



GIOVANNI DI FOLCO

Senior Partner & President
Techno Engineering & Associates

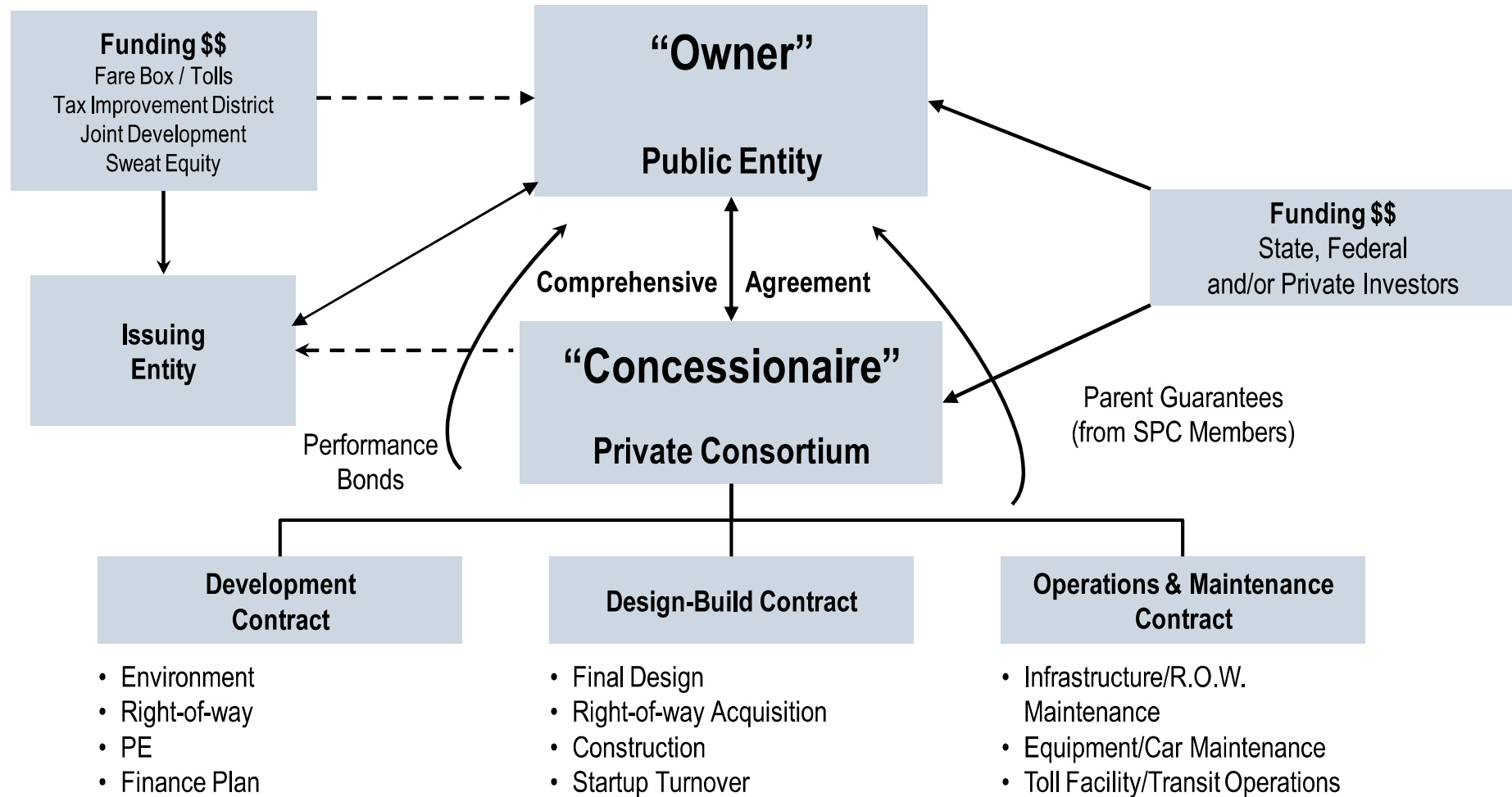
The Use of Dispute Boards in Public-Private Partnership Transactions as an Aid to Dispute Avoidance – An International Adjudicator's Overview

