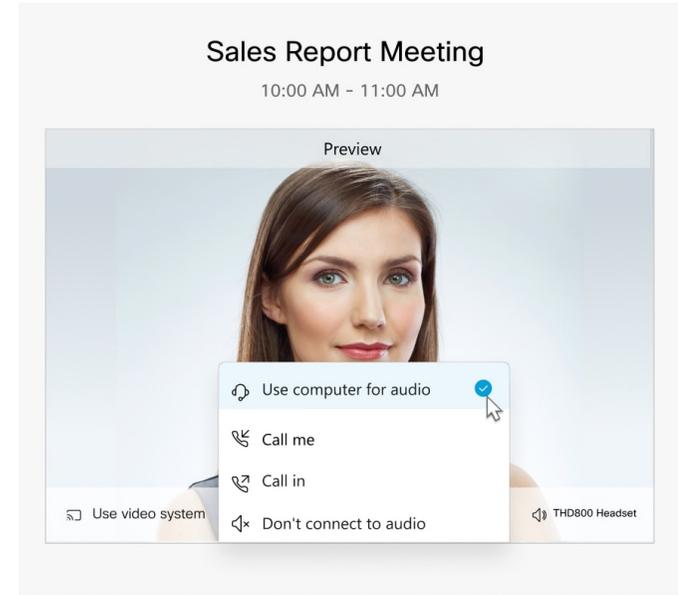
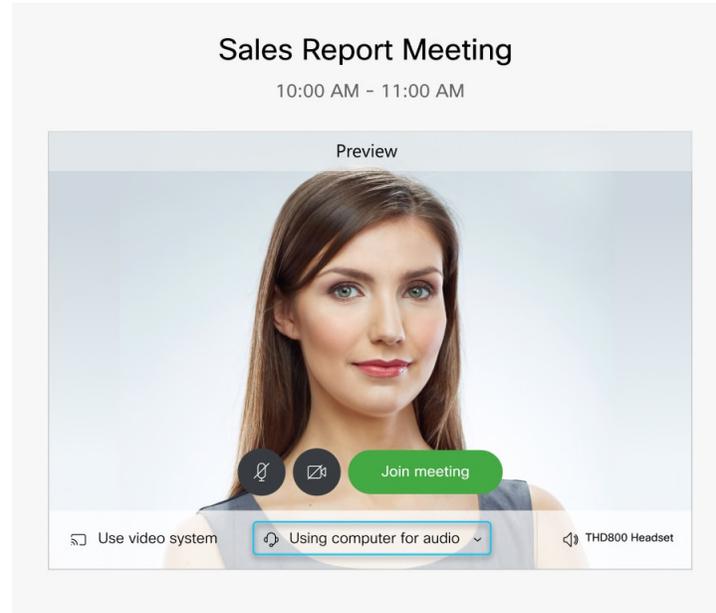


Welcome and thank you for joining us for today's presentation. Our topic is **“Why It’s Smart to Require Dispute Review Boards in Your Agreements.”**

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Why It's Smart to Require Dispute Review Boards in Your Agreements

Presented by:

Sarah Biser, Fox Rothschild LLP
Mark Hess, Fox Rothschild LLP
Roberto Hernandez-Garcia, COMAD, S.C.

James Perry, PS Consulting
Bob Rubin, Construction Disputes, Avoidance and Resolution
Micha Tollman, Pearl Cohen Zedek Latzer Baratz



BOB RUBIN

*Construction Disputes
Avoidance and Resolution*

PEARL COHEN

Pearl Cohen Zedek Latzer Baratz



COMAD
Firma de Abogados desde 1965

Speaker Profiles: Sarah Biser



Ranked by Chambers USA as a leader in construction law for 11 consecutive years, Sarah represents owners, contractors, developers, architects and engineers, both in the United States and abroad, in all stages of the construction process. Co-chair of the firm's national Construction Law and International Arbitration groups, she focuses her practice on large, capital-intensive construction projects, with a particular emphasis on drafting and negotiating contracts for complex and unique construction and infrastructure, as well as litigating disputes involving such projects both in the courtroom and in domestic and international arbitration.



