The Ins and Outs of Dispute Review Boards

by Harvey J. Kirsh

“You have a pretty good case, Mr. Pitkin. How much justice can you afford?”

(Lawyer to his client (caption to New Yorker magazine cartoon, J.B. Handelsman, (December 24, 1973))

DISPUTE REVIEW BOARDS: AN OVERVIEW

(i)  Introduction

Most construction contracts contain mechanisms for the preliminary determination of disputes. For example, the 2008 revisions to the Canadian standard form construction contracts (e.g., CCDC 2-2008, issued by the Canadian Construction Documents Committee), although continuing the traditional role of the project consultant as the arbiter of first instance with respect to the interpretation, application, implementation, administration or enforcement of the contract, nevertheless call for the early appointment of a neutral, independent “Project Mediator” to supplement the dispute resolution function.

Similarly, the 2007 revisions to the AIA (American Institute of Architects) series of contracts call for the appointment of an independent “Initial Decision Maker”, who

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assumes the role, traditionally performed by the project architect/consultant, in rendering initial decisions for disagreements or disputes between the owner and the contractor\(^2\). A related process has been used on government projects in Hong Kong, in which a “Dispute Resolution Advisor” is jointly appointed by the government and the contractor to assist the parties, essentially though facilitated negotiation, in directly resolving disputes on the job\(^3\).

However, large, complex construction and engineering projects are increasingly calling for the establishment of panels of “standing neutrals” to provide preliminary rulings upon disagreements and claims as they arise. Such panels are created either in the construction contract or at the outset of a project. Where the panel is mandated to provide a non-binding opinion on the merits of a dispute, it is generally referred to as a “Dispute Review Board” (or “DRB”)\(^4\).

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\(^2\) This revision arose out of complaints by owners that they preferred to have the project architect advocate on their behalf in a dispute with the contractor, rather than serve as a neutral decision maker; and from skepticism by contractors as to whether project architects, who are paid by the owner, could serve impartially, particularly where the contractor’s claims included allegations that the architect was negligent.


\(^4\) Unsuccessful attempts have been made to use “hybrid DRBs” to serve as arbitration panels issuing final and binding decisions as to disputes under a certain dollar amount, and issuing only recommendations as to disputes exceeding that dollar amount: see Robert A. Rubin, “How NOT to Implement the DRB Process”, in Forum (the newsletter of The Dispute Resolution Board Foundation), Vol. 10, Issue 1 (February 2006), at page 13
According to The Dispute Resolution Board Foundation\(^5\), which was established in 1996, a DRB consists of “a board of impartial professionals formed at the beginning of the project to follow construction progress, encourage dispute avoidance, and assist in the resolution of disputes for the duration of the project”\(^6\). Fairness, in terms of procedures and protocols, and the promotion and maintenance of good project relationships are cornerstone values of the DRB process\(^7\).

Although the earliest reported use of a form of DRB (then called a “Joint Consulting Board”) was on the Boundary Dam Hydroelectric Project in northeastern Washington in the 1960s\(^8\), the genesis of the more common use of DRBs occurred in the mid-1970s on civil engineering works, particularly tunneling projects\(^9\), such as the construction of the second bore of the Eisenhower Tunnel on I-70 in Colorado\(^10\), and

\(^{5}\) “The Dispute Review Board Foundation” changed its name to “The Dispute Resolution Board Foundation” in November of 2001, in order “to conform with the dispute board trends on a global basis”, and particularly since DRBs are described in the DRBF bylaws as a “means for prevention and resolution of construction disputes” (see “Changing Our Name to Dispute Resolution Board Foundation” in Forum (the newsletter of the DRBF, Vol. 6, Issue 1 (January 2002), at page 1

\(^{6}\) See “DRBF Practices and Procedures Manual (January 2007)”, Chapter 1, Section 1, page 1 (at http://www.drb.org/manual/1.1_final_12-06.pdf)

\(^{7}\) See Jim Phillips, “When is Fair Not Fair? Ethics in the DRB Process”, in Forum (the newsletter of The Dispute Resolution Board Foundation, Vol. 11, Issue 1 (February 2007), at page 1


\(^{9}\) See Hinchey and Harris, at para. 1:10.  Also see Richard A. Shadbolt, “Resolution of Construction Disputes by Disputes Review Boards” [1999] The International Construction Law Review 101 at 103ff

\(^{10}\) See “DRBF Practices and Procedures Manual (January 2007)”, Chapter 1, Section 1, page 2 (at http://www.drb.org/manual/1.1_final_12-06.pdf)
the Boston Central Artery Tunnel Project. Other more recent tunneling projects employing the DRB process include the San Antonio River and San Pedro Creek Tunnels; the Bradley Lake Hydroelectric Power Tunnel; and Boston’s Marine Industrial Park Tunnel.