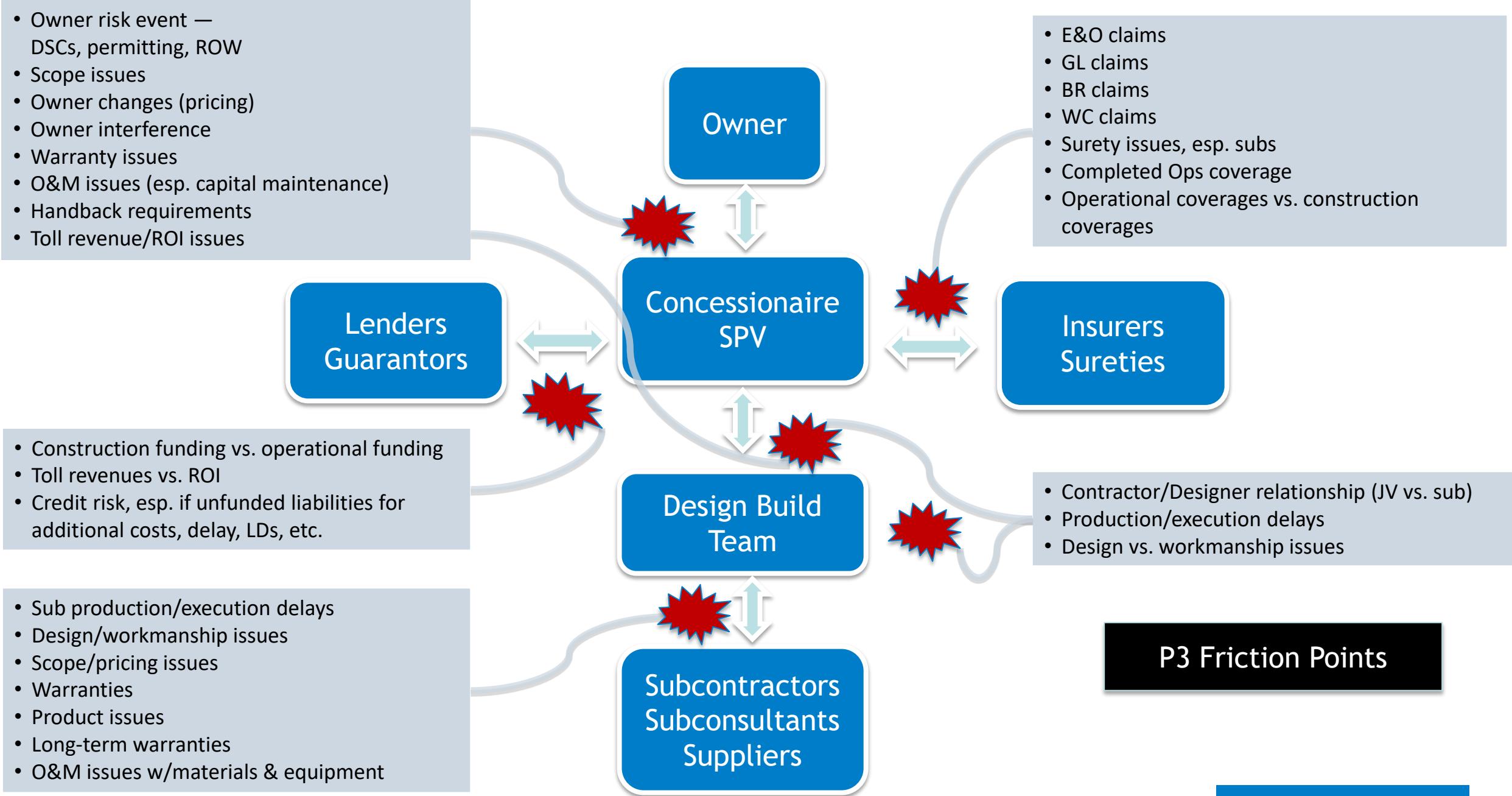
The Use of Dispute Boards in Public-Private Partnership Transactions as an Aid to Dispute Avoidance – An International Adjudicator's Overview

