

# UNDERCONSTRUCTION

## Why Dispute Boards Are An Excellent Dispute-Resolution Tool During The COVID-19 Crisis

Roberto Hernández-García

For many years the construction industry has been contentious and litigious in countries such as the United States. As a non-U.S. construction lawyer, I am always fascinated by the different theories that litigations and arbitrations in the U.S. bring to the table in order to claim rights and compensation for the parties. In Latin America, while the industry is not so different concerning complications and issues that arise, the construction industry has been historically less litigious since it carries expectations from contractors, subcontractors and suppliers to solve their disputes during lunch and friendly negotiations with our counterparts instead of fighting. In fact, there is a cultural saying in Spanish that says: “Mas vale un mal arreglo que un buen pleito” (“A bad settlement is better than a good fight”).

I personally think that neither position is healthy. In the U.S. approach, parties are “cold” enough to sue many times, without considering the sensitiveness that characterizes the Latin spirit. On the other side, Latin Americans are too “warm” to fight face to face when we have the right to make a claim, many times losing their rights or even waiving their needs due to the promises of “future contracts.”

In the middle of these extremes, the COVID-19 pandemic has brought a real possibility of a deep financial crisis in construction. This has raised many concerns in the construction industry, one of them being the following:

How do we solve our disputes in an efficient, fast, and low-cost way vis-à-vis an environment that will be characterized by scarcity of financial and time resources?

I think that the industry, unfortunately, will bleed a lot in these times due to the public-health and financial crisis, and when a person is bleeding what is needed is to stop the blood? What the construction industry DOES NOT NEED are extensive arbitrations, endless litigation and, in many cases, unsuccessful mediations that depend on the personal and professional quality of mediators. Therefore, to the question, “What do I think will be the best option of dispute resolution in the COVID-19 times?” I would answer straightforwardly:

“My absolutely preferred option is Dispute Boards.” And I’m going to tell you why...

### Where are the Dispute Boards in the Constellation of Dispute-Resolution Methods?

Dispute Boards are not mini-arbitrations, mini-mediations or mini-expert determinations, but a very intelligent mixture of all those methods in a one-of-a-kind mechanism that, in some ways, is not exclusive to the construction industry, but has been very connected to it.

A Dispute Board is a panel of one or three (sometimes even five) members formed to

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monitor a project in the construction industry, visit the site, follow up on the documentation, avoid disputes and solve disputes in the most efficient and expedited way, issuing what are called “decisions” or “conclusions,” as recently defined in the International Chamber of Commerce (ICC) rules of Dispute Boards. In general, there are two ways in which a Dispute Board can participate in a project: from the beginning of the contract/project, called “Standing Dispute Boards,” and those that are called at a specific time in order to solve a dispute, called “Ad Hoc Dispute Boards.” A Dispute Board has two main missions:

1. **avoid disputes** during the execution of the construction project through site visits, site meetings, regular conferences, review of documentation, and issuance of non-binding recommendations; and
2. **solve disputes** that parties submit to you.

This means that a Dispute Board has a broad spectrum of possibilities in order to allow parties to settle their disputes efficiently and fast.

### **My Current Experience As A Dispute-Board Member on Construction Projects**

In order to avoid being theoretical, I will share my experience as a sole Dispute-Board member in the recent pandemic times of COVID-19, in addition to my 14 years of experience as a neutral in this field. For the past two years, I have been working on several Dispute Boards. However, only one has been a Standing Dispute Board, and it is still in place.

What has happened since COVID-19 in my Standing Dispute Board? First, I was able, as a neutral, to generate an immediate call with the parties of the project. I was able to speak with them virtually and ask them if they needed something from me since this is a Dispute-Board duty. The parties started to speak on the challenges of the project vis-à-vis the governmental regulations that closed the site, the borders and the supplies. We spoke about the issues informally and, at some point, we discussed a possible “informal consultation” in a specific matter in order to avoid a possible dispute. What a wonderful possibility! They were looking at the Dispute Board in connection with a problem that they are forecasting and intend to solve it initially in an amicable way.

A week afterward, I had a virtual hearing in connection with two submissions filed by the contractor which I will have to solve during the next month. This means that the parties will not have to wait for months for the appointment of arbitrators or mediators, acceptance or challenges, requests for arbitrations, hearings or, in the worst case, endless and exhausting litigation. They have their own judge at home in order to help them go ahead in their existing lives as owner and contractor.

At the same time, I’m sure that there is going to be a

mixture of pre-COVID-19, simultaneous issues with COVID-19 and post-COVID-19 matters that parties may want to submit to the Dispute Board that will have to take into consideration their needs. By sharing this experience, you can see that having a Standing Dispute Board on a project is the most effective way to address immediate matters and resolve pending disputes (existing claims), current disputes (COVID-19 effects), and future disputes using only one mechanism: Dispute Boards.

Now, some people ask me, “What if I don’t have a Dispute Board in place on my project”? My answer is straightforward: *It is never too late or wrong.* You can agree on a Dispute Board at any time for specific disputes. I have personally been appointed to decide disputes in South and Central American projects that are very specific or have even concluded several years ago where there were claims pending in which parties were absolutely satisfied with the mechanism.

