



Dispute Resolution Boards

An Alternative to Arbitration and Litigation



The DRB Foundation

- **Nonprofit corporation**
- **Formed in 1996**
- **Created to promote the use of DRBs around the world**
- **Over 500 members from more than thirty countries**



The DRB Foundation

- **Goals**
 - **Education**
 - **Public awareness**
 - **Networking**
 - **Historical database**
 - **Member & training directories**
 - **Newsletter, specifications & other publications**
 - **International presence**



Development of DRBs

- **History**
- **Global Use of DRBs**
- **DRBs – an evolving concept**
- **Aims of paper – to examine what DRBs achieve
– common mechanics - outcomes**
- **Objectives – to enable readers to chose
appropriate international DRB outcomes**



What is a DRB? (1)

- **3 reviewers**
 - **experienced**
 - **respected**
 - **impartial**
- **Organized before construction begins**



What is a DRB? (2)

- **Provided with contract documents**
- **Becomes familiar with**
 - **project**
 - **participants**



What is a DRB? (3)

- **Meets on regular site visits**
 - **with employer representatives**
 - **with contractor representatives**
- **Encourages resolution of disputes at job level**
- **Holds hearings**
 - **makes recommendations**



How a DRB is Organized (1)

Employer actions:

- **Evaluates applicability of DRB to this project**
- **Decides to use DRB**
- **Includes DRB specifications and 3-party agreement in bidding documents**



How a DRB is Organized (2)

After contract award:

- **Each party nominates one DRB member**
- **Parties approve other's nominee**
- **First two members**
 - **review contract documents**
 - **select third member**



How a DRB is Organized (3)

- **Third member approved and receives contract documents**
- **DRB is formally convened**
 - **3-party agreement is signed**
 - **Organizational meetings are held**



DRB Responsibilities (1)

- **Periodic site-visits**
- **Keep abreast of project activities and developments**
- **Encourage resolution of disputes by parties**



DRB Responsibilities (2)

- **When a dispute is referred**
 - **conduct hearing**
 - **complete timely deliberations**
 - **prepare a recommendation**



WHAT DRBs SEEK TO ACHIEVE (1)

- 1 Identify problems in advance : provide informal mechanism for solving issues before they develop into disputes.**
- 2 Provide a mechanism for the settlement of on-going construction disputes by independent panel of industry experts.**
- 3 Minimise the cost to industry traditionally arising out of the litigation of disputes.**



WHAT DRBs SEEK TO ACHIEVE (2)

- 4 Provide a speedy mechanism that prevents damage to the interests of both parties.**
- 5 Preserve the working relationship between the parties.**
- 6 Keep disputes out of the public arena as much as possible.**
- 7 Provide industry informed solutions to disputes.**



COMMON MECHANICS OF DRB (1)

- **Dispute resolution process is provided for in the contract.**
- **5 way contract is established between each member and the parties and between members.**
- **Board appointed before work commences.**
- **Board supplied with documentation in advance.**



COMMON MECHANICS OF DRB (2)

- **Board makes regular site visits, updated by parties on progress : provides informal/formal facilities for settlement of disputes as they arise.**
- **The board ceases to exist when the project is completed.**
- **Lawyers play a less significant role than arbitration/litigation. Objective is for parties to set out their views in a non-legal manner whenever possible.**



COMMON MECHANICS OF DRB (3)

- **Board party appointed 1 by either side 3rd by appointees : aims to achieve balanced board with wide expertise.**
- **Majority outcomes are permitted.**
- **The parties share the costs equally.**
- **Members are paid on an equal, pro-rata basis.**
- **Either party can refer dispute to board.**



COMMON MECHANICS OF DRB (4)

- **All members are neutral and serve both parties equally and fairly.**
- **Only the full board meets, particularly on site visits. The board never meets with parties without inviting both parties to attend. The board will not meet with a single party without the permission of the other party.**



COMMON MECHANICS OF DRB (5)

- **All communications shared with all parties/members. Telephone conferencing favoured : avoids perceptions of bias/allegations of breach of due process.**
- **Members may not receive payments in cash or kind from one party.**
- **Members absolved of personal/professional liability arising out of DRB activities.**