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Speaker Profiles: Mark H. Hess



Mark Hess is a tax partner at Fox Rothschild LLP, specializing in employee benefits and executive compensation. He is a licensed attorney both in Israel and in California. Mark and his family made aliyah from Los Angeles in 2002; since that time he has divided his time between the United States and Israel. Mark is one of the co-chairs of Fox Rothschild's Israel Practice Group. In addition to his U.S.-based practice, Mark advises and assists Israeli individuals and companies wishing to do business in the United States, American individuals and companies wishing to do business in Israel, and American families either considering or making aliyah.



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Speaker Profiles: Roberto Hernandez-Garcia



Roberto got his law degree in 1995 and his Masters Degree (Cum Laude) in 2012 from Universidad Panamericana, Mexico City.

In 1989, he joined COMAD, a prestigious Mexican law firm in the areas of construction law, public procurement and dispute resolution.

He has acted as counselor in transactional and dispute work in projects related to transmission lines, substations, highways, trains and railways and airports, among many others, including the New International Mexico City Airport and the Mexico-Toluca train, considered the two most important public construction projects in the country in the last years.

He has been counsel in projects in Mexico of several leading engineering and construction companies, as well as design and architecture firms from the U.S., Canada and Europe.



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Speaker Profiles: James Perry



Jim Perry is a member of the District of Columbia Bar and has a bachelor's degree in civil engineering. Based in Paris since 1988, Jim works mainly as an arbitrator and dispute board member, but also as counsel, specializing in the construction industry. Jim has served on numerous dispute boards and ICC, DIAC and other Arbitration Tribunals including in Panama, Peru and Guatemala, Central Europe, Central Asia, Africa, SE Asia, Australasia and the Middle East and has experience with dam construction, bridges, port terminals and marine construction, roads, water management, hydro and thermal power plants, oil and gas, rail, and the built environment. Jim is member of the FIDIC President's list of dispute board adjudicators and the immediate Past-president of the Dispute Resolution Board Foundation (DRBF).



Speaker Profiles: Bob Rubin



Bob Rubin is widely regarded for his five decades' experience in complex construction disputes avoidance and resolution. Bob is an early pioneer in the use of dispute boards and has served on, and chaired, numerous such boards. He is Adjunct Professor, Columbia University, faculties of Law and Civil Engineering, where he teaches an interdisciplinary course on construction industry law. He is a member of the New York State Bar and is a licensed Professional Engineer in New York. Bob is Past President of the American College of Construction Lawyers; Past President of the Dispute Resolution Board Foundation; a Fellow of the College of Commercial Arbitrators; and a member of the National Academy of Construction. He is a member of the AAA Construction Mega Project Arbitrator and Master Mediator Panels. Bob received a Bachelor of Civil Engineering from Cornell University and a Juris Doctor from Columbia University.



Speaker Profiles: Micha Tollman

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Micha has worked on many of Israel's largest projects in the transport, energy and defense sectors, including on a PPP/ BOT basis, where he has represented owners, major contractors, the state and consultants deliver the projects, as well as advise on complex construction disputes that arise on such projects.

Prior to joining the firm, Micha was a partner in the Project Finance and Infrastructure department of Yigal Arnon&Co., after having practiced as a construction lawyer with Allens-Linklaters in Sydney, Australia.

Micha's experience covers all sectors and industries, namely: transportation, motorways, railway and intercity rail, ministry of defense projects, civil & marine engineering, ports and harbors, renewable & conventional electricity, conversion of waste to energy and large commercial complexes.



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Dispute Resolution Board Foundation

Fostering Best Practice in Project Management
and Dispute Resolution Worldwide

Dispute Resolution Board Foundation. *Moving projects forward* since 1996.



Dispute Review Boards

- Three independent and impartial people selected by parties.
- Established at the beginning of a project.
- DRB engages in regular visits to site.
- Actively involved through construction process.
- DRBs should be considered as being part of the project team.
- DRBs issue recommendations; may become binding.
- Internationally, DABs issue binding but not final decisions.

