



Webinar:

Metro São Paulo case study: DB binding decision (adjudication) compared to litigation

with Luis Otavio Rosa of Taroba Engenharia, Brazil

The importance of a DB Decision – the lessons to be learnt

with Gerard Monaghan Chartered Engineer, Chartered Arbitrator, Ireland

16 January 2025 | 11:00am UK (GMT)

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Luis Otavio Rosa
Partner
Taroba Engenharia



Gerard P. Monaghan
Chartered Engineer
Chartered Arbitrator
FIDIC Presidents List of
Adjudicators



**Metro São Paulo case study: DB binding
decision compared to litigation**

The importance of a DB Decision

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METRO SÃO PAULO case study

Dispute Board binding decision (adjudication) compared to litigation

Luis Otavio Rosa, FCCE FCT

January 2025

about Luis Otavio Rosa



Civil Engineer, University of São Paulo Politécnica 1980

MBA Accounting and Finance, FGV-SP 1982

FIDIC FCCE and FCT

DRBF Region 4 (Latin America) leader

IBDiC technical director 2024-2027

Former director of IBAPE-SP and AACE Brazil

Member of ICC Institute, CARD-Ankawa, CBAr and CLAPEC

Arbitrator, adjudicator, expert and dispute board member

One of the founders of TAROBÁ, a consulting company specialized in claims and dispute management, with activities in Latin America and developing countries.

He has more than 40 years of experience in construction and industry, in projects in Europe, America and Africa.

- What is Dispute Board
- Brazil Legal framework
- Metro São Paulo and Yellow Line Dispute Boards
- DAB Yellow Line Phase 2 decision
- Conclusion

What is Dispute Board

- Dispute Board (DB) is a type of contractual ADR method
- DB main objective is to allow the contract to be completed, as soon as possible without interruptions
- The Dispute Resolution Board Foundation (DRBF) considers that the purpose of a DB is:
 - “to encourage dispute **avoidance** and to assist in timely and cost-effective **resolution** of disputes for the duration of a project”^[1]
- DB is parties own choices or by impositions of financing agencies, like World Bank and other developing banks

What is Dispute Board

- DBs are a consequence of **contractual** provisions
- DBs answer to a dispute may be considered :
 - **recommendation**, as usual in North America, and it is up to the parties to accept them or not (DRB)
 - **decision** or adjudication, which must be followed immediately as in other continents (DAB or DAAB)
- Standardized **models of contracts** provide the use of DBs since 1999, published by ICC, FIDIC and NEC
- FIDIC include dispute **adjudication** boards (DABs) and since 2017 dispute **avoidance and adjudication** boards (DAABs), with binding decisions