With this in mind, I can tell you under the current circumstances I think that there is no better way to solve the disputes on a project during the COVID-19 times than through Dispute Boards for the following reasons:

1. Dispute Boards are made up of construction lawyers, engineers or architects who know the industry and can understand legal and technical issues as well as the needs of time of engineering and construction.
2. Dispute Boards have a good ethical reputation as problem solvers. Organizations such as the Dispute Resolution Board Foundation (DRBF) or the Dispute Board Federation (DBF) put great emphasis on ethical conduct in order to prevent deviations that may affect the Dispute-Boards reputation.
3. Dispute Boards are less onerous than litigation or arbitration. The preparation of submissions, the hearings and the process itself tends to be less rigorous and, therefore, more effective in costs and the preparation than arbitration or litigation.
4. The costs of Dispute Boards are literally “small” in comparison to arbitration fees and, most of the time, there are no administration costs (including the ICC).
5. While I love the concept of mediation, the experience, temperament and quality of the mediator can be the difference in the parties reaching an agreement. With a Dispute Board, the temperament is not essential when addressing a dispute since the issue has to be decided when the time comes and you can rely on the experience of the Dispute Board.
6. While arbitration is an incredible means of solving disputes, it has become a complex mixture of “mini-litigation” and “obscene excess of time and cost” as a client told me once. The industry will need in the times of COVID-19 effective, immediate results.

- Dispute Boards are recognized by some of the most important international organizations, such as the ICC through its rules, or the FIDIC model Contract Dispute Board Provisions. In addition, many local organizations have their own rules and regulations.

Do you need more reasons?

### Suggestions If You Have a Dispute With a Dispute Board and If You Don't During the COVID-19 Pandemic

If you have a Standing Dispute Board:

- Don't wait to speak openly with your client on the possible issues of COVID-19. One of the expected things of this complicated time is not to "hide cards" and play fair.
- Use the "informal consultation" resource as needed. DAB's appreciate the possibility of issuing objective decisions or conclusions that may help the parties, without pressure to benefit or affect one side.
- Submit your disputes as soon as you can, in order to allow possible settlements and timely decisions of the Dispute Board that can become effective in implementation and/or collection.

If you don't have a Dispute Board but want one:

- Talk with your client on the possibility of agreeing on one that will assist on the resolution of specific problems.
- Look for a candidate that specializes not only on the industry but the kind of work, so you don't have to worry about explaining what is happening, as in the case of some arbitrators or mediators, that even with the perfect personal quality, are distant to the industry reality.
- Activate it immediately and make use of it, emphasizing on the need of prompt, efficient and industry-oriented resolutions.

### Final Thoughts

I think that readers may think twice about not using a Dispute Board or at least thinking of implementing one in this strange but interesting time of COVID-19. It is clear that the experience and closeness of Dispute-Board members with the industry—and their capacity to avoid disputes, facilitate solutions or decide in the case of straightforward conflicts—is an excellent alternative in the "new normal." ■



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## CONSTRUCTION LAW 101

Looking to build the next generation of the best construction lawyers, Under Construction publishes articles on fundamental construction law topics for our law student and new attorney members. In this edition, we publish three such articles relevant to the COVID-19 pandemic.

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By Bryan E. Rogers, Swanson, Martin & Bell, LLP, Chicago, IL

While force majeure was all the rage on list serves this spring, this article provides practical guidance regarding the history and application of the force majeure.



### Impossibility, Impracticability, and Frustration of Purpose in the Age of COVID-19

By Kelly Bundy, Hirschler, Richmond, VA

When your contract does not have a force majeure provision or it does not assist in recovery, reliance on these common law doctrines may provide some help in disputes.



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By Alex Costa, JD, Roger Williams University Law  
An overview of the Cardinal Change / Abandonment doctrines — unique doctrines to construction law. Mr. Costa compares a few cases applying this fact-intensive theory.

## IN MEMORIAM



The Forum on Construction Law mourns the death of our member, friend, and colleague, **John Livengood**. John was the senior managing director at Ankura with 40 years of experience in the design and construction industry. John was an architect, attorney, and consultant and, as such, has been not only an active member and leader in the Forum, he has been a good friend, strong supporter, and esteemed colleague. John was recognized as a leader in several forums outside the ABA as well; including the President of AACE International, Inc. 2016-2017, being noted as "...one of the best' experts in the market" by Who's Who Legal 2020, and other recognitions.

John was a role model for generous leadership. He gave of his time, rarely ever missing a Forum Meeting and serving on the Division 3/ Design Steering Committee for several years. John spearheaded the idea of a service project in conjunction with Forum national meetings many years ago — and his company always pledged their time and support/ sponsorship for those service projects. John was always ready and willing to help, to listen, to come up with ideas. We will all remember John for his warm smile and kind heart.

John is survived by his wife, Caren Yglesias, as well as his children and grandchildren. As the Forum, we honor John's memory with heartfelt gratitude and grief. May he rest in peace.

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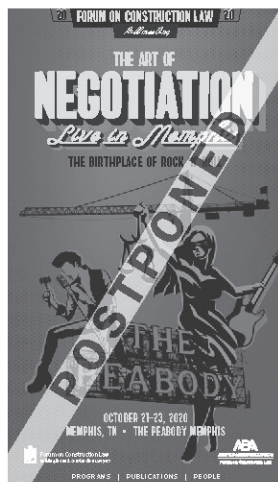
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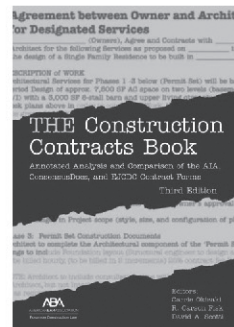
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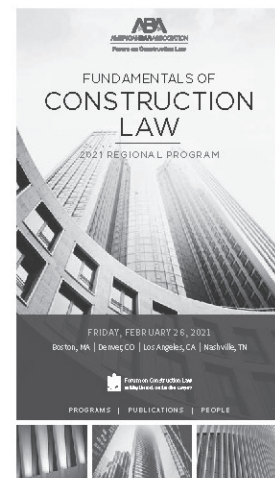


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