‘Dispute Review Boards in the Context of UK Construction’

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QUOTE

Lord Donaldson

(Forward to “The ICE Arbitration Practice”, Hawker, Uff and Timms 1983)

“It may be that as a Judge, I have a distorted view of some aspects of life, but I cannot imagine a civil engineering contract, particularly one of any size, which did not give rise to some disputes. This is not to the discredit of either party to the contract. It is simply the nature of the beast. What is to their discredit is if they fail to resolve those disputes as quickly, economically and sensibly as possible”

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Abstract

The incidence of disputes in UK construction continues at high levels with significant cash, resources and time expended on the prosecution, defence and resolution of these disputes. This is of concern to both the UK Government and the industry and during the 1990’s a number of reports and recommendations were prepared for change within the industry. Recommended changes included the adoption of adjudication for dispute resolution and Partnering in an attempt to avoid and reduce the incidence of disputes.

During the late 1980’s and 1990’s a system of combined dispute avoidance, dispute attrition and dispute resolution has developed in the USA and internationally known as Dispute Review Boards (DRB). Parties agree to select, establish and empower a standing board of respected experts at the commencement of a construction contract. They agree to refer all disputes to the board for their findings. The board may act in an informal advisory role, as mediator or in a quasi-judicial role issuing findings that are either recommendations, temporarily final and binding or finally binding. The use of DRB’s in the USA and internationally is reported to be successful in reducing costs, resources and time consumed by disputes. DRB’s are also influential in assisting with the development of a co-operative, non-adversarial culture on projects.

The focus in UK construction over recent years has been in the resolution of disputes and apart from partnering there has been little interest in combined avoidance and resolution mechanisms such as DRB’s. This dissertation reviews the concept of DRB’s, what they are, how they work and why they work. It seeks to look at a number of key aspects of English law and how the operation of a DRB is affected by both the common law and legislation such as the Housing Grants Act 1996. It also seeks to propose a model for DRB’s which is compliant and useable within the UK construction industry.

The dissertation also seeks to examine the key benefits of DRB’s and why they are successful. This extends not only to the relatively easily measured and understood savings in cost, resources and time delivered by DRB’s but also to the benefits of improved co-operation and culture change which a DRB can assist in developing. The establishment of a DRB with or without a formal partnering agreement can act as a catalyst for improved relations, reduced conflict and development of a team culture of co-operation and problem solving.

Finally, the proposition is presented that the future of DRB’s in the UK will be through their adoption and demonstration on major public works and infrastructure projects, supported and enabled by government and government / industry sponsored organisations for change, such as the Rethinking Construction Initiative.

CHAPTER ONE
Introduction and background to dispute attrition and DRB's

INTRODUCTION

The construction industry is a major contributor to the UK economy. In the year 2000 construction output was £68 billion and the sector employed 945,923 people.[1] The industry is usually involved in delivering complex, bespoke work, often in difficult physical conditions and to tight budgets and timescales. Complex projects require a variety of different skills. It can be observed that the structure of the UK construction industry reflects the trend in the general UK economy towards increased commercial specialisation and outsourcing[2]. This has meant that the required skills are provided by a large number of specialist suppliers and sub contractors. Accordingly, the contractual arrangements for construction projects reflect both the complexity of the work and the complexity of supply.

Within the UK construction industry commercial competition is fierce and profit margins often low, resulting in a culture of close and careful accounting and the pursuit of maximising opportunities for additional payment by the contractor or the Employer seeking to minimise payments due to the contractor.[3] Opportunities for the parties to maximise or minimise payment, extensions of time or other benefits can arise in many ways the most common being claims for additions or variations to the works, claims for delay and disruption to the works, claims arising from the measurement and valuation of works and claims regarding the quality of the work produced. Traditionally, most forms of construction contract allow for variations, additions and claims for additional payment or extensions of time and other matters, to be decided by the adjudication of a neutral, standing third party expert, often referred to as The Contract Administrator in JCT form contracts[4] or The Engineer in ICE form contracts[5], who are identified and empowered by the contract Many matters are resolved by the normal administration of the contract without difference or dispute between the parties.

However, in many cases the adjudication decision of the third party is unacceptable to one of the parties and the claim becomes the subject matter of a contractual dispute or difference of positions between the parties. Unfortunately, in the UK construction industry such disputes are common place. By any measure, construction claims and disputes in the UK take up a significant level of time and resources to prepare, defend, manage and resolve. A whole sub industry within the construction sector has developed in support of this dispute culture.

