themselves in accordance with underlying liability. The contract that provides for this is known as the interface agreement.

As events which give rise to multiple deductions can constitute an act of default under the Project Agreement giving the public authority rights of termination, there remains significant risk to the SPV of non-performance by its sub-contractors. The SPV throughout remains liable to the public authority even although its role may only be to provide the financing.

There are certain direct agreements between the SPV’s lenders and the public authority and between the lenders and the sub-contractors. The lenders to the project will seek to ensure that all risk has been allocated clearly and that suitable remedies have been included in the project documents to protect their position. They will want direct agreements with each of the parties contracting with the SPV to ensure that the Project Agreement or sub-contracts do not immediately fall away if the SPV is in breach of its obligations under them. The lenders will have the right to step into the Project Agreement and/or the sub-contracts. For example, this might arise where the SPV is in breach or one of the sub-contractors has become insolvent giving rise to termination risk by the public authority. In those circumstances the lender has the option to “step into” the SPV’s place in the Project Agreement to preserve the asset.<sup>6</sup>

In concession PPPs the contract structure is less complicated. The concessionaire is often the SPV and it is this company which retains responsibility for delivering the service. At most, these services may be sub-contracted to the SPV shareholders. Beyond that, the SPV does not “pass through” the risk in the same way that the SPV does in an availability-based PPP.

## **Risk Allocation**

Much work is currently being done on the risk allocation in PPP projects. Some of the issues around risk allocation will arise regardless of whether the contract is a PPP model.<sup>7</sup> However, as is evident from the PPP structures described above, there are obvious friction points with these projects.

## **Pressure Points/Identifiable Risks in PPPs**

Some of these risks would arise under other procurement methods, for example, a design and build or design, build and operate contract, but they have a greater impact under PPP because of the length of the project period and/or the fee basis. Other risks are unique to the PPP structure.

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<sup>5</sup> In practical terms, the sub-contractor which is due payment by the SPV at the point that the SPV has a right to apply the deductions, will suffer the reduction from its payment.

<sup>6</sup> “Step in” rights are very seldom exercised as any lender “stepping in” must meet any pre-existing obligations, the extent of which may be unknown at point of step in. However, a lender will insist on having such rights.

<sup>7</sup> See European PPP Expertise Centre PPP Guide 2015 <http://www.eib.org.epec>.

This assessment of the key risks is based on the experience of those involved in PPPs in some of the countries listed in the appendix.

It should be noted that we do not differentiate between PPPs in countries with civil law background from those with a common law background. The generally accepted view is that these differences do not matter when it comes to general risk allocation. What is more important is the stage which a country has reached in developing these models.

### **Key Risks: Up to and During Construction Phase**

- Allocation of pre-construction risk of permits; rights of way; expropriation.
- Changing user demands; changes in law; political risk.
- Interface between the design and build sub-contractor and the operation and maintenance sub-contractors, for example, where performance outputs do not meet the required standards.

### **Key Risks: Operation and Maintenance Phase**

- Interface between design and build or and operation/ maintenance sub-contractors (as above)
- Changing user demands; changes in law; political risk.
- Length of contract period.
- Hand back of asset.

### **Key Risks: Throughout the Project**

- The approach of the public body/SPV/lenders to risk transfer i.e. that all risk has been passed down to the sub-contractors.
- Lack of experience of public authorities in preparation for and management of long-term contractual relationships.<sup>8</sup>

There are certain common themes relative to risk allocation and therefore potential areas of friction. We identify five central issues namely (i) how to make PPPs resilient in times of change; (ii) the multi-party nature of an availability based PPP with its large number of interfaces to be managed; (iii) the public authority's often unrealistic expectations of such projects and, in concession arrangements, the public's demands and expectations; (iv) the measurement of the output and (v) the project's lifetime which can be up to 50 years.

### **Adaptability and Resilience in Times of Change**

A huge issue for PPPs is the ability within its structure to deal with major changes. Some changes can be dealt with within the Project Agreement. For example, changes in work scope can be instructed as variations and the Project Agreement will provide as to how these will impact on the availability fee and the prescribed outputs. Other changes which may be imposed upon the parties may not be able to be accommodated within the contractual structure. For example, changes in the economic environment when debt becomes more or less expensive may have an impact on services.

