

# ISTANBUL PPP WEEK

16 - 19 JAN 2023

PPP: INVEST IN  
PEOPLE | CLIMATE | ECONOMY



## Dispute Resolution and Renegotiation of Public-Private Partnerships – New Approaches with Dispute Resolution Boards

**Mark M. Moseley**

**Principal, Moseley Infrastructure Advisory Services**

**Mark.Moseley@MMMInfra.com**

# Outline of the Presentation

## Five main topics

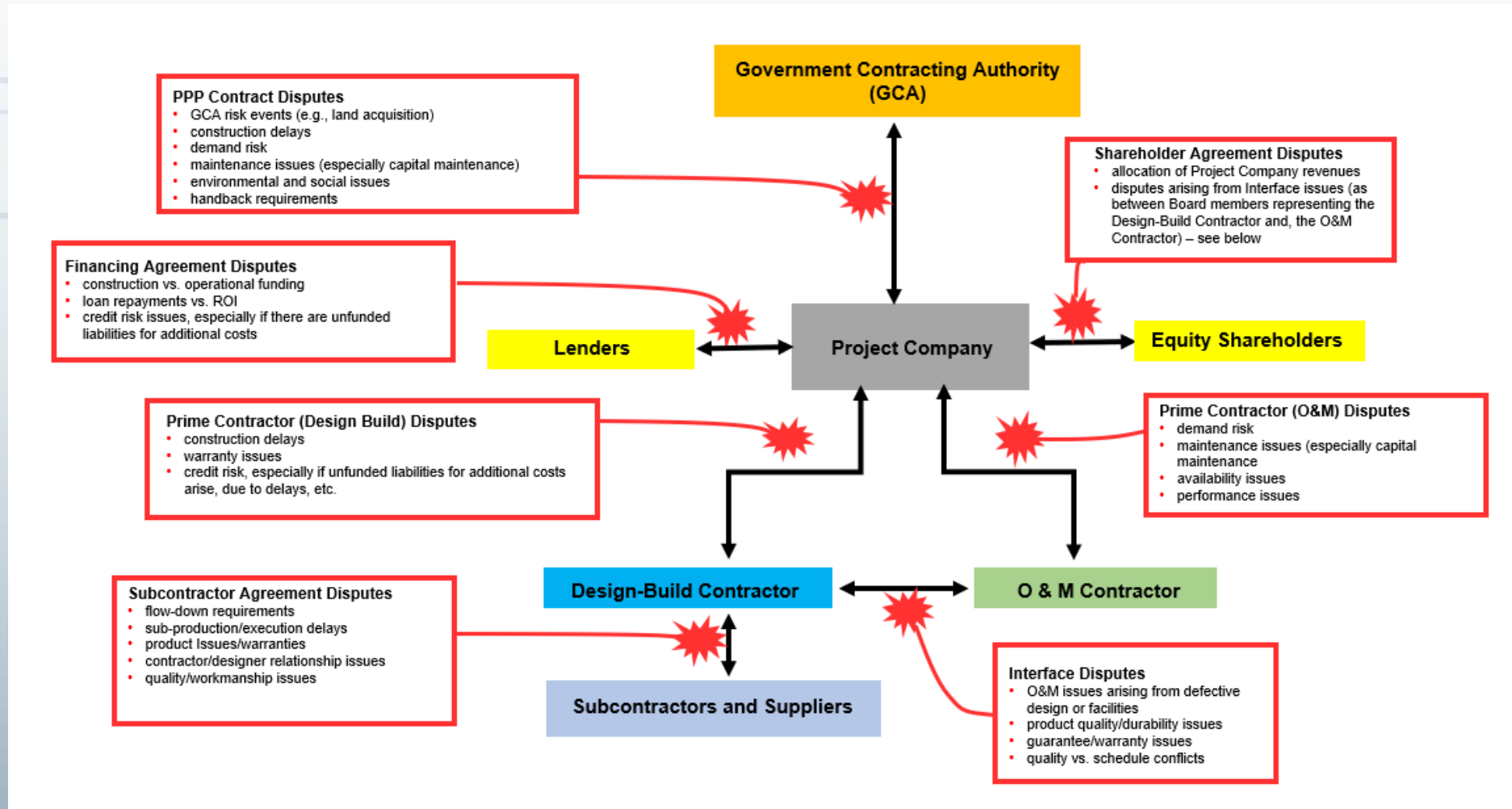
- I. Frequency and Characteristics of Disputes in PPP Transactions**
- II. Mechanisms Traditionally Used for PPP Dispute Resolution**
- III. A Better Approach to PPP Dispute Resolution – Dispute Resolution Boards**
- IV. Renegotiations of PPP Contracts**
- V. Renegotiations – A Possible Additional Role for Dispute Resolution Boards**