A DEFINITION OF THE PPP PROJECT DELIVERY SYSTEM

- The government/owner specifies the services it desires and the length of time it will allow the private entity to operate the services/facilities after which the design and construction are left to the private entity as well as its operation into the future with a profit split arrangement. Thus, in theory, giving the private partner an incentive to incur additional construction costs, if those costs would reduce future operating and maintenance costs.
- **ASSUMPTION:** Therefore the risks are on the private party and not the government/owner - or is it?

PPP Project Structure





P3 Friction Points

The Use of Dispute Boards in Public-Private Partnership Transactions as an Aid to Dispute Avoidance – An International Adjudicator’s Overview

DUE TO THOSE FRICTION POINTS, DISPUTES ARE COMMON IN THESE TYPICALLY LARGE AND COMPLEX HIGH PROFILE P3 PROJECTS. DISPARITY BETWEEN STAKEHOLDERS’ CAPACITY AND ACCESS TO INFORMATION CAN OFTEN COMPLICATE MATTERS OR WORSE.

The Use of Dispute Boards in Public-Private Partnership Transactions as an Aid to Dispute Avoidance – An International Adjudicator’s Overview

THE LIKELY RESULTS TO COUNTRIES ADOPTING THE P3 PROJECT DELIVERY SYSTEM, WITHOUT AN ADEQUATE DISPUTE RESOLUTION MECHANISM, WOULD BE ENDLESS ARBITRATIONS AND/OR COURT LITIGATIONS AND NOT HAVING THEIR PROJECTS OR PUBLIC SERVICES DELIVERED ON TIME AND AT THE EXPECTED COST.

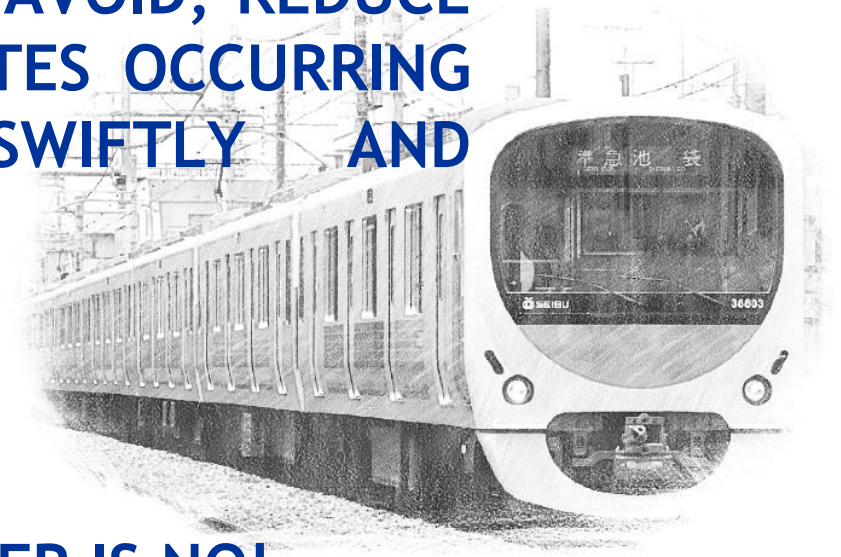
The Use of Dispute Boards in Public-Private Partnership Transactions as an Aid to Dispute Avoidance – An International Adjudicator's Overview

QUESTION:

WOULD ARBITRATION INSTITUTIONS AND THEIR ARBITRAL TRIBUNAL AND/OR COURTS OF LAW BE ABLE TO AVOID, REDUCE AND - MOST IMPORTANTLY - DEAL WITH DISPUTES OCCURRING WITHIN AND DURING P3 PROJECTS, SWIFTLY AND SATISFACTORILY?