Interestingly, a recent Google search of “Dispute Review Boards” generated 38.4 million hits (!!). Drilling down into this informal search has served to confirm that, aside from underground tunneling projects, the DRB process has also been used on a multitude of complex private and government construction projects throughout the world, including heavy civil engineering, industrial, institutional, and commercial projects.

Sample U.S. projects using DRBs include Washington, D.C.’s Metropolitan Transit Authority; Phoenix’s America West Arena (concert hall and Phoenix Suns’ basketball arena); the Inter-Island Terminal of Hawaii’s International Airport; Washington State’s SR-90 Bellevue Transit Access project; and Colorado’s Hanging

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11 See Shipley, Expanding the DRB’s Role – The Boston Central Artery Tunnel Project’s Experience with Advisory Dispute Review Boards, as referenced in Hinchey and Harris, at fn. 2 of para. 1:10
12 See “DRBF Practices and Procedures Manual (January 2007)”, Chapter 1, Section 1, Appendix A (Case Studies), page 2 (at http://www.drb.org/manual/1A_Case_Studies.pdf)
Lake Viaduct. Furthermore, domestic owner agencies that have used DRBs include State highway departments (e.g., The California Department of Transportation (Caltrans) and Florida Department of Transportation (FDOT), which use DRBs on almost all projects); public transit authorities; municipal public works projects (including bridge rehabilitation, building renovation, combined sewer overflow tunnels, convention centers, court houses, highways, libraries, parking structures, prisons, sewer pipelines and tunnels, sewerage treatment facilities, schools and water supply projects); universities (e.g., classroom and medical buildings, libraries, research facilities, and sports complexes); airport expansions; dams; hydroelectric projects; mines; manufacturing plants; office buildings; port facilities; private research laboratories; and public stadiums.

Internationally, dispute boards have also been used in the Peoples’ Republic of China (e.g., the US $3.4 billion Ertan Hydroelectric Project); on Uganda’s Owen Falls Extension Hydroelectric Project; on the US $15 billion Folkestone (England) to Calais (France) Channel Tunnel; on the London Docklands Light Railway project;

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14 supra, fn. 8
16 For a Case Study of this project, see Forum (the newsletter of The Dispute Resolution Board Foundation, Vol. 8, Issue 2 (May 2004), at page 1
17 For a Case Study of this project, see Forum (the newsletter of The Dispute Resolution Board Foundation, Vol. 8, Issue 1 (February 2004), at page 1
and on numerous projects in Australia, Bangladesh, Botswana, Canada, Denmark, Dominican Republic, Ethiopia, Honduras, Hong Kong, Hungary, India, Ireland, Italy, Lesotho, Madagascar, Mozambique, New Zealand, Pakistan, Poland, Romania, Sudan, Uganda, the U.K. and Vietnam.

In their first 30 years, it is estimated that DRBs had been planned or used in over 2,000 global projects, having a combined construction value of over US $100 billion\(^\text{18}\). And throughout North America, the DRB process (as of 2007) had been used in over 1,000 projects (averaging $42 million each), and 98.7% of those projects were completed without resorting to arbitration or litigation\(^\text{19}\).

There was an early concern that the ready availability of a DRB would attract disputes, but “in practice, just the opposite has occurred”\(^\text{20}\):

“... (T)he existence of the DRB seems to have had a dampening effect on controversies by, in effect, giving the parties an incentive to resolve disputes among themselves, rather than suffer the inconvenience, disruption, and

\(^{18}\) See “DRBF Practices and Procedures Manual”, Chapter 1, Section 3 (revised April 2007), pages 2-3 (at http://www.drb.org/manual/1.3_final_4-07.doc)

\(^{19}\) See “DRBF Practices and Procedures Manual”, Chapter 1, Section 3 (revised April 2007), pages 2-3 (at http://www.drb.org/manual/1.3_final_4-07.doc)

\(^{20}\) Hinchey and Harris, at para. 1:10
possible embarrassment of having to call in the DRB. According to virtually all surveys and commentary, party satisfaction with DRBs is high. Those who have used the process on one project tend to use it repeatedly. The high level of satisfaction is usually attributed to the ‘real time’ resolution of the dispute, while all involved parties are available and the job can continue to move forward.”