# I. Frequency and Characteristics of Disputes in PPP Transactions

**Disputes will frequently arise in PPP transactions**

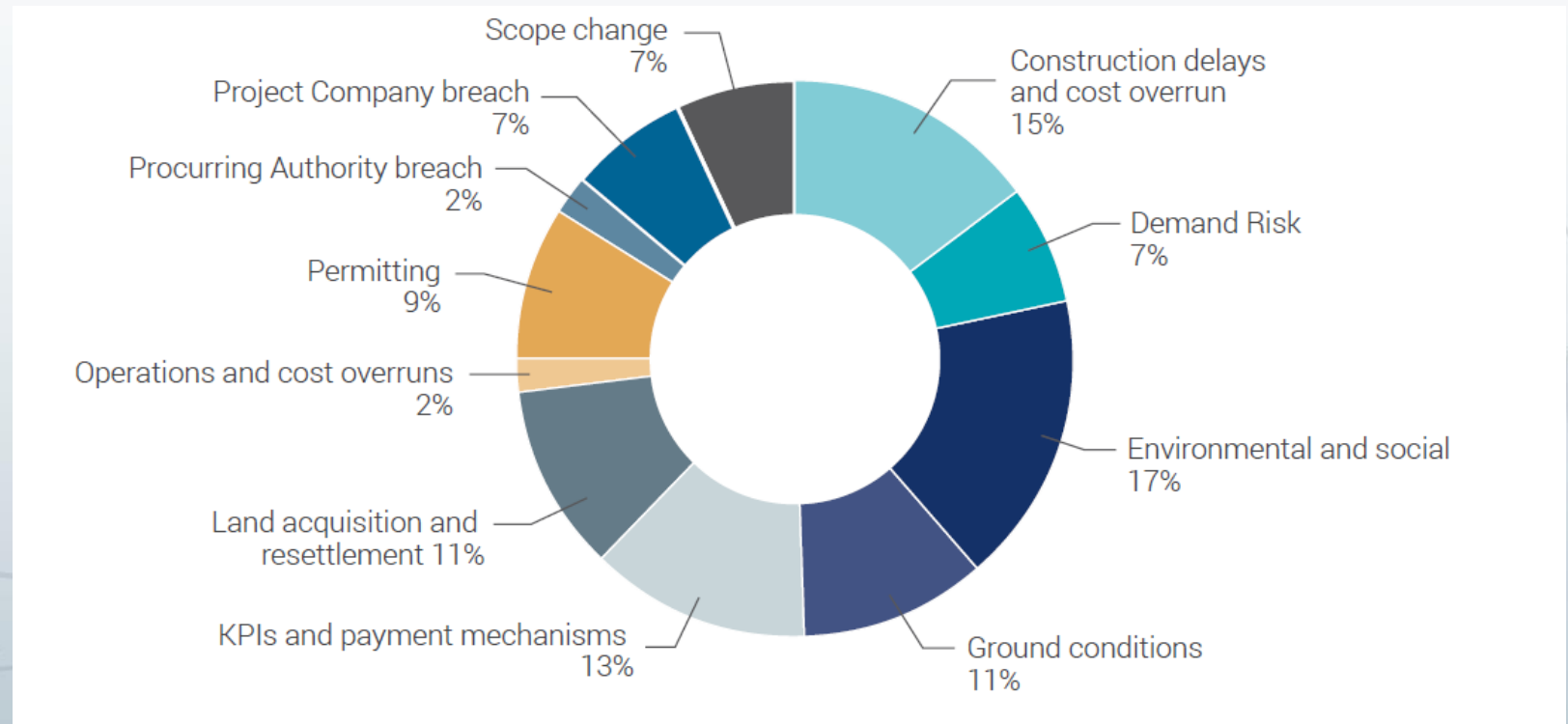
- **Public-Private Partnership projects involve numerous complex and long-term agreements between the parties engaged with the project**
- **those parties include:**
  - **the Government Contracting Authority**
  - **the PPP Project Company**
  - **equity shareholders of the Project Company**
  - **lenders to the Project Company**
  - **the Design-Build Contractor**
  - **the Operations and Maintenance(O&M) Contractor**
  - **various subcontractors**
- **even if the agreements between these parties are extremely well-designed, **contractual disputes will inevitably arise** – since it is impossible to anticipate every circumstance which might occur over the course of a 20 or 30 year project**