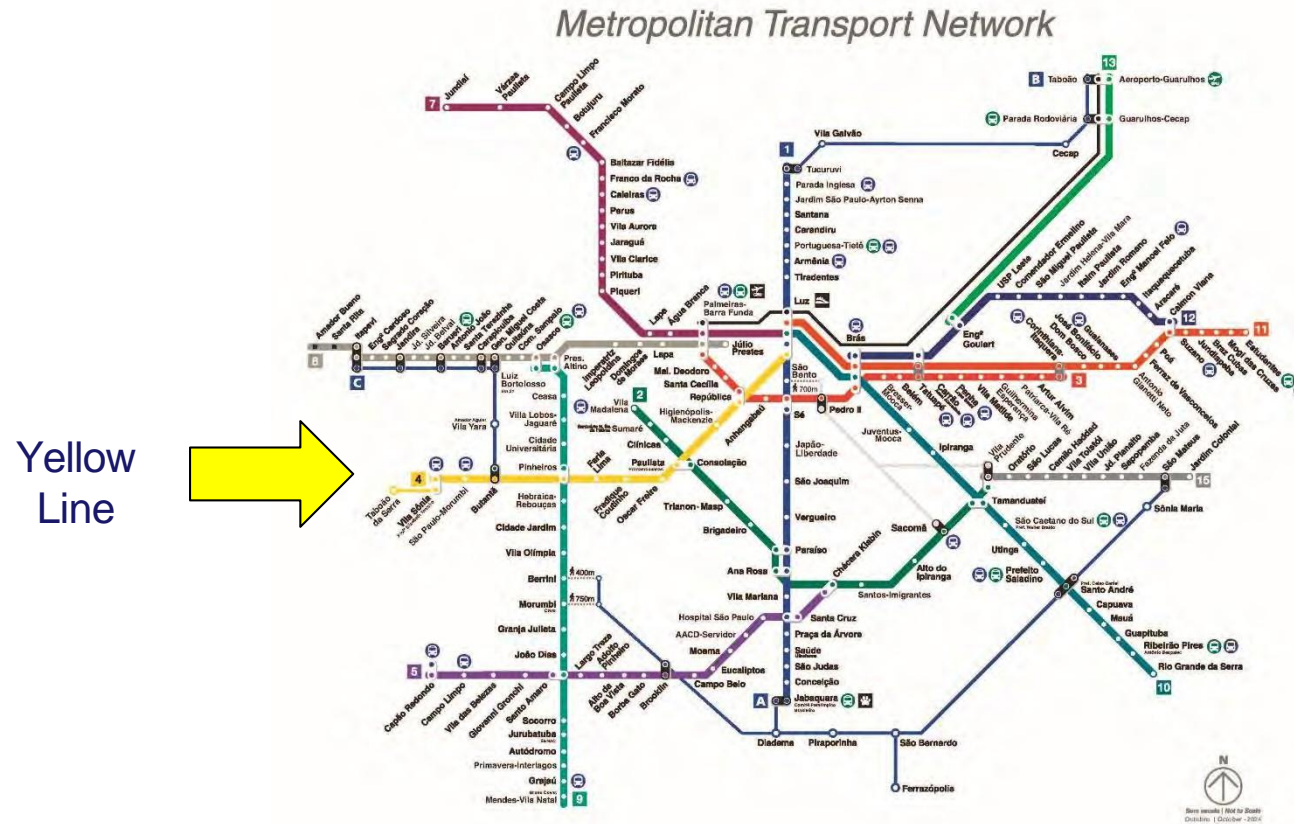
Dispute Board in brief

- DB is a panel of **3 experts**, experienced, impartial and trusted professionals, frequently 2 engineers and 1 lawyer
- Selection of DB members made by **parties** or nominating body
- DB main **activities** :
 - periodic meetings
 - site visits
 - special hearings
 - informal assistance
 - studies of issues and divergences
 - answers to disputes (decision or recommendation)
- DB answer can be **challenged** later in any situation, either in litigation or in arbitration

Brazil Legal framework

- **Civil law** tradition, with some influence of common law institutions
- Judicial system divided in Federal and 27 State Courts
- Judicial proceedings of **civil nature** are governed by Code of Civil Procedure CPC
- Right to appeal to the **second instance** (Federal or State Court)
- Appeals to higher courts Superior Court of Justice STJ or Federal Supreme Court STF (constitutional issues)
- Main **stages**: filing, answer, production of evidence, judgement