The options available to parties, between whom a dispute or difference arises, have evolved over time. Traditionally, most standard forms of contract have provided for final and binding arbitration of such disputes. Alternatively, in the absence of an arbitration agreement disputes have been settled in the courts. There is a major escalation in cost, time and resources between the resolution of a claim by the designated Contract Administrator or Engineer and the subsequent resolution of a dispute by arbitration or litigation.

The costs and time required to gain an arbitral or court award are often considerable. It is reported[6] that both routes are expensive, time consuming, overly formal and overly legal and in consequence, inappropriate and not favoured for a large percentage of construction disputes. In recent years, the level of construction claims and disputes in the UK construction industry and their resolution has been the focus of concern for many commentators and indeed government itself.

Lord Denning[7], when commenting on construction disputes, is quoted as saying

" One of the greatest threats to cashflow is the incidence of disputes. Resolving them by litigation is frequently lengthy and expensive. Arbitration in the construction context is often as bad or worse"

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[1] Construction Market Intelligence, Department of Trade and Industry
[2] Peter Davies, Structural changes in the British economy in the 1990's, Management Today Oct 2000
[3] John Burkett et al, Dispute Resolution (report), Construction Industry Council, January 1994
[4] JCT Form of Contract
[5] ICE Form of Contract
[6] R Faulkner, CH Spurin & G N Slaughter Arbitration Innovations – Dispute Review Boards and Adjudication. – The ABA International Arbitration News 2002 Vol2 No2 p14
[7] Construction Disputes Avoidance & Resolution, Ed Peter Campbell, Whittles publishing, Scotland 1997

In recognition of the shortcomings of litigation and arbitration for the resolution of construction disputes, the industry continues to develop alternative dispute resolution (ADR) initiatives. In recent years these have included the use of mediation, conciliation, expert determination and both contractual and statutory adjudication.

The Government has also been active in addressing the matter of construction disputes, commissioning a number of reviews principally by Sir Michael Latham[8] and Sir John Egan[9] and the introduction of new legislation in the form of The Arbitration Act 1996[10] and the Housing Grants, Construction and Regeneration Act 1996,[11] which now provides a statutory right of adjudication for virtually all commercial construction contracts.

Adjudication, in it's statutory form, as provided by the Housing Grants, Construction and Regeneration Act, has evolved into a well established construction dispute resolution process[12] and has generated a considerable volume of published analysis and commentary.

The focus of activity in relation to construction disputes in UK over recent years has been on the resolution of disputes. There exists a range of mechanisms whose suitability depends on the nature of the dispute, the level of commitment of the parties, their attitude to cost and time and the value placed on seeking to continue the relationship.

The mechanisms fall roughly into three categories.

Firstly, Expert Determination, where disputes of facts are determined by an independent expert.

Secondly, mediation and conciliation where the parties themselves agree a resolution of their dispute with the assistance of a neutral third party facilitator.

Thirdly, adjudication, arbitration or litigation where a resolution of the dispute is provided by a neutral third party after consideration of argument and evidence, each process differing by virtue of the rules and procedures adopted.

Each process however, does little to prevent or avoid disputes in the first place. It is a matter of simple logic that dispute avoidance is preferable to dispute resolution where a dispute is resolved some time later, after consuming time, cost and resources. There has been some development in dispute avoidance in recent years and Sir Michael Latham in his report, Constructing the Team[13], made a number of recommendations for change.

Since the late 1980's, a system has developed in the American construction industry and for major international projects, of combined dispute avoidance and dispute resolution. The system which utilises a standing panel of expert neutrals, has become generally known as a Dispute Review Board (DRB). This dissertation seeks to review the suitability and future of DRB's as a dispute avoidance and resolution mechanism in the context of UK construction.

The principal of DRB's has been considered as 'preventative law' or a process of 'dispute attrition'. This has been described by Faulkner, Spurin & Slaughter[14], as

"A systematic set of mechanisms to timely and efficiently eliminate disputes as early as possible and so preclude or peel away as many disputes as cost effectively as possible, through an innovative reconfiguration of the most useful aspects of classical arbitration methods."

It may be worth at this stage seeking to describe the concept of dispute attrition. Dispute attrition seeks to bear down on the causes of dispute and to reduce the incidence of and opportunity for disputes to arise. Furthermore dispute attrition seeks to resolve any difference or dispute at the earliest possible stage, reduce the size and scope of any dispute and reduce the time, cost and resources necessary to resolve the disputes.