# I. Frequency and Characteristics of Disputes in PPP Transactions (cont.)



# I. Frequency and Characteristics of Disputes in PPP Transactions (cont.)

In 2018, the G20's Global Infrastructure Hub provided data on the causes of PPP disputes arising between Government Contracting Authorities and Project Companies

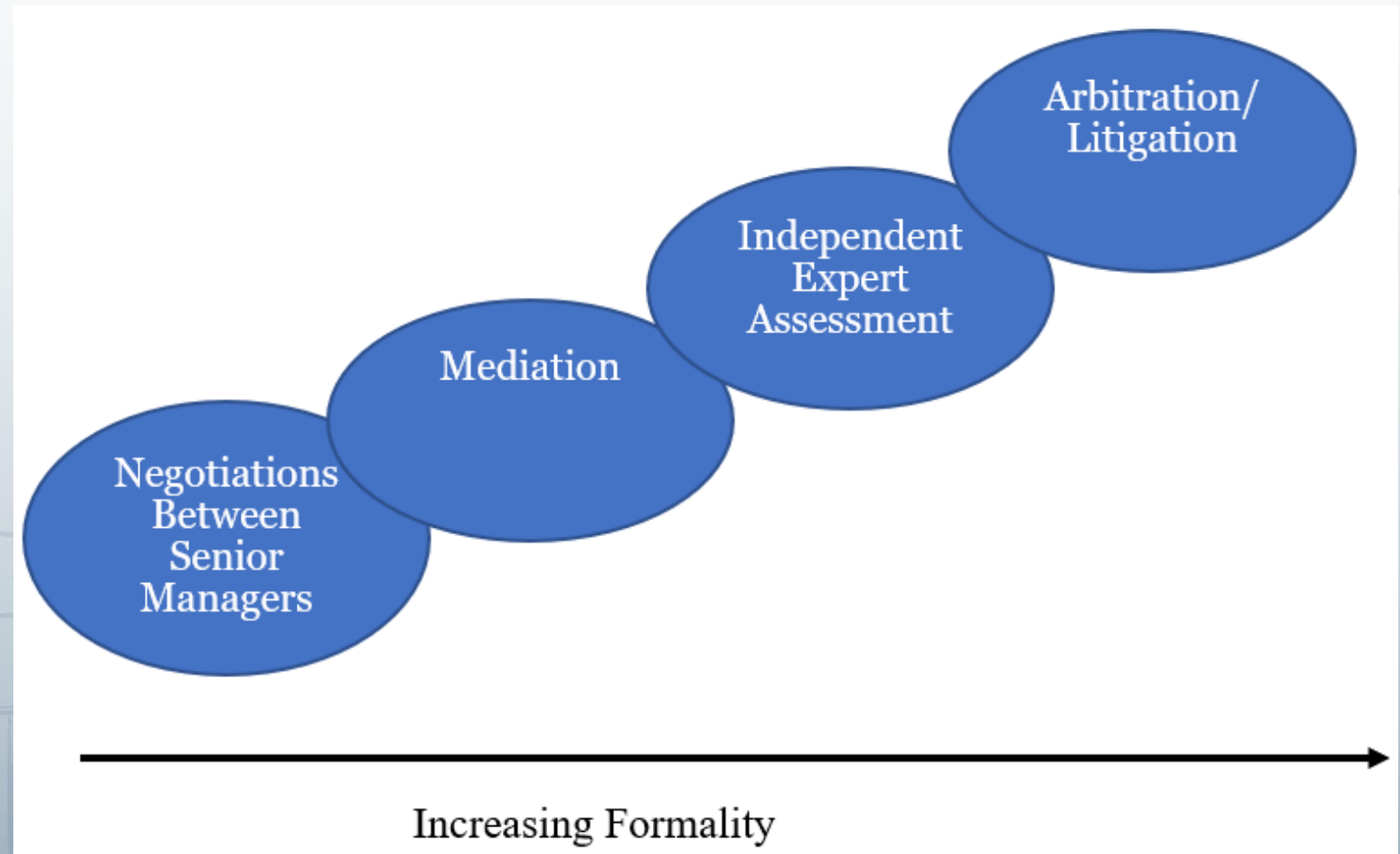


GI Hub report on *Managing PPP Contracts After Financial Close* (at Page 110), available at <https://www.gihub.org/resources/publications/managing-ppp-contracts-after-financial-close/>