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<sup>8</sup> See UK National Audit Office report on High Speed Rail Link HS 2 of June 2016 [[www.nao.org.uk/report/progress-with-preparations-for-high-speed-2](http://www.nao.org.uk/report/progress-with-preparations-for-high-speed-2)].

There may be changes in public demand and the political climate. The terms of a contract, no matter how detailed, cannot deal with such external pressures or influences.

### **Multiple Interfaces**

One of the challenges with availability-based PPPs is the number of contracts and therefore interfaces among the parties. Wherever an interface exists there are issues of allocation of risk. None more so than in PPPs. As a result, some very complicated contract terms have been devised in the mature PPP market to deal with these interfaces. For example, the concept of complete “pass through” of service fee reductions by the SPV to whatever sub-contractor is in place at that time regardless of where the ultimate liability lies. This is even the case where the deductions are not justified under the Project Agreement - it is “pay now, argue later”. This has a real influence on parties’ behaviours, not always for the better. When disputes arise in mature availability-based PPPs they tend to come “bottom up” from the sub-contractors to the SPV, on the basis that the sub-contractor is at the end of the payment chain and deductions stop with them. Dispute resolution provisions in standardised Project Agreements and associated contracts tend not to have been drafted with that in mind, as explained more fully below.

Issues as to multiple interfaces do not arise in the same way with concession PPPs.

### **Public Authority Expectations**

In availability-based PPPs one of the biggest risks can be the belief of certain public authorities that, because it is not its own capital project, all risk lies with the SPV. This is then perpetuated by the SPV being obliged, because of how it is funded, to pass all such risks down to its sub-contractors. This is because of the insistence of lenders to the SPV that it, the SPV, is kept practically free from risk. This can compromise any collaborative culture in trying to resolve issues around service delivery, and user expectations. The SPV is usually not resourced itself to manage these projects, relying almost entirely on its sub-contractors project managing the delivery. Pushing down the risks through application of deductions to sub-contractors can result in the SPV and the funders believing that there are no live issues to address. This can mean that any dissatisfaction of the public authority/end user is not identified before it starts to have an effect on the sub-contractors’ cash flow and therefore performance through service fee deductions.

To take an example, a design and build contractor delivers a waste water plant to the operator under a PPP. The operator, despite being involved in the performance tests at completion, complains several months later that the plant does not work as needed and it cannot achieve its performance standards without major additional work. The design and build contractor has been paid its sub-contract price in full. The SPV withholds part of the annual payment from the operator because of its failure to meet specified performance standards. The operator is left contractually to make a claim against the design and build contractor under an interface agreement, with no involvement from the SPV. Because the operator is left short of funds and having to pursue the design and build contractor, it is dis-incentivised from working with the SPV to maximise the value/capacity of the plant. The relationship with the SPV and the most efficient effective means of operating the plant are both at risk.

In the situation outlined above, the lenders priority is to keep the SPV “whole”. It is key to its funding agreement that the deductions made by the public body are passed down in full to one of the sub-contractors regardless of whether that sub-contractor is the party responsible for the problem. If the deductions reach a certain level, this will be an event of default under the lending agreement which has significant consequences, leading to possible termination of the Project Agreement and potential SPV insolvency.

In a concession PPP there is a complete transfer of risk from the public authority to the SPV as, in reality, the SPV steps into the place of the public body as service provider.

### **Measurement of the Output**

One of the differentiating factors of an availability-based PPP is that its success is dictated by how and to what extent it achieves defined outputs. A key element of the PPP contract is the output specifications or standards and the matrices by which their success or failure is measured. They are linked to the payments made under the contract as deductions are applied for failures to meet the availability and performance based outputs. Recurring deductions will constitute acts of default with associated termination risk. In countries with more developed PPPs, a significant number of disputes arise on the interpretation and application of these outputs and the methods of measurement. It is recognised that applying a “legalistic approach” to the operation of the Project Agreement or sub-contracts when such issues arise is unlikely to achieve the best outcome for the project.