[8] Sir Michael Latham, Constructing The Team, Joint Review of Procurement and Contractual Arrangements in The United Kingdom Construction Industry., HMSO 1994
[9] Sir John Egan, Rethinking Construction, Report of The Construction Task Force, HMSO, 1998
[10] The Arbitration Act 1996
[11] The Housing Grants, Construction and Regeneration Act 1996
[12] www.tony bingham.co.uk article 26.07.02, accessed 08.09.02
[13] Op Cit
[14] Op Cit

Dispute attrition is not bearing down on or influencing the parties to give away any rights or to compromise those right or principals for the sake of resolution.

In many aspects this is analogous to evaluative mediation, where the mediator introduces the concept of risk based cost analysis, in an attempt to get the parties to value the risks they face in third party resolution. This may influence their assessment of both parties positions and the type, range and timing of possible dispute resolution offers.

DRB's have, over the last 10 years in the USA and internationally, become a well established and well regarded mechanism for dispute attrition. Research data shows[15] that, as of September 2000, DRB's had been used or were planned on over 662 projects with a combined value of $35 billion. 841 disputes had been settled after referral to DRB's and only 25 disputes that have been put forward to the DRB's were taken to a binding dispute resolution process. However, virtually all of these have been resolved shortly after the commencement of litigation.

In addition to a high success rate in resolving most disputes referred, commentators report that it is rare for any DRB decision to be challenged and they also consider that DRB's have a strong prophylactic effect on the formation of disputes.[16] They have reported that on those projects where an experienced and neutral DRB is in place, disputes are less likely to arise. In addition to the use of DRB's in the USA they are also in place on large international construction contracts including those promoted by The World Bank and those under modified FIDIC forms of contract.

Reliable data on the use of DRB's in the UK construction industry is elusive. The DRB Foundation of the USA is represented in the UK by Mr Peter Chapman, a Barrister, Chartered Engineer and frequent international DRB member. Mr Chapman has been interviewed in his chambers by the author during the preparation of this dissertation and he reports that historic and current use of DRB's on UK projects is low. However, a number of influential promoters of construction work, such as infrastructure and utility providers are beginning to experiment with DRB's for major projects.

That is not to say that the principals of dispute attrition and DRB's have not been used in the UK, as it is reported,[17] that a designated cadre of neutrals, from which panels of three members would be assigned on an ad hoc basis to deal with disputes as they arose, was used during the construction of the Channel Tunnel.

The structure and mechanics of DRB's is well documented in documents such as The DRB Foundation Manual[18] and The American Society of Civil Engineers (ASCE) Guide

Specification for DRBs[19]. Examples of DRB requirements for international projects are contained in DRB modified FIDIC Conditions of Contract, Clause 67[20]. Such a modified contract is utilised by The World Bank on it's international major projects.

This dissertation seeks to review the characteristics of DRB's and some of the more important legal aspects in English Law. It will seek to examine how DRB's are successful in creating the benefits of dispute attrition, beyond that available to parties from other means of alternative dispute resolution in UK. Finally it will seek to consider the opportunities and barriers to their greater use and acceptance and the future for DRB's in UK construction.

The background and concept of dispute attrition and DRB's

Historically construction contracts in UK and British influenced countries have been administered and claims decided, by the supervising architect, engineer or contract administrator, with continuing disputes referred to final and binding arbitration. Such dispute resolution is effectively adjudication by a standing expert. Such

[15] Matyas, Mathews, Smith, Sperry, Construction Dispute Review Board Manual, Mcgraw Hill 1996 Para 1.2.7 and appendices A and B September 2000 update by DRB Foundation

[16] A Comparison of Dispute Review Boards and Adjudication, J P Groton, R A Rubins, B Qunitas, International Law Review Vol 18, part2, April 2001

[17] Ibid

[18] Matyas, et al, Op Cit

[19] Guide Specification for DRB, American Society of Civil Engineers, 2000 and Avoiding and Resolving Disputes During Construction, American Society of Civil Engineers, 1991

[20] Federation International des Ingenieurs Conseils (FIDIC), Conditions of Contract (International) for Works of Civil Engineering Construction.

experts are often consulting engineers or architects appointed and paid by the client, employer or promoter. They are often responsible for the design of the works in addition to the contract and claims administration. These consultants are expected to act in a quasi judicial, totally independent and neutral role between the parties (one of whom is their employer), both in the administration and valuation of the contract and in their decisions regarding disputes.

Many of the disputes arise from dissatisfaction by the contractor over a measurement or valuation decision made by the consultant and which are subsequently decided by the same consultant, who is asked to make a quasi judicial and impartial decision regarding the dispute.