## II. Mechanisms Traditionally Used for PPP Dispute Resolution

Traditionally, PPP Contracts call for a tiered, or ‘staircase’, approach to resolving disputes between the public and private parties

Each step in the process is increasingly formal



### III. A Better Approach to PPP Dispute Resolution – Dispute Resolution Boards (cont.)

**Dispute Resolution Boards are an effective tool for resolving disputes**

- **the essence of the Dispute Resolution Board (DRB) concept is the appointment – at the **beginning** of a contract – of a panel of experts with experience in the technical, financial and legal aspects of the project**
- **the panel members review the project documents, including progress reports, and meet with the contracting parties at the project site on a regular basis (3 or 4 times each year)**
- **disputes between the contracting parties are resolved quickly and informally**
- **some DRB arrangements provide that the determinations made by the DRB panel are binding upon the contracting parties, while under other arrangements the determinations are merely recommendatory**

### III. A Better Approach to PPP Dispute Resolution – Dispute Resolution Boards (cont.)

History has shown that DRBs are also effective in preventing and avoiding disputes

- the DRB approach has been successfully used for many years in the construction industry
- DRBs have been shown to reduce significantly the number of disputes which proceed to arbitration/litigation, even when the DRB's determinations are only recommendatory
- the standing nature of DRBs, and their regular engagements with the contracting parties, has meant that disputes are often avoided
- this is achieved by the DRB panel members – who are not agents of the contracting parties – working with the parties to prevent disagreements from escalating into formal disputes



### III. A Better Approach to PPP Dispute Resolution – Dispute Resolution Boards (cont.)

**DRBs are being increasingly used for PPP projects – and this approach has been recommended by the GI Hub**

Mechanism	Examples found*	Percentage*
Escalation to senior management	31	27%
Expert determination	29	25%
Dispute Resolution Board	25	22%
Mediation	37	32%
Domestic arbitration	62	54%
International arbitration	19	17%

\*As there may be more than one mechanism used per PPP contract the total examples/percentage is greater than the number of projects with data available

GI Hub report on *Managing PPP Contracts After Financial Close* (at Page 111)