Furthermore:

“. . . contractors are less likely to present exaggerated claims for the sake of increasing pressure on the owner/employer, and owners/employers are less likely to reject meritorious claims. Stated differently, both sides have a vested interest in preserving their credibility, which may suffer if they misbehave while the ‘teacher is in the room’.”

(ii) DRB Case Study: The Toronto Sheppard Subway Twin Tunnels Project

The City of Toronto's Yonge Street subway line, the first of its kind in Canada, opened in 1954. And on January 1 of that year, the Toronto Transit Commission (the “TTC”), an agency of the City of Toronto, became the sole provider of public

21 Hinchey and Harris, at para. 1:10. Also see D. D. McMillan and R. A. Rubin, “Dispute Review Boards: Key Issues, Recent Case Law, and Standard Agreements”, The Construction Lawyer (Spring, 2005) at fn. 9-10

22 Hinchey and Harris, at para. 3:26
transportation services in the city. Over the years\textsuperscript{23}, new subway extensions, branches and lines extended the reach of the city to the growing suburban populations.

The Sheppard Subway line, which took 8 years to build, and which cost almost $1 billion, opened on November 22, 2002. It was the first subway line in Canada whose two separate subway tunnels (the “Twin Tunnels”) were built entirely by two tunnel boring machines (“TBMs”). The TBMs (nicknamed “Rock” and “Roll”) not only dug through the earth, but also installed reinforced concrete liner rings as they passed. The Twin Tunnels were approximately 2.7 miles in total length, were to run side by side, approximately 40 feet apart, and were generally located from approximately 15 to 85 feet below the surface of Sheppard Avenue East.

TTC had entered into a CDN $93 million tunneling contract with MPF, a joint venture consisting McNally International Inc., PCL Constructors Eastern Inc., and The Foundation Company Inc. (subsequently known as Aecon Construction Group Inc.). The Twin Tunnels contract established, and set out the procedure, function

and key features of, a Dispute Review Board. The DRB’s stated purpose was to assist in the resolution of claims and other disputes arising out of the performance of the work on the Twin Tunnels project, in an independent, fair and impartial manner, in order to avoid construction delay and litigation. The mandate of the DRB included the provision of written recommendations to the parties in order to assist in the resolution of such disputes. However, although not binding on either party, “the recommendations of the Disputes Review Board should carry great weight for both the Commission [TTC] and the Contractor [MPF]”.

According to the Twin Tunnels contract, the DRB was to consist of one member selected by TTC and approved by MPF, a second member selected by MPF and approved by TTC, and a third member selected by the first two members and approved by both TTC and MPF. The third member was to act as Chair for all DRB activities. The contract also provided that “(i)t is desirable that all Disputes Review Board members be experienced with the type of construction involved in this Twin Tunnels Project, and interpretation of contract documents. The goal in selecting the third member is to complement the construction experience of the first two and to provide leadership for the Board’s activities”.
The DRB member selected by TTC and approved by MPF was a well-respected engineer who was President of a consulting company, and who had substantial underground and mass transit project experience and expertise.

The DRB member selected by MPF and approved by TTC was a registered civil, geotechnical and safety engineer, and a Professor of Civil Engineering at Stanford University, who had experience as an expert witness in cases involving geotechnical, contractual or construction practice issues, and who had served both as Chair and as a member of numerous other dispute review boards.

The DRB member selected by the two appointed members of the DRB as Chair of the DRB, and approved by both TTC and MPF, was an engineering consultant with substantial experience managing large tunnelling and other underground construction contracts, who had considerable experience chairing numerous other dispute review boards relating to tunnelling, subway and other construction and infrastructure projects.