ANSWER:

TIME AND PRACTICE HAS SHOWN THAT THE ANSWER IS NO!

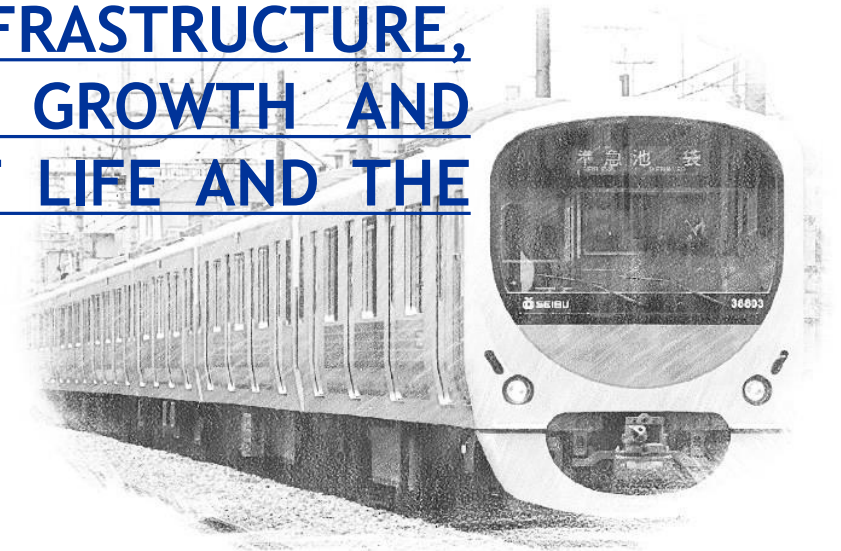


The Use of Dispute Boards in Public-Private Partnership Transactions as an Aid to Dispute Avoidance – An International Adjudicator's Overview

Considerations regarding a viable solution to Dispute Avoidance

The Use of Dispute Boards in Public-Private Partnership Transactions as an Aid to Dispute Avoidance – An International Adjudicator’s Overview

A QUICK AND EFFECTIVE DISPUTE RESOLUTION MECHANISM IS NOT JUST AN ISOLATED THEORETICAL PROBLEM. IT GOES TO THE HEART OF WHAT WE ALL WANT FOR DEVELOPING AND NON-DEVELOPING COUNTRIES: THE DELIVERY OF INFRASTRUCTURE, WHICH IS A CRITICAL IMPACT ON ECONOMIC GROWTH AND THEREFORE THE IMPROVEMENT OF QUALITY OF LIFE AND THE ALLEVIATION OF POVERTY.



HOWEVER, THIS ISSUE IS A COMMERCIAL AND POLITICAL RISK, AND NOT JUST A LEGAL RISK.

The Use of Dispute Boards in Public-Private Partnership Transactions as an Aid to Dispute Avoidance – An International Adjudicator's Overview