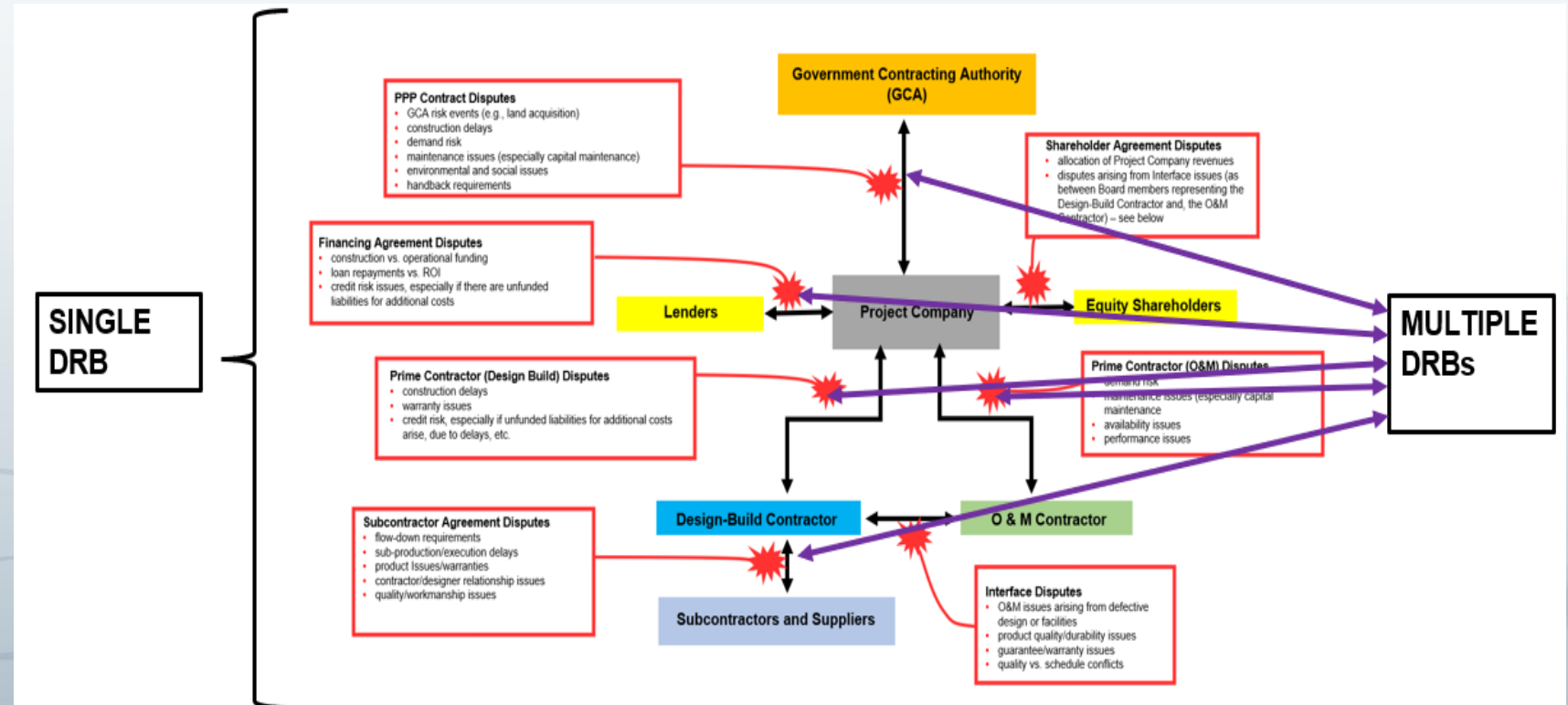
### III. A Better Approach to PPP Dispute Resolution – Dispute Resolution Boards (cont.)

#### Two key challenges in using DRBs on PPP projects

- PPP projects are different than ordinary construction contracts – in particular, PPPs have **two distinct features** which must be considered when designing a DRB arrangement
  - in most PPP projects there are a large number of contractual agreements – and ‘friction points’ – between the various parties
  - PPP projects are much longer in duration than ordinary construction projects
- this raises question regarding
  - **how many DRBs should be used on a single PPP project**
  - **for how long should the DRB panel members serve**

