

DISPUTE RESOLUTION BOARDS

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'A stitch in time saves nine.'

(old English proverb)

SYNOPSIS:

The various dispute resolution processes all suffer two particular disadvantages, which arise from the fact that these processes only come into play when a dispute has crystallized. One disadvantage is that, during the dispute resolution process, trust between the parties may be sorely tested, or even destroyed. The other disadvantage is that the time and cost of resolving a dispute may well be significantly greater than preventative measures aimed at avoiding the occurrence of disputes in the first place, or at least minimizing the scope of any disputes which arise.

In contrast, Dispute Resolution Boards (DRBs) seek to avoid or minimize the incidence of disputes by a timely and relatively informal process which takes place while the work is in progress. Used effectively, they can lead to a reinforcement and enhancement of trust, with a positive impact on the project as it progresses.

HISTORICAL BACKGROUND:

The Dispute Resolution Board¹ process is believed to have originated on a tunnel project in the USA in 1975. The process reportedly worked extremely well, and was used on another nine projects in the decade to 1985. One of these, a hydro project in Honduras, was the first use on an international project.

The growth in use of the process has been dramatic. In the years between 1988 and 2001, the number of projects reported to have used the process has grown from 18 to 800.

WHAT IS A DRB:

A DRB is a purely contractual institution. The clause providing for the DRB in a contract needs to specify precisely how it is constituted and how it operates, including all necessary

1 Sometimes DRBs are called Dispute Review Boards.

administrative arrangements.² Planning and forethought will lead to smoother implementation.

A DRB has two primary functions. The first is to become familiar with the project during its construction (on the assumption that the contract involves construction). The second is to resolve, efficiently and cost-effectively, any disputes referred to it during that phase.

The DRB is usually set up at the commencement of the project. However, some DRBs have been constituted at other stages of a project. For example, I was a member of a DRB on a major BOOT³ infrastructure project in Australia, which was constituted to deal with disputes arising during the operation phase after construction works were completed.

The usual sort of 'model' for a DRB involves the following:

- 1 The process commences with a call for a nomination from each party of an independent person experienced in the work being undertaken.
- 2 The nominees must usually be acceptable to both parties. The nominees, once appointed, choose a third person to be the chairman or chairwoman
- 3 Once appointed, members of the DRB do not act as advocates or representatives of the parties who nominated them. They participate as independent, impartial members.
- 4 How the DRB is to operate is specified in the contract documents, or any procedural rules incorporated by reference (eg. the DRBF guidelines). The matters which should be specified include:
 - (a) duration and timetable for visits of the DRB to the project (eg. two days per visit, at least one visit per quarter);
 - (b) the procedure for visits;
 - (c) information to be provided to DRB members (usually the project documents, all site meeting minutes and progress reports as they come to hand);
 - (d) the procedure for dealing with disputes, including when and how they are to be presented and considered, in what circumstances the DRB's decision become binding, and in what circumstances reasons are or are not required;
 - (e) administrative matters, including remuneration of the DRB members.

2 The Dispute Resolution Board Foundation (DRBF) has developed a suite of documents for the operation of DRBs, which can be incorporated into a contract by reference, including draft contract clauses, DRB Operating Procedures and draft Three-Party Agreements (between parties and DRB members).

3 BOOT is an acronym for Build / Own / Operate / Transfer

ADVANTAGES OFFERED BY THE DRB PROCESS:

The DRB process is aimed at dispute avoidance or dispute minimization, rather than dispute resolution. The advantages can be summed up in the old adage that *'prevention is better than cure'*.

It is a truism that the time and cost involved in resolving disputes on modern construction projects is substantial. The sense of frustration can be exacerbated when further time and cost is spent on arguments between disputants about form and forum.

Traditional methods of handling disputes on large construction projects range from adjudicative processes in which a determination is made by a third party (eg. litigation, arbitration and expert determination) to consensual processes in which a neutral third party assists the parties in reaching a resolution which is agreed rather than imposed (eg. mediation, conciliation, facilitation, expert appraisal). All these methods have achieved varying degrees of success over time.

This is not the time or place for a detailed analysis of the respective advantages and disadvantages of the various dispute resolution processes. However, regardless of whether the resolution is imposed or agreed, all of these processes suffer a significant disadvantage in that they come into play only when the dispute has crystallized and the parties are unable to come to a resolution themselves.

Often, during the course of the dispute resolution process, trust between the disputants is sorely tested, or destroyed. As ongoing trust between contracting parties is an extremely important ingredient of healthy and efficient project delivery, this can be a significant disadvantage.

HOW THE DRB PROCESS WORKS:

The first meeting of the DRB should take place soon after the implementation of the project commences. For a construction project, this would be when construction is just getting under way.