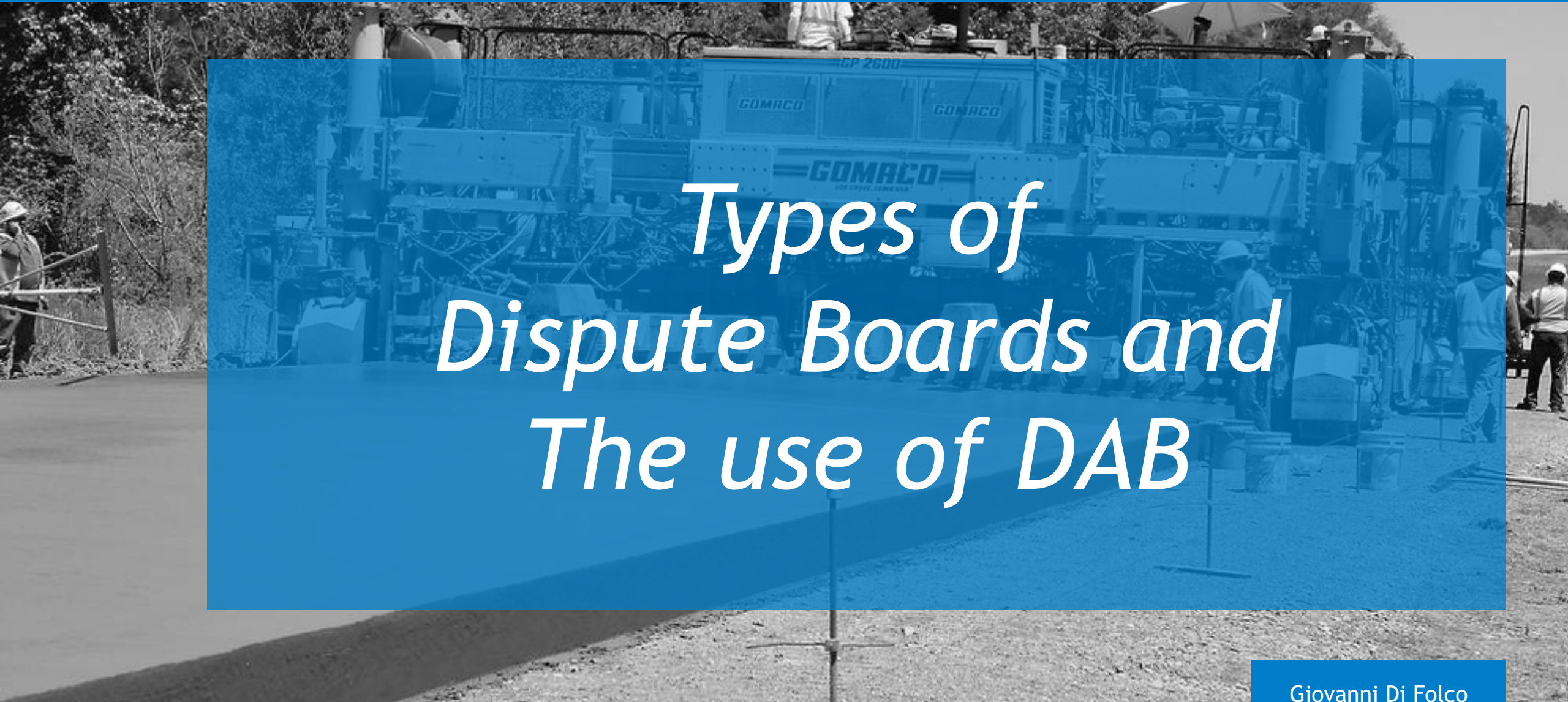
A large GOMACO GP 2600 concrete paver machine is shown in operation at a construction site. The machine is white with blue accents and has "GOMACO" and "GP 2600" printed on it. Several workers in hard hats and safety vests are visible around the machine. The scene is overlaid with a semi-transparent blue rectangle. The text "Enter Dispute Boards" is written in white, italicized font across the center of the blue overlay.

*Enter
Dispute Boards*

The Use of Dispute Boards in Public-Private Partnership Transactions as an Aid to Dispute Avoidance – An International Adjudicator's Overview

A real-time operational risk management specialist tool for engaging in a meaningful way with parties throughout the life of a project, with the mission of Dispute Avoidance

The Use of Dispute Boards in Public-Private Partnership Transactions as an Aid to Dispute Avoidance – An International Adjudicator’s Overview



*Types of
Dispute Boards and
The use of DAB*

The Use of Dispute Boards in Public-Private Partnership Transactions as an Aid to Dispute Avoidance – An International Adjudicator’s Overview

TYPES OF DISPUTE BOARDS

DISPUTE REVIEW BOARD (“DRB”)

- A DRB issues ‘Recommendations’, which are non-binding opinions.
- If no party expresses dissatisfaction with a Recommendation within a stated time period, compliance is then required.
- If a party expresses dissatisfaction within a certain period of time, that party may resort to arbitration, if so provided, or the courts of law. Pending a ruling by the arbitral tribunal or the court, the parties are not required to comply with the Recommendation.