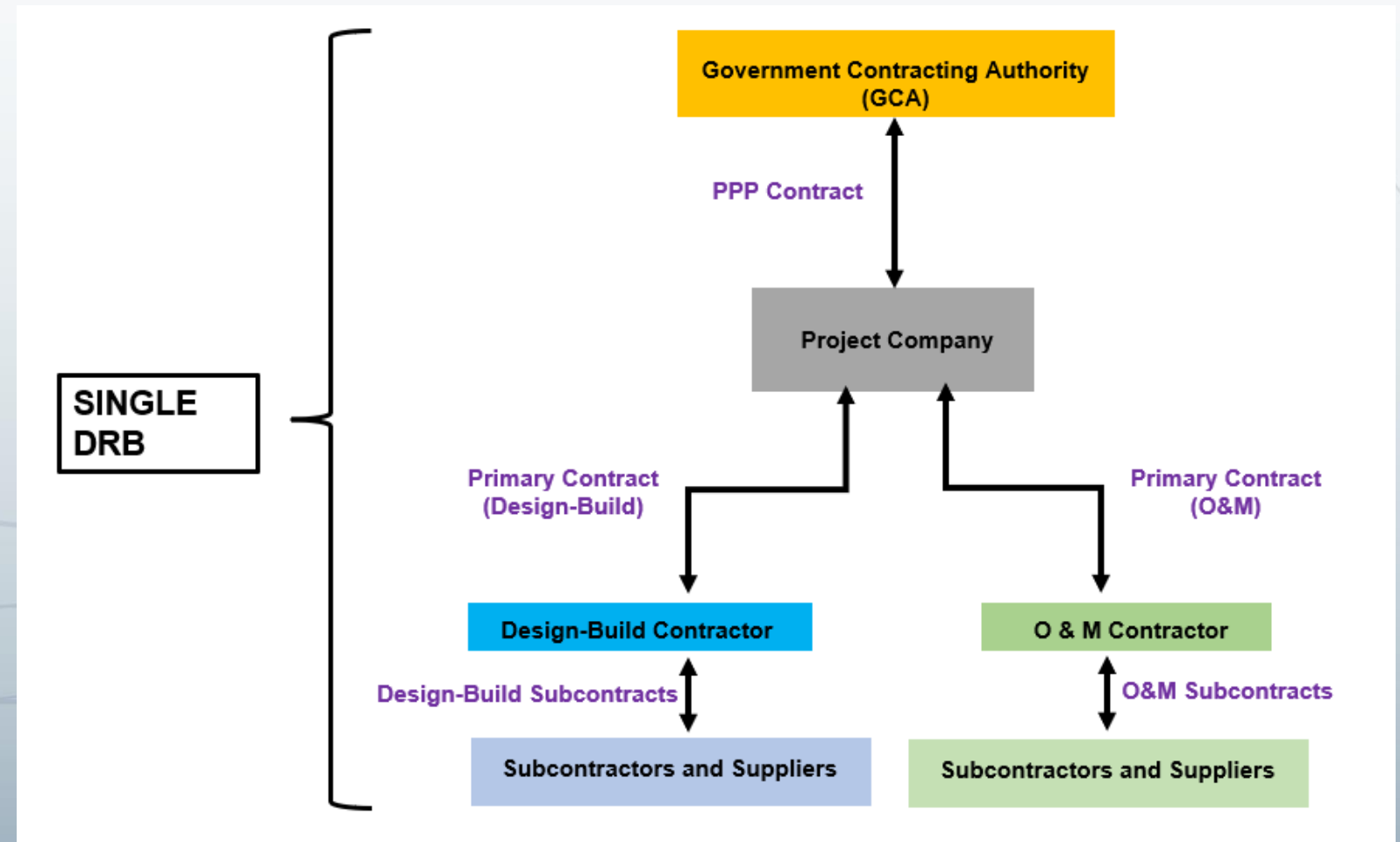
# III. A Better Approach to PPP Dispute Resolution – Dispute Resolution Boards (cont.)

## Multiple vs. Single DRB arrangements



### III. A Better Approach to PPP Dispute Resolution – Dispute Resolution Boards (cont.)

**Recommended DRB arrangement for a PPP project**



### III. A Better Approach to PPP Dispute Resolution – Dispute Resolution Boards (cont.)

#### Recommended 'Whole Life' DRB mechanisms for PPP projects

- the initial DRB would consist of five panel members, four of whom would be nominated by the four concerned parties (i.e., the Government Contracting Authority, the Project Company, the Design-Build Contractor and the O&M Contractor)
- these four panel member would choose an independent Chairperson
- **this five-person panel would remain in place, and make quarterly site visits, throughout the Design & Build Phase and the first three years of the O&M Phase of the project**
- thereafter, one panel member would be replaced every three years, with site visits taking place only once each year

## IV. Renegotiation of PPP Contracts

PPP Contract renegotiations are frequent – and they have been initiated by both private sector project companies and by governments

- by definition, **a renegotiation of a PPP transaction involves a change to the original contractual terms and conditions**, as distinct from an adjustment – such as a payment increase – that takes place pursuant to a mechanism defined in the PPP Contract
- renegotiations of PPP Contracts happen relatively frequently, with the data suggesting that **approximately one-third of all PPP Contracts are renegotiated** at some point during the lifetime of the project
- the majority of renegotiations are initiated by private sector Project Companies, but there are many instances of renegotiations being requested by Government Contracting Authorities