Such powers were and still are conferred on the Contract Administrator or Architect in JCT form of contract and on The Engineer in ICE forms of contract, by the parties in the formation of their contract. The JCT form of contract[21] empowers the Architect, also referred to as the Contract Administrator, to issue mandatory instructions and to decided the value of interim and final payment certificates

For example

Cl 4.1"The contractor shall forthwith comply with all instructions issued to him by the architect in regards to any matter in respect of which the architect is expressly empowered……."

Cl 30.1*"The Architect shall from time to time as provided by Cl 30, issue interim certificates stating the amount due to the contractor…."*

The ICE Conditions of contract[22] vest very considerable powers in The Engineer, to accept work or to reject work considered sub standard, to order and to value variations and to determine the interim and final valuation of the works.

For example

Cl 60(4) *" Within 3 months after receipt of the (contractors) final account and of all information reasonably required for it's verification the Engineer shall issue a certificate stating the amount which in his opinion is finally due under the contract……"*

The finality of such decisions has however been the subject of much debate and litigation.

In recent years the legal position of the Engineers or Contract Administrators decisions has been clarified and subsequently changed.

In the Court of Appeal case of Northern Regional Health Authority v Derrick Crouch Construction Ltd[23] the court ruled that it had no power to open up, review and revise a certificate issued by an Architect empowered under the JCT 80 form of contract. Such a right of review lay only with the arbitrator empowered by the arbitration agreement contained in the contract. Prior to this case the Official Referees had for many years opened up and reviewed such certificates. The decision in Crouch effectively meant that arbitration was the only route to dispute resolution where a claimant sought to have a certificate reviewed.

The finding could be considered as a policy decision, to reduce the incidence of litigation in building disputes and channel such disputes to arbitration. However, in the 1998 case of Beaufort Developments (NI) Limited v Gilbert Nash NI Limited[24] the House of Lords has overruled the decision in Crouch and decided that

"The Court is entitled to examine the facts and form it's own opinion upon them in the light of the evidence. The fact that the architect has formed an opinion on the matter will be part of the evidence. But, as it will not be conclusive evidence, the Court can disregard his opinion if it does not agree with it."

This represents current law and thereby enables a claimant access to both arbitration or litigation in order to challenge a contract certificate. Parties are no longer therefore bound to arbitrate to achieve such a remedy. Furthermore, Amendment 18 of the JCT 80 makes the arbitration clause optional. It is reported by Masons Construction lawyers[25] that

[21] Op Cit
[22] Op Cit
[23] Northern Regional Health Authority v Derrick Crouch Construction Co Limited [1984]QB 644
[24] Beaufort Developments (NI) Limited v Gilbert Nash NI Limited [1998] 2 All ER 778, HL
[25]http:// www.masons.com/php/page3 accessed 14.09.02

"In recent years there has been some dissatisfaction with arbitration and more frequently parties have struck the arbitration clause from the contract (see Gould, N. (1998) 'Appropriate Dispute Resolution in the UK construction Industry' Civil Justice Quarterly, Vol 17, April). In recognition of this trend the parties may chose between arbitration or litigation as the final tier resolution process."

Since 1998 statutory adjudication under the Housing Grants, Construction and Regeneration Act is also available as a final relief until and unless overturned by arbitration or litigation. There is ongoing debate and argument[26] as to the authority of an adjudicator to open up and review certificates. Section 108 of the Housing Grants, Construction and Regeneration Act 1996 does not provide such a power[27]. This power could however, be included in an adjudication agreement between the parties. Interestingly, if no adjudication agreement exists the Scheme for Construction contracts applies, providing a default adjudication provision and this empowers an adjudicator to open up and review certificates.

In some forms of contract provision for mediation is permitted, but not as a mandatory form of dispute resolution or a condition precedent to action.

There exists within these traditional contract administration structures and systems a number of underlying potential difficulties. One difficulty is the potential for bias and conflicts of interest. Firstly the Contract Administrator is usually employed and paid by the Employer only, yet is expected when acting in a quasi judicial role to be independent and impartial. Many professionals have for a long time tried to live up to these expectations. Coupled to this many of the contract administrators or consulting firms employed to undertake this role have previously undertaken the design work for the project and given advice, budgets etc to their clients, who are now acting as Employer for the works. This again raises the issue of conflict of interest and seeking to possibly cover up design omissions or their previous errors at the contractors expense.