The Use of Dispute Boards in Public-Private Partnership Transactions as an Aid to Dispute Avoidance – An International Adjudicator’s Overview

TYPES OF DISPUTE BOARDS (cont’d)

DISPUTE ADJUDICATION BOARD (“DAB”)

- A DAB issues ‘Decisions’, which are binding.
- The parties must comply with a Decision as soon as they receive it.
- If a party expresses dissatisfaction with a Decision within a specific time period, it may submit the dispute for final solution to arbitration, of the courts of law, but the parties meanwhile remain contractually bound to comply with the Decision.

The Use of Dispute Boards in Public-Private Partnership Transactions as an Aid to Dispute Avoidance – An International Adjudicator’s Overview

TYPES OF DISPUTE BOARDS (cont’d)

COMBINED DISPUTE BOARD (“CDB”)

- A CDB normally issues Recommendations, but may issue Decisions if a party so requests and the other party does not object.

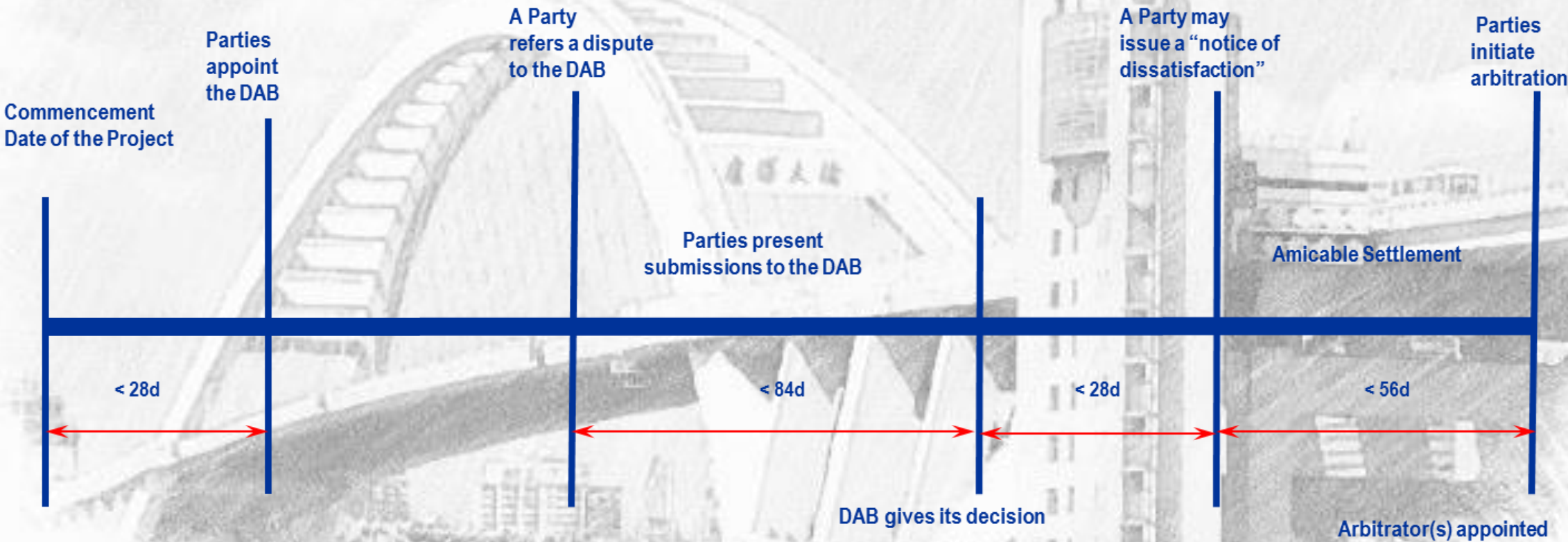
THE USE OF DISPUTE ADJUDICATION BOARDS:

