



## METRO SÃO PAULO case study

# Dispute Board binding decision (adjudication) compared to litigation

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## 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 CLAPEEC*

*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”<sup>[1]</sup>
- 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

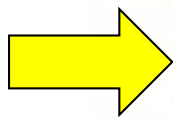
- **Civil law** tradition, with some influence of common law institutions
- Judicial system divided in Federal and 27 State Courts
- Judicial proceedings of **civil nature** are governed by Code of Civil Procedure CPC
- Right to appeal to the **second instance** (Federal or State Court)
- Appeals to 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

Metropolitan Transport Network



Yellow Line



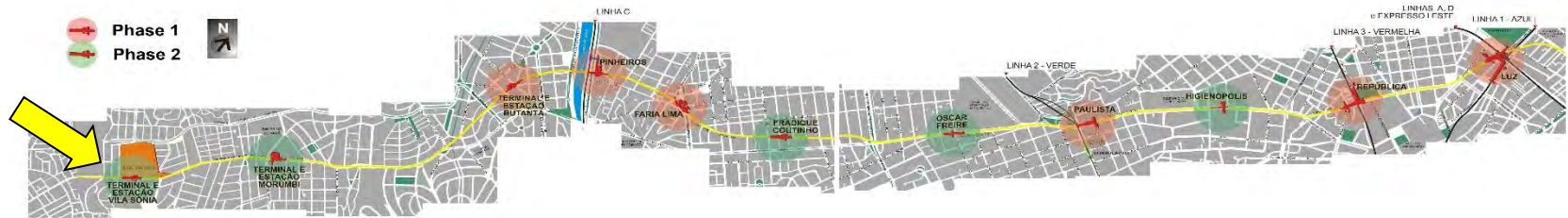
<https://www.stm.sp.gov.br/MapaRede/MapaDaRedeDeTransporteMetropolitanoComLegenda.pdf>

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 <sup>[2]</sup>

11 **recommendations** (1 arbitration)

- Phase 2

Contract July 2016 ~December 2021

DAB 2 engineers and 1 lawyer July 2017 ~ 2023 <sup>[3]</sup>

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<sup>o</sup>1 challenge

### Injunction

Submission of injunction

Preliminary injunction granted (1<sup>st</sup> instance)

Injunction revoked (2<sup>nd</sup> instance)