### **Length of Project Period**

There are risks arising from the length of project period particularly in concession PPPs. Typical contract periods are upward of 20 years – sometimes 30 years and over. In concession agreements the level and expectations of the public service to be delivered by the concessionaire undoubtedly change over the contract period. The concession agreement often does not regulate how this is done or the implications for the concessionaire. In the availability-based PPP the challenges of a long contract period include the life cycle of the assets. Compensation for changes in the law will often be regulated by the project agreement. However, policy changes in the sector, which fall short of legislation, may also have significant financial implications on delivery of the services. These would include for example employment law changes. Often the Project Agreement is completely silent on this.

PPPs are output based and such outputs may require to be adjusted to reflect changing demands and trends as referred to above.

### **Potential for Disputes**

As is evident from the above, the potential for disputes among the parties is high. The imperative to avoid such disputes and maintain working relationships over the lifetime of the project is even greater than in a typical contract situation.

How do existing PPPs deal with dispute prevention in the PPP contract structure?

In the countries where PPP is well developed, standardised and often mandatory forms of contracts have been developed for these projects. Often there are different mandatory forms depending on the sector or nature of the project. The contracts can be extremely complex and detailed. There is little opportunity for negotiation of core terms. Whilst principles of equity may be applied to disputes in certain jurisdictions, there remains uncertainty of outcome. The dispute avoidance provisions normally include some form of escalation process where issues are first aired between the parties at increasing levels of seniority. They then may require mediation with the ultimate forum either arbitration or litigation.<sup>9</sup>

The aim of the draftsman in the availability based PPP is to provide for the same dispute resolution process in each contract in the project, with only some minor differences, to avoid any contradictory decisions on the same issues. This requires complex provisions which bind the design and build contractor and the operation and maintenance contractor into the dispute resolution process and outcomes in the project agreement. There are very few PPPs which have any ongoing dispute avoidance provisions.

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<sup>9</sup> In the UK there is a fast track dispute resolution known as adjudication which is temporarily binding on parties pending ultimate dispute resolution. This is compulsory for construction contracts as defined under UK statute. It has created an anomaly as the legislation excludes the Project Agreement from such a mechanism but the Design and Build contract and the O&M contract (to the extent it includes maintenance) is subject to adjudication. To avoid potentially conflicting decisions in the contractual chain the adjudication procedure is usually, by agreement rather than legislation, also incorporated into the Project Agreement.



In availability-based PPPs most of these standardised dispute resolution provisions have been drafted in anticipation of the public authority initiating a dispute with the SPV first and the SPV then initiating the same dispute with its sub-contractors, usually with some attempt at requiring them to be heard or dealt with together. In fact, experience shows that the bulk of disputes in such PPPs start with the sub-contractors as they feel the effect of a dispute through cash flow. For example, in a case where deductions for non-availability are applied by a public authority against the payment due to the SPV the SPV will pass these down to its sub-contractor by deducting them from sums that would otherwise be due to them. It will therefore usually be the sub-contractor that starts the dispute process against the SPV as its payer, not the public authority or the SPV.

There are Dispute Boards written into certain PPPs. Some of these are, in fact, panels of individuals, technical, financial and legal, who can be called upon to deal with disputes when they arise.<sup>10</sup> These Dispute Boards or panels are what we describe as ad hoc Dispute Boards. Because of their temporary nature and restricted scope to the dispute in question, they do not fulfil any dispute avoidance functions.

In the Netherlands in most PPP contracts, Dispute Boards (predominantly ad hoc) have been agreed to, sometimes for limited types of dispute and in others for all disputes. In those PPPs where subsequent disputes have arisen, the same ad hoc Dispute Board has often been used. Such continuity enables the Dispute Board to play a dispute avoidance role.

In a Belgian PPP, Liefkenshoek railway link, a standing Dispute Board was appointed based on the 2005 model Dispute Board rules developed in the Netherlands (which allow parties to choose from a menu of dispute resolution methods: binding, non-binding, mediation, expert determination). We understand no disputes were referred to the DB.

The World Bank published its “Report on Recommended PPP Contractual Provisions 2015 Edition” and includes provisions for dispute resolution processes, not dispute avoidance. In this it provides a menu of mediation, dispute panels and Dispute Boards. It recommends adopting the New Zealand approach which is to establish a dispute panel as opposed to a Dispute Board. These panels are to comprise 4 members, two appointed by each party. These members are senior representatives of the parties with alternates. The fall back should this not work is referral to an independent expert, where the appointees come from lists in schedules within the Project Agreement.