Perceived Barriers to DRBs (1)

- **Departure from traditional practices**
- **DRBs do not add value**
- **DRBs impose their own concepts of**
 - **fairness**
 - **Equity**
- **DRBs may promote claims**



Perceived Barriers to DRBs (2)

- **Lack of qualification or presence of bias**
- **Lack of project-specific knowledge**
- **Prolongation of claims process**
- **Prejudice resulting from disclosure**
- **Promotion of acrimony & posturing**
- **Lack of legal procedures & standards**



Comparison of DRB to other ADR Processes (1)

- **Tends to promote bilateral agreement**
- **Facilitates positive relations**
- **Facilitates open communications**
- **Facilitates trust and cooperation**
- **Minimizes aggregation of claims**
- **Minimizes posturing**



Comparison of DRB to other ADR Processes (2)

- **Encourages identification, evaluation and dealing with claims in a prompt, business-like manner**
- **Focuses on early identification and analysis, and prompt resolution**



BENEFITS OF USING DRB (1)

- **HIGH RESOLUTION RATE**

- **DRBF Statistical Database 1988 thru September, 2001**

- **Total # projects** **920**

- **Total value** **\$US73.4 billion**

- **Recommendations issued** **1125**

- **Acceptance rate** **97.6%**



BENEFITS OF USING DRB (2)

- **Provides an impartial forum**
- **Provides informal and rational basis for resolution (political cover)**
- **Parties are normally predisposed to DRB proceedings**



BENEFITS OF USING DRB (3)

- **Reduces transactional costs**
 - **legal fees**
 - **consulting fees**
- **Reduces lost productivity time**
- **Better informed decisions**
- **Lower bids because of lower bid risk premium**



9 Elements of a Successful DRB (1)

Source: *Construction Dispute Review Board Manual*, McGraw-Hill, 1996, by Mathews, Matyas, Smith & Sperry



9 Elements of a Successful DRB (2)

1 All 3 members are:

- **Neutral**
- **Subject to approval of both parties**

2 All 3 members sign a 3-party agreement obligating them to serve both parties equally and fairly



9 Elements of a Successful DRB (3)

- 3 The fees and expenses of the DRB members are shared equally by the parties**
- 4 The DRB is organized when the work begins, BEFORE there are any disputes**



9 Elements of a Successful DRB (4)

5 The DRB keeps abreast of job developments by:

- **relevant documentation**
- **regular site visits**

6 Either party can refer a dispute

7 An informal but comprehensive hearing is convened promptly



9 Elements of a Successful DRB (5)

8 The written recommendations of the DRB are non-binding but admissible as evidence later in

- **arbitration**
- **litigation**
- **to extent permitted by law**



9 Elements of a Successful DRB (6)

- 9 **The DRB members are absolved from any personal or professional liability arising from their DRB activities**
 - **Fees**
 - **Financing DRB**
 - **Procedure**
 - **Outcomes**



SUB-CONTRACTORS AND THE DRB

- **Sub-contractor presence is limited so strong relationship difficult to establish**
- **Cost of DRB for sub-contractors**



Partnering and the DRB

- **Objectives of Partnering and DRB processes are broadly similar, BUT methodologies involved are different OFTEN incompatible.**
- **State legislation may require both partnering and a DRB.**
- **Conflict is in respect of the resolution of disputes.**
- **Partnering elevates disputes**
- **DRB ends them quickly**



DRB VARIATIONS BY COMPOSITION

- **DISPUTE REVIEW ADVISOR DRA**
- **ADVANTAGES**
 - **Cost**
 - **Flexibility**
- **DISADVANTAGES**
 - **Loss of expertise**
 - **Loss of authority**



VARIATIONS IN OUTCOMES

- **Non-admissible advisory opinion – Non Admissible DRB.**
- **Binding conciliated / mediated settlement - DMedB**
- **Adjudication – immediately enforceable temporarily binding decision - DAdjB**
- **Arbitration – immediately enforceable final binding decision - DArbB**



CONCLUSIONS

- **Non-binding recommendations a problem outside the US**
- **DRB can work for public and private projects**
- **DAdjB is globally attractive**
- **Training is essential**
- **DRBs are no substitute for good contract drafting**



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