Metro São Paulo in brief

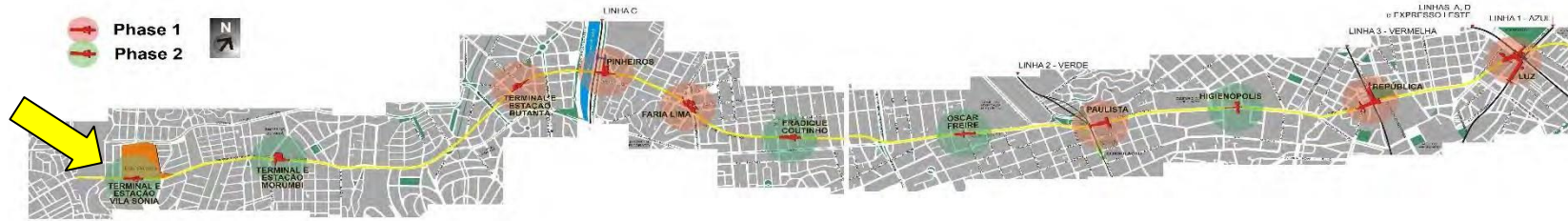


<https://www.stm.sp.gov.br/MapaRede/MapaDaRedeDeTransporteMetropolitanoComLegenda.pdf>

Inaugurated in September 1974
 More than 5 million passengers per day (2024)

Extension 104 km
 6 Lines and 91 stations

Metro São Paulo Yellow line



<http://www.metro.sp.gov.br/obras/pdf/linha-4-amarela/rap-l4-sma.pdf>

Extension 12,8km and 11 stations

~700 thousand pas/ day (December 2024)

Phase 1 > tunnels, yards and 6 stations

- EPC contracts signed October 2003 (World Bank model)
- Start operation April 2010, completed September 2011

Phase 2 > 5 stations

- Contract terminated > 1 station 2014 (2012~2015)
- Remaining 4 stations
- FIDIC MDB 2010 construction contract (DBB) signed July 2016
- First station January 2018, completed December 2021

Metro São Paulo Yellow line DB

- Phase 1

Contracts October 2003 ~September 2011

DRB 3 engineers July 2004 ~ June 2015 [2]

11 **recommendations** (1 arbitration)

- Phase 2

Contract July 2016 ~December 2021

DAB 2 engineers and 1 lawyer July 2017 ~ 2023 [3]

18 **decisions** = 11+7 decisions (1 litigation, local consortium) Decision N°1 on litigation

Submission

Disposal of waste soil contaminated from the excavation of a section of 270m (VCA Vila Sonia)

Issue 1

Process of disposal with 2 possibilities with different contractual prices (co-processing or thermal desorption)

Issue 2

Quantity of waste soil disposed and contaminated

DAB Procedure

2 meetings

3 documents submissions

DAB decision > settlement decision > contract amendment

Phase 2 DAB decision N°1 challenge

Injunction

Submission of injunction

Preliminary injunction granted (1st instance)

Injunction revoked (2nd instance)