It is useful to look at experiences beyond the PPP model to contracts of long durations involving a number of parties to see what practices there can usefully be applied to the PPP structure. For example, the FIDIC Conditions of Contract for Design Build and Operate Projects (the Gold Book) requires a Dispute Adjudication Board (DAB) to be appointed for the Design-Build period. This Board does have dispute avoidance functions including visiting the site regularly; offering to give informal assistance etc. Its term ends on issue of the Commissioning Certificate or 28 days after the DAB has given its decision on a dispute, whichever is the later. As the Gold Book also covers the operational stage, the Conditions also provide for a one-person DAB during what it describes as the Operation Service period, this person to be jointly appointed by parties or, failing that, FIDIC. The term of the one-person DAB is five years with a new DAB appointed at the end of each five-year period. The same person may continually be re-appointed for a further four terms by agreement.

The FIDIC Sub-Contract Conditions 2009 for use with the FIDIC Forms of Contract for Building and Engineering Works designed by the Employer (the Red Book) and the Multilateral Development Bank Harmonised Edition of these same conditions (the Pink Book) provide that the sub-contractor will allow its dispute, where it is a related claim to a claim under the main contract, to be referred to the main contract DAB. A sub-contract DAB will separately decide disputes that are non-related claims.

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<sup>10</sup> The situation is different in Australia where a number of standing Dispute Boards have been established on PPP transport projects, such as rail.

The task force is not aware of any sub-contracts in the PPP availability-based model which provide for the same Dispute Board as in the Project Agreement. The task force is not aware of any sub-contracts in the PPP regime which have their own separate Dispute Boards. It would be interested to hear from those who do have such experience. It is aware of certain infrastructure PPP projects in Australia where the standing Dispute Board, constituted at Project Agreement level, bring in the design and build sub-contractors to its meetings to the extent the issues touch upon their sub-contracted works. This is a voluntary exercise rather than mandatory under the respective contracts. It is recognised that the issue is how to bind such third parties into the process. In legal terms Dispute Boards appointed under the Project Agreement will have no authority or status with the sub-contractors unless the sub-contractors have agreed to this in their sub-contract or by means of some form of protocol.

## **Recommendations**

It is the task force's view that using standing Dispute Boards in PPPs would be beneficial to the effective operation and durability of a PPP. Such Boards could recognise and try to respond to issues between the parties before they become disputes. A board would also be able to deal with issues which cannot be dealt with through application of contract provisions, for example the ability of a PPP to adapt to major change in its operating environment.

A Dispute Board could assist in agreeing changes in output and cost. We do not consider that the issue of whether that Board has power to make decisions or to issue recommendations is relevant to this debate as what is important is having a Dispute Board trusted by all parties to the process. It is the dispute avoidance elements of the board functions that are key, not the dispute resolution functions. However, we note in passing that in low and middle income countries the current perception is that recommendations are more acceptable to public bodies.

It is recognised that very different issues arise at construction stage to those in the operational phase and that the skills and expertise required of the board members varies across the lifetime of the project. The task force considers that there are two possible solutions for this.

The first is to have a mixed skill base on the Board, which is often the case in any event. The other is by providing that the make-up of the Board change over the contract period to reflect the changing stage of the project. In any event, given the lifetime of a project, it is extremely unlikely that the same Board members would see a project through to the end. Some form of overlap of members could be provided for that ensured there were always individuals on the board with a history of the project and its issues.

It is the task force's opinion that appointing a Dispute Board (whether it is one which issues recommendations or makes determinations is immaterial for these purposes) only at Project Agreement level may be insufficient in the avoidance of disputes. It is considered that in availability-based PPPs, an effective Dispute Board is one able to engage with all parties with a stake in the delivery of the project i.e. including the sub-contractors and having the authority to do so underwritten by the contracts among the parties.

Using the same Dispute Board across the main delivery contracts would allow a consistent and combined approach to dispute avoidance and, if necessary, dispute resolution. As Dispute Boards are a creature of contract, careful thought requires to be given as to how a Dispute Board could be placed at the heart of a project. One needs to look at the contract matrix to identify how they could be integrated into the project documents. Some suggestions include:

- A. Setting up a Dispute Board at Project Agreement level but allowing the key sub-contractor(s), such as the Design & Build sub-contractor to attend meetings and make any relevant observations; but with no contractual compulsion under the sub-contract.