Within a short time after commencing its tunneling work, MPF gave notice to TTC that it was incurring additional cost as a result of muck disposal problems due to high foam usage. MPF alleged that the actual quantity of foam that it was required to use in order to successfully excavate the tunnels far exceeded both what it expected to
use and what it could have reasonably been expected to use. MPF contended that, as a result of the high foam usage, its tunnel spoil was reduced to such a high-slump condition that its disposal costs were significantly increased. MPF alleged that both it and its trucking subcontractor were forced to haul the excavated and conditioned tunnel muck to inconvenient and expensive disposal sites, all at costs far beyond what MPF had included in its bid.

Subsequently, MPF submitted its 369-page claim for CDN $4.4 million in additional costs associated with tunnel spoil disposal. TTC quickly responded that there was no valid basis for the claim, and, after preliminary settlement discussions, the parties agreed to bring the matter before the DRB for a formal hearing.

Both TTC and MPF were given the opportunity to make written pre-hearing submissions, to present both factual and expert evidence, to make further submissions at the 2-day hearing, and to make written post-hearing submissions.

Shortly thereafter, the DRB released its detailed and comprehensive 41-page written “Recommendation”. The three members of the panel, in unanimously rejecting MPF’s claim, stated that “MPF has not made a reasonable case for extra compensation based upon arguments that lay within the four corners of the contract.”
Presumably of the view that success lay just outside “the four corners of the contract”, MPF provided written notification to TTC of its rejection of the DRB’s Recommendation (in accordance with the contract), and commenced litigation proceedings.

The facts, issues, pleadings, and submissions in the ensuing litigation were virtually identical to those which were put before the DRB. However, in its Statement of Claim, MPF made no reference whatsoever to the hearing before, or to the Recommendation of, the DRB. So TTC, in its Statement of Defence, pleaded that “(t)he claim being asserted by MPF against TTC in this litigation is precisely the same claim that was submitted by MPF and TTC to the DRB for hearing more than 2½ years ago”. MPF might have, but neglected to, put forward a reply to the effect that the entire DRB process was non-binding and akin to mediation, and was therefore privileged as being in the nature of settlement communications.

TTC also pleaded that the commencement of this litigation gave rise to the risk of the court making a decision that would be inconsistent with the decision made 2½ years earlier by the panel of three eminently qualified and experienced experts comprising the DRB; and that inconsistent decisions would bring the alternative dispute resolution and DRB processes into disrepute.
Furthermore, TTC pleaded that, as a matter of public policy, the commencement of litigation, after the same claim was unanimously and unequivocally rejected previously by a DRB, created a precedent that only served to discredit the benefits of the partnering, dispute resolution and DRB concepts and processes, and to discourage other parties on other projects from attempting to resolve their disputes using those concepts and processes instead of litigation.

The litigation settled before trial.

DISPUTE BOARDS AND THE INTERNATIONAL CHAMBER OF COMMERCE

The International Chamber of Commerce (“ICC”), based in Paris, employs three types of dispute resolution procedures for large construction and engineering projects:

1. **Dispute Review Boards** (“DRB”s) issue *non-binding recommendations* for disputes which arise during the course of a project. The parties may accept or reject the recommendation. If none of the parties objects within a specified time frame, then the recommendation of the DRB would become contractually binding.

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25 The standard ICC Dispute Board clauses for DRBs provide that all disputes arising out of or in connection with the contract *shall* be submitted, *in the first instance*, to the DRB, in accordance with the ICC’s Dispute Board Rules
other hand, if one of the parties should object, then the recommendation would not be binding, in which case the dispute may then be referred to arbitration (if the parties should agree), or litigated. Pending an ultimate decision of the arbitration panel or the court, the parties may voluntarily comply with the recommendation, but are not bound to do so. The ICC promotes the overall DRB approach as a device to avoid one party “winning” and the other party “losing”.

2. **Dispute Adjudication Boards** (“DAB”s) issue *provisionally binding* decisions.26 Decisions are enforceable without delay as a term of the contract, unless or until one of the parties should later succeed in convincing an arbitration panel or a court to reverse or modify the DAB’s decision. Pending a decision of an arbitration panel or a court reversing or modifying the decision, the parties are required to comply with it.

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26 The standard ICC Dispute Board clauses for DABs provide that all disputes arising out of or in connection with the contract *shall* be submitted, *in the first instance*, to the DAB, in accordance with the ICC’s Dispute Board Rules
3. Combined Dispute Boards (“CDB”s)\textsuperscript{27} typically issue non-binding recommendations, but, at the request of one or both of the parties, has the flexibility to issue provisionally binding decisions. This is considered to be a hybrid or intermediate procedure.