Evidence

Start of engineering and accounting evidence

Experts reports

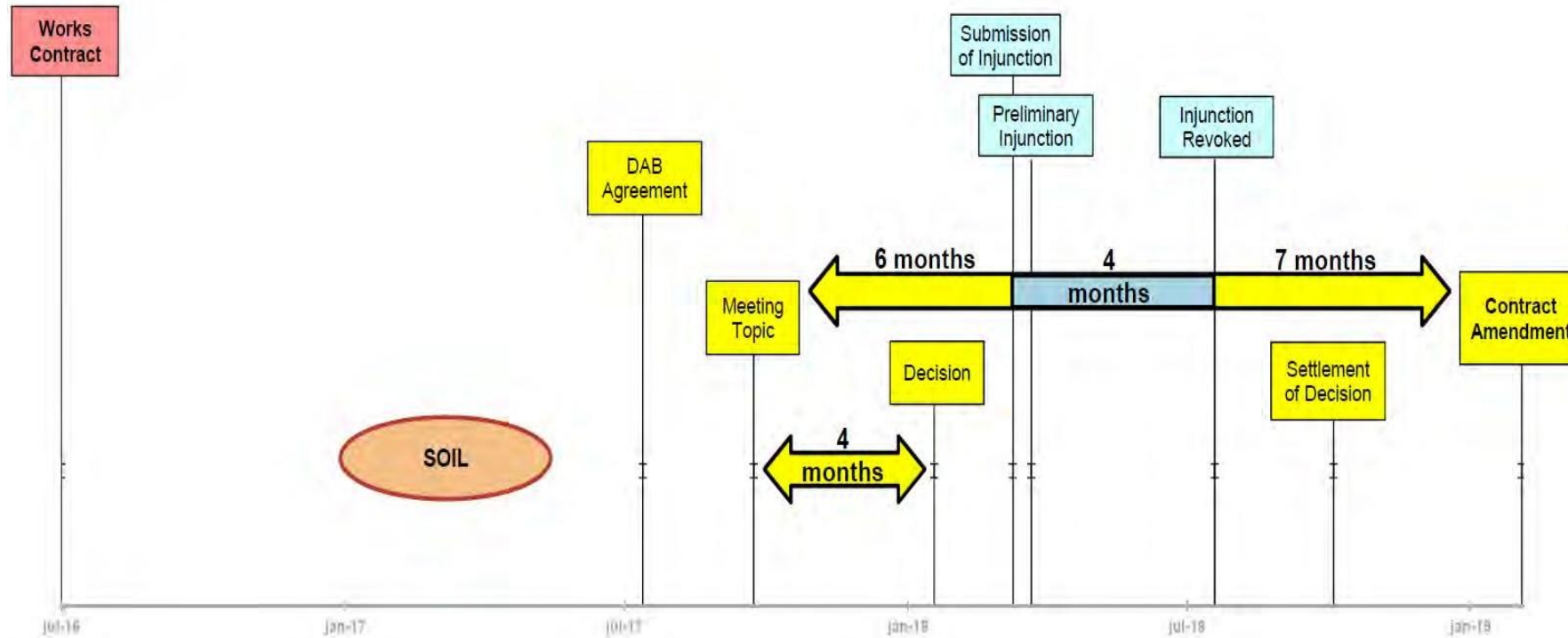
Parties comments of experts reports

Experts clarifications

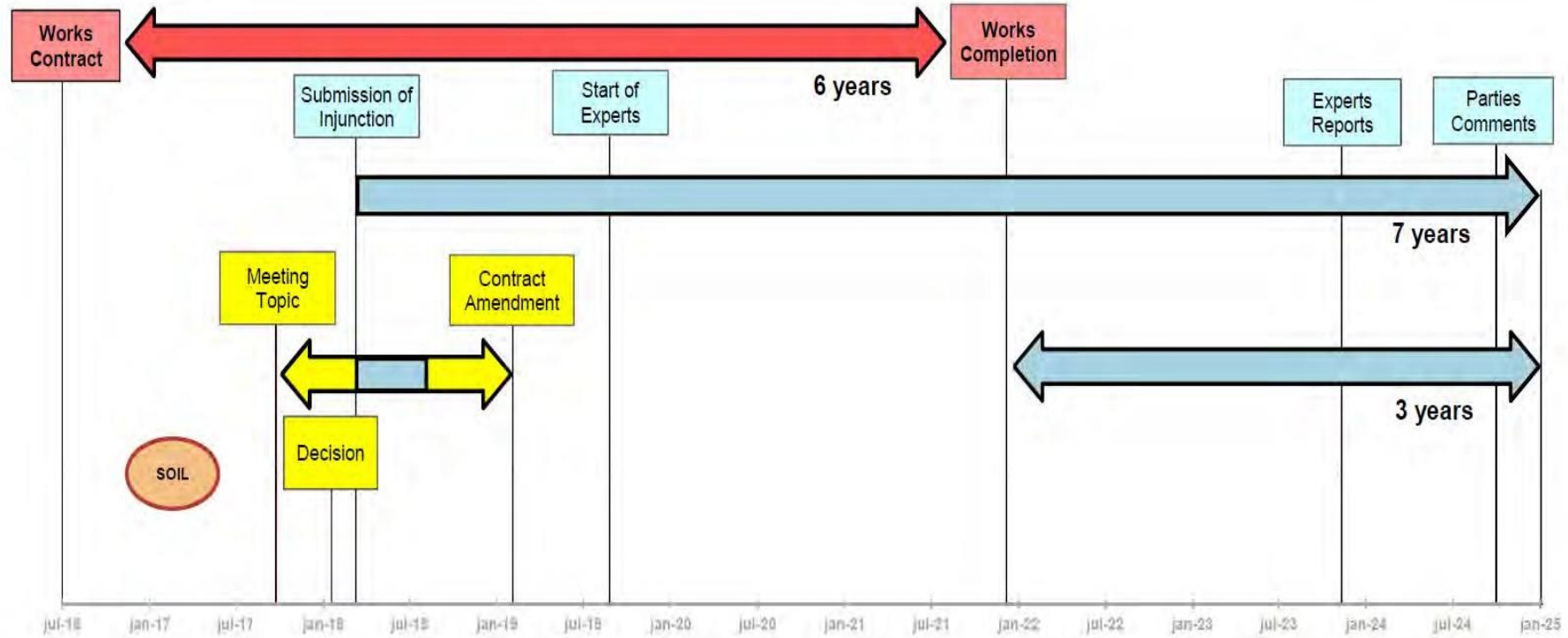
Parties comments of experts clarifications