- B. Including within the key sub-contracts the same dispute board as under the Project Agreement, although recognising there will be issues between SPV and sub-contractor, which do not involve the public authority.
- C. Having the construction and operation and maintenance sub-contractors sign up to a non-binding protocol/ statement of intent regarding co-operation with the Project Agreement Dispute Board and adherence to its determinations/ recommendations.
- D. Including within the key sub-contracts a commitment to co-operate with the Project Agreement Dispute Board; attend their meetings when required to do so and to agree to be bound by any decisions made by them which concern or are related to their own issues with appropriate caveats.

As is evident there are a number of variants. There is no “right” or “wrong” solution. The task force considers the key is engagement between the Project Agreement Dispute Board and parties to the project at all levels of project participation

One question that does arise regularly is the cost of a standing Dispute Board over the lifetime of a PPP project and the perception that the expense is not justified. Putting a figure on the benefits and savings that may be achieved by the presence of the standing DB is challenging. The task force recognises that, unless governments and lenders are convinced of the benefits of Dispute Boards, they will not become part of PPPs and their management structure.

One of the challenges to date with Dispute Boards has been convincing public bodies and funders that the costs of a Dispute Board are minimal when compared with the consequences in terms of time and money of full-blown arbitration or litigation. Sceptics are keen to have “proof” of the benefits – but it is difficult, if not impossible, to prove that a project that has a Dispute Board but no disputes would have had disputes if there had been no Board. However, progress is being made in convincing procuring bodies that Dispute Boards are not part of the litigation process but are in fact a dispute avoidance tool. In the case of PPPs, spreading the cost of a standing Board over the lifetime of the project or a major part of it can be achieved by including it in the financial model<sup>11</sup> at the commencement of the project. This would mean that the impact on the fee paid by the public body would be almost imperceptible.

## **Summary of Recommendations**

### **GENERAL**

- Use of standing Dispute Boards in PPPs, both concession and availability based, would assist in the effective management of these projects and resolution of key friction points over their lifetime.
- The lifetime of the Dispute Board should extend beyond the design and construction phase to include the operational phase.
- Where it is not considered economic or practicable to have a Board over the whole of the operational period, it is recommended to have the board in place as a minimum for the first five years of operations.

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<sup>11</sup> The financial model is the instrument (in a financial spreadsheet or database format) used by the SPV/concessionaire, the authority and the lenders to predict future cash flows and cover ratios. The model is based on predicted capital and operational expenditure and income; it is also used to analyse the effect of change events, such as relief events and refinancing. The cost of a Dispute Board could be included in both capital (during the construction phase) and operational (during the operational phase) expenditure.

- Alternatively, to reduce the size of the Board say from three to one following the expiry of the first five years of operation, renewable say every five years.
- Board members should have appropriate and relevant experience in PPP. Such experience could include, for example, knowledge and understanding of the PPP process and how it is funded. Experience and knowledge in the economic environment of the country and the sector or area of public services in question is also desirable.
- Consideration should be given to refreshing the Board and changing its skill base as the project moves into different phases e.g. to “steady state” after a bedding in period or at price review stages (when there may be adjustment of the price through contract mechanisms such as benchmarking; market testing of the price).
- Engagement of the design and build and operation and maintenance sub-contractors with the Project Agreement Dispute Board and its decisions or recommendations is essential. This can be by a contractual commitment at sub-contract level or some form of agreed protocol.

### **About the DRBF**

*The Dispute Resolution Board Foundation is a non-profit organization dedicated to promoting the avoidance and resolution of disputes worldwide using the unique and proven Dispute Board method. For more information, visit [www.drb.org](http://www.drb.org) or send an email to [info@drb.org](mailto:info@drb.org).*

## Appendix 1

**Countries where PPPs are used** (note this is not an exhaustive list)

Algeria	Morocco
Argentina	Netherlands
Austria	Peru
Belgium	Poland
Brazil	Romania
Chile	Russia
Congo	Senegal
Croatia	Serbia
France	Slovakia
Gabon	South Africa
Germany	Spain
India	Switzerland
Italy	Tunisia
Ivory Coast	Turkey
Madagascar	United Kingdom