History of Dispute Boards

1970s: Tunneling industry conducted studies on new approaches to dispute resolution

1975: First DRB used on second bore of I-70 Eisenhower Tunnel

1981: First international DB, El Cajon Dam, Honduras

1992: FIDIC issues DAB Supplement to the 4th Ed. Red Book

1995: The World Bank makes DBs mandatory for all World Bank-financed projects in excess of US \$50M

1996: Dispute Resolution Board Foundation established; Dispute Board Manual published



History of Dispute Boards

- 1997: Asian Development Bank & European Bank for Reconstruction & Development adopt DB approach
- 1999: FIDIC rainbow suite introduces Standing and Ad Hoc Dispute Adjudication Boards
- 2004: ICC introduces DB rules (DRB/DAB/CDB)
- 2005: WB (on behalf of all development banks/multi-lateral lending agencies) with FIDIC develop “harmonised” set of conditions with a DB
- 2006: 9 Multilateral Development Banks adopt DBs, and ICC and ICE publish DB Rules

History of Dispute Boards

2017: FIDIC rainbow suite 2nd edition. Standing DAABs only.
Ad Hoc DABs eliminated

2020: WB expands use of DBs to assist with monitoring of
SEA program. Result: WB will ensure early
appointment of standing DBs

Other Notable Users

- Millennium Challenge Corporation (USA)
- Japan International Cooperation Agency (JICA)
- European Investment Bank
- Asian Infrastructure Investment Bank (AIIB)
- Olympic Delivery Authority London 2012
- International Thermonuclear Experimental Reactor (ITER)
- Conseil Européen pour la Recherche Nucléaire (CERN)

International Issues

- Bank imposed – not always understood at first by owners and sometimes even by contractors
- DBs appointed late in the project
- Binding decisions, but problem with enforcement
- The next generation of international DBs:
 - International contractors bring the concept home
 - More accent on dispute avoidance
 - Innovation: DB consent decisions
 - Dangers: Escalation into mini-arbitration

Dispute Resolution Board Foundation

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DRB History (cont'd)

- Dispute Review Board (DRB) is a creature of contract. The contracting parties establish and empower a DRB with jurisdiction to resolve disputes.
- DRBs originated in the U.S. and provide a non-binding recommendation.
- Dispute Adjudication Board (DAB) provides for a decision that has interim binding force.
- Combined Dispute Board (CDB) is a hybrid of DRBs and DABs – created under a scheme published by the ICC.
- Although DRBs were born in the construction industry, other industries now use DRBs: financial services, insurance, IT, long-term concession, operational and maintenance contracts.



Why Use a Dispute Review Board

- DRBs are successful!
- Are DRB recommendations (non-binding) useful? Yes!!
 - If the DRB opinion is admissible (as it often is), the arbitrator or judge will be greatly influenced by a decision of a panel of experienced, impartial construction experts who were familiar with the project during construction.
 - It is likely that a DRB opinion will not favor the same party all the time. So, the parties are inclined to honor the favorable decisions even those decisions that favor the opposing party.
- DRB members should be chosen with care – expertise, harmonious relationships and mutual trust?



How Does a Dispute Review Board Operate?

- Routine visits, claims, potential claims and matters of concern are subject to review
- Frequency of site visits: Depends upon the nature and technical characteristics of the work
 - Can be several times a month, once every several months or twice a year. Also, timing can be stipulated in the contract.
- Typical visit:
 - Review of joint schedules of matters of concern prepared by parties
 - Brief progress update
 - Site inspection
 - Each party will provide opportunity to provide DRB with further information on issues
 - Additional sessions with parties during which DRB asks questions, or seeks information about how to resolve differences
 - If a dispute has not been resolved, a hearing can commence once the routine visit is over
 - DRB prepares report and/or recommendation or interim



U.S. DRB Roundup

Northeast - Steady Growth

- NYC, MTA Capital Construction, Second Avenue Subway, E Side Access
- Boston, Central Artery Project
- Pennsylvania
- New Jersey
- Maryland
- DC, Water

South - Moderate Growth

- Florida DOT
- Greater Miami, Airports, Tunnels
- West Virginia

U.S. DRB Roundup (Cont.)