Judgement ?

Timeline DAB decision N°1



Timeline contract with litigation



Contract

6 years duration

Completion 3 years after decision's contract amendment

DAB decision

4 months to a decision (adjudication)

7 months from decision until contract amendment (excluding injunction)

Litigation

7 years and it's not over yet

Lasting more than 3 years after works completion

A DAB decision makes the contract continue until completion

Thank you

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References

1Dispute Board Manual: A Guide to Best Practices and Procedures, Charlotte NC: Dispute Resolution Board Foundation, 2019.

2A experiência brasileira em CRD: o caso do metrô de São Paulo. *In*: TRINDADE, Bernardo [et al.]. *Comitê de resolução de disputas nos contratos de construção e infraestrutura*. São Paulo: Pini, 2016.

3Comitês de Prevenção e Resolução de Disputas em contratos administrativos: experiência nos setores de infraestrutura o Brasil e no Peru. *In*: SARRA DE DEUS, Adriana [et al.]. *Arbitragem, Infraestrutura e Direito da Construção*. São Paulo: Thomson Reuters, 2024

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Gerard P. Monaghan

**Chartered Engineer
Chartered Arbitrator
FIDIC Presidents List of Adjudicators**

The importance of a DB Decision

Gerard P. Monaghan



Chartered Engineer, Chartered Arbitrator, CEDR Accredited Mediator
Member of the FIDIC Presidents List of Adjudicators

35 years' experience in the engineering and construction industry involved in the design, procurement, delivery and technical and commercial management of major construction projects

Very experienced DAB/DAAB member for Multilateral Development Bank (MDB) funded projects in the Middle East, Africa and Asia

Experienced ADR professional having acted as arbitrator, mediator, conciliator, adjudicator and expert for construction disputes.

Delegate Member of the International Chamber of Commerce (ICC) Commission on Arbitration and ADR for the 2024 – 2027 term.

Member of the FIDIC Contracts Committee Task Group 9 as Principal Drafter of the Yellow, Red and Emerald Book Subcontract forms.

DRBF Region 2 and Ireland Country Representative

Basic Structure of a DAB Decision

- Parties and contract
- Authority to act and procedural history
- Referral notice and jurisdiction.
- Summary of parties case
- Chronology of relevant events
- Issues to be decided
- Facts, Law and quantum per issue and outcome
- Reliefs and Remedies
- Operatives Part – “ *I/we decide and order*”

QUESTIONS





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NEXT WEBINAR

20 February 2025 | 11:00 AM UK (GMT)

with Melissa Murphy KC - Landmark Chambers

Guest speaker – to be announced.

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Thank You



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