### Evidence

Start of engineering and accounting evidence

Experts reports

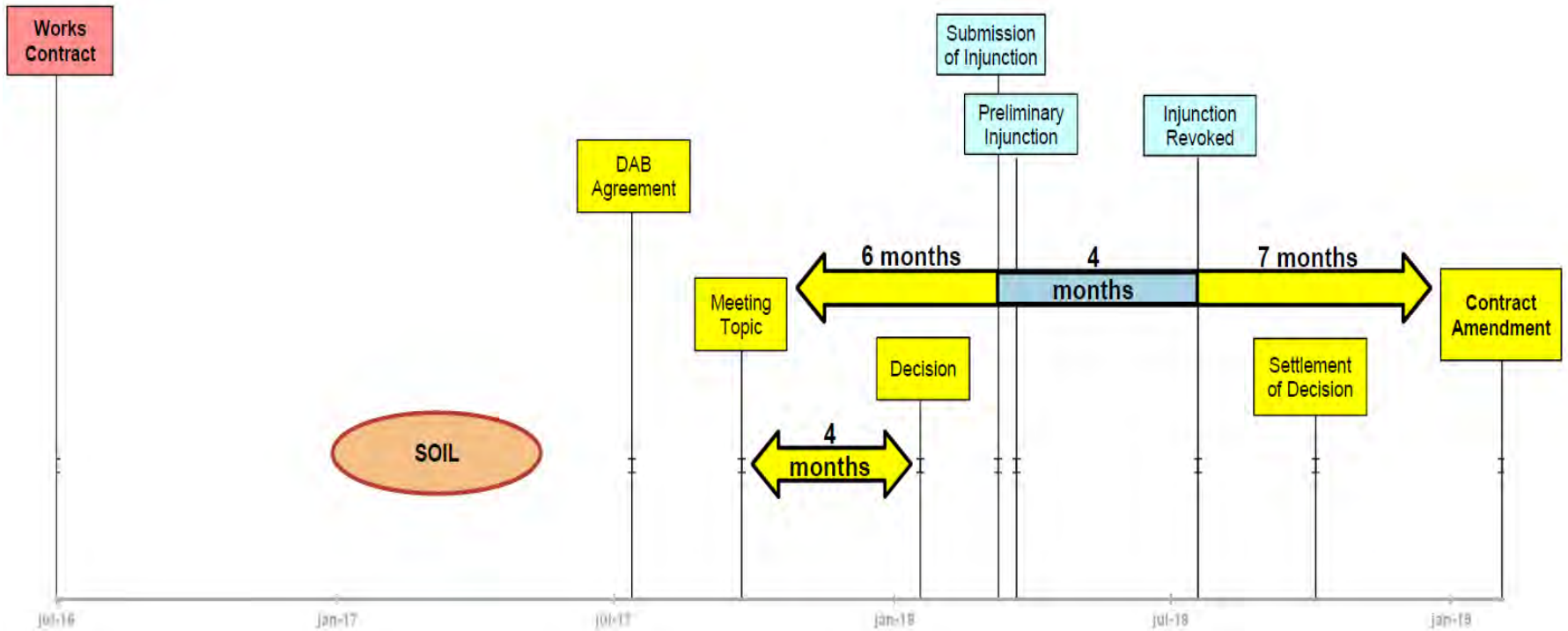
Parties comments of experts reports

Experts clarifications

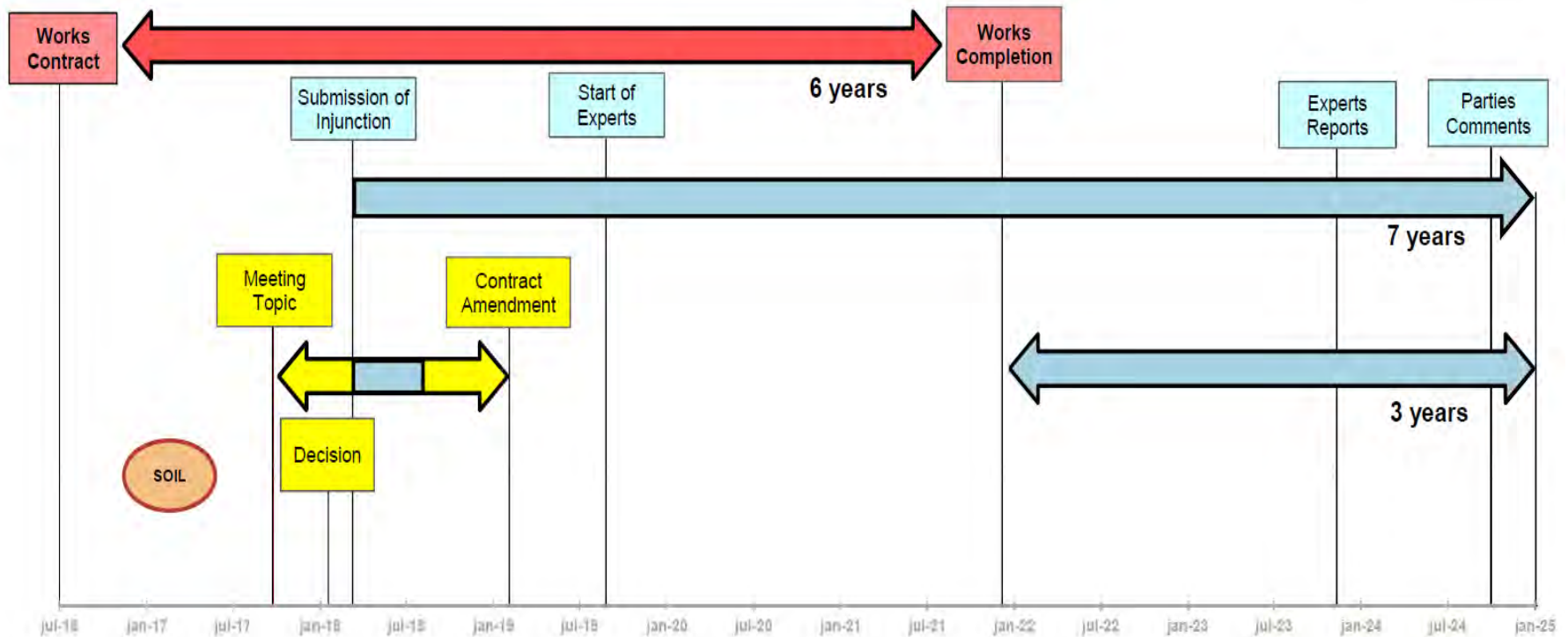
Parties comments of experts clarifications

### 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

- [1] Dispute Board Manual: A Guide to Best Practices and Procedures, Charlotte NC: Dispute Resolution Board Foundation, 2019.
- [2] A 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.
- [3] Comitês 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