Middle America - Moderate Growth

- Texas DOT Dallas
- Ohio
- Michigan
- Wisconsin
- Chicago, Transit
- Denver

West Coast - Strong Growth

- Oregon
- California, Ca/trans, Convention Centers, Sports, Water, Medical
- LA Metro
- Greater Seattle, Transportation, Universities
- New Mexico

Scattered - Sporadic, P-3 Projects

U.S. DRB Issues

Defining Features

- Lack of Uniformity
- Defined Solely by Contract
- No Governing Statutes
- Paucity of Case Law
- Engineer Driven
- Neutrality / Experience of Members
- Informality
- Periodic Meetings During Construction
- Real Time - Disputes Avoidance | Resolution
- Ability to Affect Project Outcome



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U.S. DRB Issues (Cont.)

Owner Incentives

- Expand Bidder Pool
- More Competitive Prices
- Provides "Cover"

U.S. DRB Issues (Cont.)

Major Issues

- Recommendation / Binding Decision
- Admissible I Non-Admissible
- Role of Lawyers
- Level / Tilted Playing Field
- Procedural Obstacles to Access
- Removal of DRB Members With / Without Cause

DRBs – In Israel

1. Educate and change mindset of local construction industry that considers drawn-out, hostile, construction disputes, a given.
2. Approach Israeli ADR centers to introduce DRBs. At present, forms of ADR in Israeli construction industry comprise arbitration, mediation, and other *ad hoc* expert determination
3. Present business case to Israeli ministry of Justice that authorizes State procurement agencies and ministries to implement various ADR forms in contracts to which State is party
4. Introduce DRBF to Israeli construction eco system
5. DRBF training workshops, courses on the proper implementation of Dispute Boards to customized sessions developed for specific programs and contract conditions

DRBs – In Israel

- Yes, single advisor DBs may be used on smaller projects under US\$10 million in costs. Projects that are larger than US\$10 million in construction costs should use the standard three-member DB.
- It will be challenging to get local construction companies to trust a single advisor DRB, as the typical mindset in Israel will be that I need a DRB Member only looking out for me

DRBs – In Israel

1. DB hearings are typically conducted right on the project site shortly after the dispute surfaced.
2. Board members are familiar with the project having attended regular quarterly status meetings and reviewing monthly progress reports. In some instances DB members can be involved during contract negotiation
3. DB members are selected because of their experience in construction of similar projects.
4. DB procedures are informal and simplified in comparison with court or arbitration proceedings.
5. Lawyers are encouraged not to attend hearings and, if they do attend, they are rarely permitted to make presentations or participate in the proceedings.
6. As such, DB hearings are short and do not disrupt construction or adversely impact job progress.
7. DB hearings are conducted with all relevant personnel currently engaged in the challenge and there is no need for a judge or arbitrator to learn a project that goes back 2-3 years and to find construction managers that have long left the projects.



DRBs – In Israel

- Developers goal to complete the project on time with no cost blowout enhanced
- Prospect of dispute avoidance highly appealing to developers
- Assuming we're dealing with arms length contractor that hasn't entered a manipulative bid which he intends to make up for with borderline variation claims, there shouldn't be any competing interests between developer and contractor who desire best project outcome.

Thank You



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Dispute Boards in Latin America

- Latin America- a culture of its own
- Civil Law countries
- No model contracts in general.
- Very based in government models and government procurement
- Courts- very formalistic and slow
- Need of Transparency and Integrity
- The importance of relevant dispute Resolution and dispute boards under this situation

Dispute Boards in Latin America (cont.)

- Dispute Boards- some years ago implementation remote
- Very strong promotion in the recent years
- Today: several dispute boards in place
- Important in order to promote clear, transparent dispute resolution
- FIDIC, NEC, AD-Hoc. Presence of the ICC
- Expectations.- Look forward to the implementation of more dispute boards in LA



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