The Use of Dispute Boards in Public-Private Partnership Transactions as an Aid to Dispute Avoidance – An International Adjudicator's Overview

- Adopted by World Bank and all International Development Banks.
- They comprise 1 to 3 members, usually engineers but recently also construction lawyers, independent of the parties, but all accepted by the parties and or appointed by appointing authorities like FIDIC, ICC, DBF.
- Permanent or *Ad Hoc* DAB:
 - Permanent DAB maintains familiarity with project and parties, visits site periodically, gives non-binding opinions, decides disputes that arise by (provisionally) binding decisions.
 - Ad Hoc DAB is constituted for and decides an individual dispute by a (provisionally) binding decision.
- Experience to date: Reasonably successfully used on medium and major projects internationally.

The Use of Dispute Boards in Public-Private Partnership Transactions as an Aid to Dispute Avoidance – An International Adjudicator’s Overview

Typical Sequence of Dispute Events



The Use of Dispute Boards in Public-Private Partnership Transactions as an Aid to Dispute Avoidance – An International Adjudicator's Overview

THE BENEFITS FOR OWNERS, CONTRACTORS, FUNDERS AND INDUSTRY ARE:

- The Dispute Board is part of the project.
- DB's routine project visits provide focus for parties to discuss with the DB disputes and potential disputes, which is a tremendous opportunity for dispute avoidance.
- Thanks to the routine project's visits (minimum 3 times per year) and through reviews of regular reports, the DB will be up to speed with project matters at all times.
- Consequently the DB will understand the project, the parties, individuals involved, physical difficulties and economic/financial background.

The Use of Dispute Boards in Public-Private Partnership Transactions as an Aid to Dispute Avoidance – An International Adjudicator's Overview

DISPUTE BOARD BENEFITS (cont'd):

- Speed in resolving disputes in Real-Time.
- Economy (DB costs are less than 0.2% of project costs).
- In 90% of the cases, disputes are ended by the DB as parties would be reluctant to proceed to arbitration/courts, especially if the DB output is admissible as evidence.
- Fear of unknown dispute resolution tribunal is avoided.
- Expanding the role of DBs to community outreach and greater dispute avoidance to include the needs, hopes and concerns of affected communities.

The Use of Dispute Boards in Public-Private Partnership Transactions as an Aid to Dispute Avoidance – An International Adjudicator’s Overview

HOW DISPUTE BOARDS ARE DIFFERENT FROM ARBITRATION

Although the “Referral” of a matter to a Dispute Board is rather similar to arbitration, yet it can be distinguished from arbitration based on two key principles:

- Whilst an arbitrator[s] is chosen/appointed to exercise a judicial function and to resolve a dispute based upon submissions/pleadings by the parties. A Dispute Board is chosen for its expertise in a certain subject matter and often the DB does its own investigations or appreciation of the issues, with or without submissions by the parties. Therefore, the DB has, *inter alia* an inquisitorial role.

The Use of Dispute Boards in Public-Private Partnership Transactions as an Aid to Dispute Avoidance – An International Adjudicator's Overview

HOW DISPUTE BOARDS ARE DIFFERENT FROM ARBITRATION (cont'd)

- While arbitral awards can be judicially enforced, a Dispute Board determination/decision, unless re-qualified as an arbitration, is in some jurisdictions not enforceable in a court of law. The enforceability issue is governed by the applicable law, and is unresolved in many jurisdictions.

The Use of Dispute Boards in Public-Private Partnership Transactions as an Aid to Dispute Avoidance – An International Adjudicator's Overview

Thank you for your kind attention!