At the first meeting:

- the DRB should be fully briefed on the Owner's expectations for the project, the Contractor's plans and expectations, and the concerns of other stakeholders (if any);⁴
- details of the procedure will need to be finalized, including such things as procedures for meetings, minutes to be kept, attendance (usually senior site representatives of the parties and their off-site superiors);
- the objectives of the DRB should be outlined, namely to fairly and equitably deal with differences and disputes, on the basis of the facts observed on the visits by the DRB and material provided to the DRB members, and their own experience.

4 For example, financiers of a BOOT project, operators of the project (if different to the Owner), consultants or contractors for inter-dependent works

The DRB should ensure that the ordinary principles of natural justice are observed during their dealings with representatives of the parties. At all times during visits, the DRB members should be accompanied by representatives of both parties and should not meet separately with either party. Communications to DRB members should be in writing, with a copy provided to the other party.

The periodic visits to the site and briefing of the DRB members occurs regardless of whether or not differences or disputes have arisen between the parties. As a result, when a difference does arise requiring resolution by the DRB, its members are already familiar with what is occurring on site, and should have gained the trust and respect of the on-site personnel, such that they can quickly come to grips with the problem and recommend a solution before adversarial attitudes take hold.

The dynamics of the DRB process ensures that the DRB members view and keep abreast of all developments on the project. Preferably, as differences emerge, they can be brought to the DRB for resolution. Occasionally, differences will be elevated to disputes before the DRB has an opportunity to consider them. In these situations, the DRB will receive submissions on the respective positions of the parties, and should be able to give a timely decision.

In comparison with the formal processes and the ADR processes previously mentioned, the DRB effectively provides a dispute avoidance mechanism. Experience suggests that, in most cases, the parties are likely to accept the DRB's decision, and there the dispute ends. Some project DRB procedures provide for parties to be able to refer disputes to arbitration if they are not satisfied with the DRB's decision. However, even with this option open to them, experience indicates that few parties do so. This may possibly be explained by the fact that, in doing so, a party will be going against a decision of a panel of people who were appointed by them, under procedures agreed to by them, and who (hopefully) they will have come to trust and respect. Another factor weighing strongly against challenging the DRB's decision is where it is admissible in the arbitration.

COST EFFECTIVENESS OF DRBs:

An important factor in considering whether to adopt the DRB process for projects is the issue of cost effectiveness.

As indicated above, the effectiveness of the process in avoiding disputes is based on periodic visits to the site and briefing of the DRB members, which occur regardless of whether or not differences or disputes have arisen.

Experience has shown that the DRB process is cost effective on projects with a value in excess of approximately US\$50 million. For a project of 2 years duration, with meetings each quarter, the cost without hearings will be less than 0.5% of the contract value. Based on the record of DRBs worldwide, with about a 99% success rate, this represents quite economical protection against the time and cost of becoming embroiled in lengthy, expensive litigation or arbitration.

EXPERIENCE IN THE USE OF DRBs:

The World Bank now requires projects with an estimated construction value in excess of US\$50 million to provide for three-person DRBs. The FIDC 'Red Book' for international civil engineering

projects, provides for the setting up of three-person Dispute Adjudication Boards (DABs) for projects over US\$25 million.⁵

The introduction of DRBs has had a significant impact on the number of arbitrations on major construction projects for the Californian Department of Transportation (Caltrans), which is responsible for about US\$2 billion worth of projects each year. California law requires that the ultimate method of dispute resolution on state projects be arbitration. Caltrans initiated DRBs on 8 projects in 1994, while retaining the right to arbitration if a party is dissatisfied with the DRB's decision. There are currently 110 Caltrans projects with DRBs. Since 1994, 282 disputes have been decided by DRBs. Of those, the decision was accepted in more than 60% of cases. Of the remainder, most were either settled or dropped. Only 4 of the 282 disputes (1.4%) have remained unresolved and required arbitration.⁶

Some examples of the operation of DRBs on large dam and similar projects outside the USA are set out in the Appendix to this paper, to illustrate some of the features of how they operate.⁷

The Hong Kong Airport project illustrates how the process can be streamlined to yield savings in cost and time where there are multiple contracts on the one project. The project DRB was constituted before any contracts were let. The Principal and the Contractor's Association each chose three mutually acceptable nominee members and a non-sitting convenor. As each contract was let, the successful contractor and the principal each chose one of the nominee members and they in turn chose the chairman from the other members to form the DRB for that particular contract. The seven members of the various DRBs then made visits to site for the project, each DRB sitting to examine progress and features of the contract it was concerned with. These arrangements saved travel time and expenses as each member sat on multiple boards.

