

# Focus

ALTERNATIVE DISPUTE RESOLUTION

## Construction resolution utilizes experts



**Keith Bannon**

Increasingly, dispute review boards are playing an important role in construction projects both in Canada and internationally, as parties appreciate the assistance of neutral experts with a familiarity with their projects who are able, on a quick and informal basis, to provide non-binding recommendations that divert disputes from what could otherwise become protracted and costly disputes.

### Overview

A dispute resolution board (DRB) is set up in the contract documents at the outset of a project. Typically, it consists of one to three members who are agreed upon by both parties or selected through a nomination process. Members are selected for their subject matter expertise and, thus, experts are rarely called over the course of the board's deliberations. They familiarize themselves with the project

and its key participants, and often conduct site visits at which parties make presentations to the board (Chern on Dispute Review Boards (Oxford: Blackwell Publishing, 2008) and F.E.A. Sander et al, 19 C.L.R. (2d) 194.).

Once a formal dispute has arisen, either party may refer the matter to the board; however, in rare cases, the board may intervene on its own, without the parties' consent. Hearings are held as soon as possible and the board has full control over admissibility of evidence and the manner in which it is presented. Rules of legal procedure do not apply, nor are boards based on the principle of fairness in the presentation of evidence. However, a code of ethics has been developed for DRBs (Chern; R.M. Matyas et al, Construction Dispute Review Board Manual, (New York: McGraw Hill, 1996)).

A DRB must issue written reasoned recommendations within a short, prescribed period of time. Such recommendations are not binding. If a party refuses to accept a recommendation, the contract usually provides for recourse to some further dispute resolution process to occur after substantial performance or, in some cases,

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total completion of the project. A party's failure to accept the board's recommendation does not in itself entitle the other party to stop performance (Chern).

### Costs

Despite the early involvement of board members, the costs of DRBs appear to be significantly less than those involved in litigation, or even adjudication. A three-person dispute board typically costs between 0.05 and 0.3

per cent of total project costs, with member fees falling between \$1,000 and \$2,000 a day. The costs depend on the time required for the hearing, and to prepare written recommendations (Chern; Matyas et al).

### Trends

A telling factor in the use of DRBs is the size of the projects for which they are employed. While DRBs are often thought to be feasible only for major projects, they are actually most often used for projects with a volume of less than \$100 million (Chern).

### Critiques

While DRBs are frequently hailed as a cost-effective alternative to litigation, this dispute review mechanism is not perfect. The non-binding quality of recommendations issued by the board can be a weakness, given that dissatisfied or, more crudely, “losing” parties can proceed to seek a second decision from the courts.

In addition, while the informal nature of DRB hearings is often cited as one of its strengths, the absence of procedural rules can result in a lack of confidence in

the board's recommendations. The absence of lawyers at DRB hearings has been said to be a weakness, particularly where contractual interpretation and complex points of law are involved. DRBs have been criticized for appearing to place equities before contract provisions or the facts of the dispute in making recommendations.

### Conclusion

Despite these concerns, DRBs have proved to be a tremendous asset to parties wishing to advance their projects while resolving contentious issues before they develop into full-blown disputes. Through DRBs, parties utilize the skills of experts in the relevant field, who have direct knowledge of the project and the interests of stakeholders, to preserve the relationship and, ultimately, ensure the success of the project.

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