Other international arbitral bodies -- such as the Oslo Chamber of Commerce, the International Center for Dispute Resolution, and the Cairo Regional Center for International Commercial Arbitration -- have similar procedures.

DISPUTE ADJUDICATION BOARDS AND FIDIC

FIDIC (International Federation of Consulting Engineers / Fédération Internationale des Ingénieurs-Conseils) is an international organization, based in Geneva, whose “rainbow” suite of standard forms of contracts for engineering construction are widely used throughout the world.

\textsuperscript{27} This third dispute resolution procedure was added by the ICC Dispute Board Rules, which came into force on September 1, 2004. As one commentator wrote: “As its name suggests, this creature is a kind of hybrid which, depending upon the circumstances, can issue either a Decision or a Recommendation. Some guidance is given in art. 6 of the Rules as to the circumstances in which one or [the] other route may be taken but it is easy to see difficulties in this novel and uncertain arrangement”: see Christopher Dering, “Engineer or Dispute Adjudication Board: How to Choose”, at http://www1.fidic.org/resources/contracts/ibc_oct05/dering_different_ibc_oct05.asp, at page 2
The current versions of FIDIC’s contract forms all provide that disputes are to be resolved by a Disputes Adjudication Board (“DAB”), which issues a “decision”. Under the evolving FIDIC arrangements, the DAB process has replaced the dispute-resolving role of the engineer as the arbiter of first instance\(^\text{28}\). On this point, one commentator wrote:

“FIDIC’s [then] proposed alternative of having disputes settled by the Board procedure instead of the Engineer is a welcome development. The availability of this alternative will help redress the imbalance in favour of the Employer that has long existed in Clause 67 of the Red Book. The Board can provide a neutral and objective, even if rough and ready, prediction of [what] an arbitral tribunal will decide, at modest cost and within a short time frame compared to international arbitration. This should enable more disputes to be finally settled without arbitration than was true when disputes were referred to the Engineer”\(^\text{29}\).

In the FIDIC “Red Book” (Conditions of Contract for Construction, for Building and Engineering Works Designed by the Employer), the DAB is to be appointed at the outset of the contract, usually within 28 days. Typically three persons, having a

\(^{28}\) In some cases, the engineer may be appointed as the DAB, and would perform the Board’s function

blend of technical, legal, contractual, and procedural skills, are appointed to the panel, and their decision-making mandate is determined by the Procedural Rules annexed to the contract.

The Procedural Rules require the DAB to visit the project site at intervals of not more than 140 days, including times of critical construction events, at the request of either the owner or the contractor.

By way of contrast to the Red Book procedure, appointment of a DAB, under the Yellow (Conditions of Contract for Plant and Design-Build) and Silver Books (Conditions of Contract for EPC and Turnkey), takes place only after a dispute has arisen (i.e., within 28 days of the reference of a dispute\textsuperscript{30}). And, unlike the Red Book process (where the DAB remains in place through the life of the project), under the Yellow and Silver Book procedures the appointment of each DAB (there can be more than one) expires after it has completed its mandate dealing with the original dispute which was referred to it.

Procedural Rule 7 gives the DAB wide discretion and powers with respect to, among other things, its own jurisdiction; the scope of any dispute which may be referred to it; the procedure to be applied in deciding a dispute; and the conduct of any hearing.

\textsuperscript{30} Appointment could take 28 days plus the time required to nominate and secure the agreement of the third DAB panel member if the parties are unable to agree
Its decision, which must be made within 12 weeks of the reference of the dispute, is *provisionally binding*, and the parties are required to comply with it pending a subsequent reversal or modification of it by agreement between the parties or by an arbitral award. If neither party gives “*notice of dissatisfaction*” within 28 days of receiving the decision, it becomes *final and binding*. On the other hand, should a notice of dissatisfaction be served, then, in accordance with Sub-Clause 20.6 of the contract, the dispute shall be resolved by final and binding arbitration, by a panel of three arbitrators\(^{31}\). Interestingly enough, that sub-clause also provides that any decision of the DAB shall be admissible in evidence in the arbitration hearing, which raises legal, evidentiary, and strategy issues.

\(^{31}\) The contract calls for ICC-administered international arbitration under the ICC Rules