A similar arrangement was put in place for the Central Artery Project in Boston, involving bridges across the Charles River and a new tunnel under Boston Harbour.⁸ Total value of the project is in excess of US\$10 billion spread out over 14 years from 1991 to 2004, involving 70 distinct contracts. The Principal, the Massachusetts Highway Department, had a key project objective to avoid litigation on this challenging project that involved complex and intricate work. It made an early decision to use DRBs on major construction packages (those over US\$20 million). Consequently, there was potential for DRBs to be used on 45 distinct packages involving 135 individual DRB members.

After lengthy and detailed discussions, the Principal and contractor community arrived at a model for consolidating DRBs. The Principal and the contractor each have the option on a newly awarded contract of using the same DRB that was in place on another contract with the same contractor, provided the DRB members were willing to serve in this expanded role.

This procedure commenced in 1997 and the results have reportedly been very positive. There have been eight 'consolidated' DRBs appointed, with appointees of the Principal and each of the

5 DAB are essentially the same as DRBs, except decisions are binding unless reversed by subsequent litigation, which is very rare.

6 See *'DRBs Overtake Arbitration in California'*, DRBF Forum, August 2003, p. 1

7 See *'Worldwide Application of the Dispute Review Board Method of Dispute Resolution'*, P. H. J. Chapman.

8 See *'Central Artery/Tunnel Project Implements Use of Consolidated DRBs'*, DRBF Forum, January 1998, p. 6

general contractors, (or lead joint venture partners) overseeing 22 separate contracts. The DRBs meet quarterly in Boston for two to three days as necessary, when they are briefed on the status of the work by the Resident Engineer and the contractor's Project Manager and are then taken on a site visit, for each of the contracts overseen by that DRB. As a result, the administration of the DRB process has been reduced by two thirds and operational savings (particularly travel) have been significant.

DRBs are not a guaranteed recipe for a trouble-free, litigation-free project. An example of what can go wrong was the project for the construction of a portion of a subway for the Los Angeles County Metropolitan Transportation Authority, which has embroiled the process in unwelcome litigation.⁹ For two years, the Authority and its contractor litigated the status and authority of the DRB following the purported termination of the contract by the Authority.

The parties had had numerous disagreements prior to the termination. The contractor requested a DRB hearing following the notice of termination. The Authority did not participate in the hearing and argued that the DRB no longer existed by virtue of the termination of the contract. The DRB conducted a hearing without the Authority at which the DRB found that the Authority's purported termination was in breach of the contract. For a variety of reasons, including the behaviour of one member of the DRB, the California Court of Appeals upheld the decision of a lower Court to remove the DRB.

The behaviour which was criticised by the Court in that case provides a useful checklist for appropriate conduct of DRB members, namely:

1. **Private communications:** communications with DRB members must be made in the presence of both parties.
2. **Perceived bias or lack of objectivity:** DRBs have been successful primarily because of the integrity, knowledge and experience of the members and the faith of the principal and contractor in the objectivity and integrity of the members of the DRB, whose members must therefore avoid any appearance of partiality or subjectivity.
3. **Appearance of prejudgment of issues:** Members of DRBs must decide disputes or differences which come before them based on the facts and circumstances of each particular dispute or difference.
4. **Advice beyond the scope of the referred dispute or difference:** Members of DRBs should limit their advice or recommendations to the particular dispute or difference formally referred to the DRB. Members of DRBs are not consultants, peer reviewers or construction managers. Furnishing technical or legal advice is not the function of a DRB.

CHOOSING THE MEMBERS OF THE DRB:

In much the same way that arbitrators, mediators, adjudicators and other dispute resolvers must have an appropriate level of competence to be nominated for matters, potential members of DRBs need to have a sufficient level of understanding and experience of the DRB process, the principles

9 See 'California Court of Appeals Upholds Removal of DRB Member on LA Project', DRBF Forum, January 1998, p.1

of cost-effective dispute resolution, as well as qualifications and experience in the technical issues involved.

For construction projects, sound, extensive (at least 15 years management) experience on major construction works of the type being undertaken is an important quality for potential members of DRBs, particularly those appointed by the parties.¹⁰ Extensive knowledge and experience with contract management and cost-effective dispute management and resolution is another important quality. An extensive knowledge of the workings of the DRB process and its many possible variants is also desirable essential so that the DRB can adapt the process to particular features of the project so that the process is made to fit the project and not vice versa.

The Dispute Resolution Board Foundation has played a prominent role in promoting the concept of DRBs and supporting its use in the construction industry, both through its own training and training and promotion conducted through affiliations with other bodies such as the Institute of Arbitrators & Mediators Australia. Some of these bodies maintain lists of potential appointees to DRBs and will make lists available for consideration by interested parties.¹¹

CONCLUSION:

Major infrastructure projects such as dams, hydro-electric facilities, irrigation projects and similar projects have been dogged over the years by complex and costly disputes.