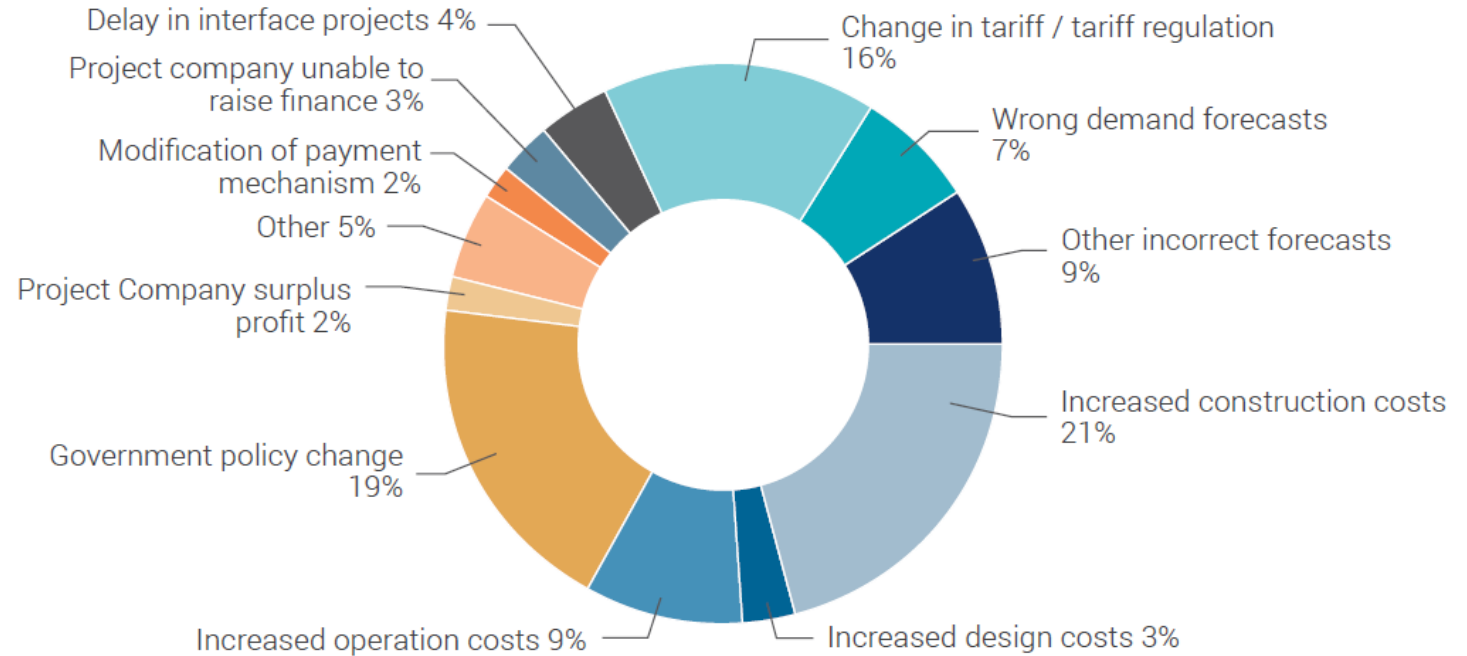
## IV. Renegotiation of PPP Contracts (cont.)

**PPP Contract renegotiations are challenging**

- **in a renegotiation, the competitive pressures that are present during a normal procurement do not exist – with the result being that a renegotiation is, simply, a direct negotiation between the incumbent Project Company and the Government Contracting Authority**
- **under these conditions, it is very difficult for a government to ensure that it is achieving Value for Money**
- **if a government agrees, on a frequent basis, to requests from Project Companies for the renegotiation of PPP contracts, it can encourage “opportunistic bidding” during the competitive procurement process**
- **in addition, if it is the government that is initiating a renegotiation, it should not do so for political reasons – such as a change in the governing party – since this will undermine investor and public confidence in PPP programs**

## IV. Renegotiation of PPP Contracts (cont.)

### Causes of PPP Renegotiations



GI Hub report on *Managing PPP Contracts After Financial Close* (at Page 87)



## IV. Renegotiation of PPP Contracts (cont.)

### A possible role for DRBs in PPP Contract Renegotiations

- in an successful effort to reduce the adverse impacts of frequent PPP renegotiations, Chile enacted a number of reforms in 2010, establishing thresholds for changes to PPP Contracts; clear lines of responsibility for approval of renegotiations; and the public disclosure of all costs
- one of the significant reforms was to establish **an independent technical panel, responsible for reviewing and authorising all proposed renegotiations**
- conceivably, a DRB could be used as an ‘independent technical panel that reviews and authorises renegotiations’
- such a concept is unconventional – but the technical expertise of DRB panel members, and their and deep familiarity with the project, suggest that this idea may be worthy of further consideration



# ISTANBUL PPP WEEK

---

**THANK YOU FOR LISTENING**

---

**Mark M. Moseley**  
Principal, Moseley Infrastructure Advisory Services  
[Mark.Moseley@MMMInfra.com](mailto:Mark.Moseley@MMMInfra.com)



pppcoe



PPPCoE



PPPCOE



[istanbulpppweek.com](http://istanbulpppweek.com)