The use of DRBs and similar processes has emerged as an effective, constructive means to minimise the harmful impact of disputes on these projects as far as possible. They also serve to ensure that, where differences between parties escalate into disputes, the issues are resolved equitably and as expeditiously and cost-effectively as possible, so that relationships are enhanced (rather than harmed) for the future.

10 This quality is less important in the choice, by the appointees of the parties, of the DRB chairperson, who is usually chosen for his or her qualities in the other two aspects referred to in this paragraph.

11 The Institute of Arbitrators and Mediators Australia provides services for Dispute Resolution Boards on request. Further details are available from the Institute's National Office (email: national@iama.org.au)

Appendix – Examples of Use of DRBs

CHINA - CONCRETE ARCH DAM AND HYDROPOWER PLANT

Approx. Value: US\$2 billion (civil works alone)

Employer: Chinese State Organisation

Contract: FIDIC 4th Edition

Construction Period: 1991 to 2000

Contractors: International Joint Ventures with local partners

Number of Main Contracts subject to DRBs: 2

Number on the DRB: 3

How Chosen: Parties each chose one, members chose chairman.

Frequency of visits: about 4 monthly

Total number of visit to site: about 20

Nature of DRB's determinations: Recommendations, not automatically final and not binding

Number of disputes referred to DRB: 40

Number of disputes that went to arbitration: Nil

Special Factors: First DRB in China. For most of the participants this was their first exposure to DRBs. Parties developed confidence in the DRB and realised that it could help the project by resolving difficult issues. Over the years, the DRB became more proactive and assisted the project in an informal capacity as well as operating formally. At the end of the project, DRB assisted in securing the parties consent to the final account.

HONG KONG – INTERNATIONAL AIRPORT

Approx. value: US\$ 15 billion

Employer: Airport Authority

Contract: Similar to H K Government standard

Construction Period: 1994 to 1998

Contractors: International, some Joint Ventures with local partners, many specialists (e.g. Air Traffic Control Systems)

Number of Main Contracts subject to DRBs: 22

Number on the DRB: Convenor (non-sitting) plus 6 others of various disciplines.

How Chosen: Agreement between Authority and Contractor's Association, members selected prior to contract award.

Frequency of visits: exactly 3 monthly

HONG KONG – INTERNATIONAL AIRPORT (CTD)

Total number of visit to site: about 16

Nature of DRB's determinations: Decisions, not automatically final but binding in the interim.

Number of disputes referred to DRB: 6

Number of disputes that went to arbitration: 1 (DRB decision upheld)

Special Factors: DRB covered all main airport contracts. Visits were with all main contractors at pre-scheduled quarterly review meetings, each DRB member was selected for his specialist knowledge and experience, hearings were formal and parties' positions were well presented by engineers, not lawyers, draft decisions given for party comments before finalisation. DRB ended too soon for maximum benefit but principal parties, retrospectively, have stated on record that the DRB was an excellent idea but not fully utilised by the parties during the construction period.

LESOTHO (SOUTHERN AFRICA) – CONCRETE ARCH DAM

Approx. Value: US\$1.5 billion (civil works)

Employer: State Authority

Contract: FIDIC 4th Edition.

Construction Period: 1993 to 1998

Contractors: International Joint Ventures with local partners

Number of Main Contracts subject to DRB: 1

Number on the DRB: 3

How Chosen: All three selected jointly by parties

Frequency of visits: about five-monthly

Total number of visits to site: about 16

Nature of DB's determinations; Recommendations, not automatically final and not binding

Number of disputes referred to DRB: 12 (56 day determinations).

Number of disputes that went to arbitration: 1 (Still to be determined)

Special Factors: First DRB in Africa. Party representatives all new to the DRB process. Referrals to the DRB had to follow formal notice of arbitration.

LESOTHO – ROCK-FILL DAM, HYDROPOWER PLANT AND ANCILLARY WORKS

Approx. value: \$US4 billion

Employer: State Authority

Contract Construction Period: 1999 to 2003

Contractors: Various international

Number of Main Contracts subject to DRB: 3

Number on the DRB: 3

How Chosen: One by each party, one by the members. Members selected who would be chairman

Frequency of visits: 6 months

Total number of visit to site: 3 (to 2001)

Nature of DRB's determinations: Recommendations

Number of disputes referred to DRB: first two referrals withdrawn, further referral anticipates late 2001

Number of disputes that went to arbitration: nil (to 2001)

Special Factors: One DRB covers three large contracts, claimant must refer to arbitration before DRB can operate, possibility for DB to act informally to help avoid disputes.