In a competitive and sophisticated market where parties, now even more than ever, seek commercial advantage and seek to uphold and exercise all of their rights and options, the decisions of the contract administrator are often considered (fairly or unfairly) somewhat lacking.

This results in increasing numbers of decisions by the contract administrators which are challenged as not acceptable to the parties, resulting in increasing numbers of contractual claims.

Further difficulties are then introduced, as these claims are then decided by the person who made the original decision and when such decisions are still not acceptable they are often forwarded for adjudication, arbitration or litigation. The industry appears to continue to question the reliability of this well established process and seems to have lost faith in the long established, but questionable, impartiality and decision making ability of the contract administrator to make impartial, acceptable quasi judicial decisions, often involving large sums of money.

The ability at adjudication, arbitration and litigation to have contract certificates opened up and reviewed may indeed be legal, fair and reasonable but does little to assist in reducing disputes or damping down the adversarial dispute culture in UK construction.

In addition, the picture is further complicated in that the UK construction industry and the UK government have become increasingly critical and dissatisfied with the external dispute resolution mechanisms traditionally provided for in the contract or the alternative of contract litigation. Criticism of these techniques included the perceived high levels of formality and legalisation of the process, the high costs and the high levels of resources necessary to resolve a dispute. Also, interestingly, particularly in the USA, criticisms included the fact that the existing dispute mechanisms did little if anything to help to avoid disputes in the first place. In response to the increased dissatisfaction with the traditional systems and the dissatisfaction with the subsequent options of mediation, adjudication, arbitration and litigation for the resolution of construction disputes, the industry and commentators began to consider other possible ways of dispute avoidance and resolution. Such thoughts and experiments were the embryonic beginnings of the of dispute attrition.

It is interesting to note, that the UK and USA, through a mixture of analysis, organic development and legislation, have developed different new generation dispute resolution techniques.

[26] eg. www.tonybingham.co.uk accessed 14.09.02
[27] Op Cit

In the United States during the 1980's, they began to experiment with the concept of 'Standing Neutrals'[28] in the form of project arbitrators, project arbitration panels and Dispute Review Boards. The concept of standing neutrals is worthy of comment and as the title suggests it is made up of expert, neutral, third parties, either as individuals or panels. This reflects the best of classical arbitration, using independent or impartial third parties acting fairly and governed by the rules of natural justice. These fundamental principals of arbitration are reflected in many national and international arbitration laws and rules, including the new UK 1996 Arbitration Act[29]

The Act includes key sections such as:

S1(a) "The object of arbitration is to obtain a fair resolution of disputes by an impartial tribunal without unnecessary delay and expense" and

S33 (1)(a) "Act fairly and impartially as between the parties giving each party a reasonable opportunity of putting his case and dealing with his opponents".

The other aspect of the concept of "Standing Neutrals is that they 'stand' or are available during the lifetime of the project. This represents a major development compared with the existing ADR processes, where the mediator, arbitrator or judge is identified or commissioned only after the differences between the parties become disputes whose resolution is now sought. It is this aspect of the experimentation in the USA which had the potential to develop a means of dispute resolution which also functions in a preventative law or dispute attrition role and goes beyond the simple threat of expensive and time consuming arbitration or litigation . It is this to which we will return later.

Meanwhile in the UK, in addition to dissatisfaction with the traditional contract administration process and dissatisfaction with the available dispute resolution mechanisms, the UK Government were increasing concerned with the state of the industry and commissioned a number of reports in the mid 1990's.

These culminated with a hard hitting and comprehensive report by Sir Michael Latham in July 1994 entitled 'Constructing the Team[30] In Chapter 9, Latham acknowledges the adversarial attitudes in both the UK and US construction industries and the advances made in the USA in the development of alternative dispute resolution. He recognised the strong debate and dissatisfaction with mediation, arbitration and litigation in the UK construction industry. It is interesting to note that this report predates the new and generally well received 1996 Arbitration Act[31]. Latham acknowledged that the best solution would be to avoid disputes and hence the report made recommendations in respect of a combination of structural and cultural changes to the relationships, both contractual and interpersonal, between construction project stakeholders in an attempt to reduce disputes.

From the Latham Report flowed a number of recommendations to improve relationships through cultural and contractual change, with initiatives such as Partnering, changes in tendering and selection, client education, better project information etc. However, probably the most significant recommendation was for a system of statutory adjudication for disputes, to be available to each party to a compliant construction contract. Latham's concept of adjudication was a form of 28 day fast track arbitration with an expert third party neutral appointed to decide a dispute after enquiry and considering the submissions of both sides. Adjudication was seen as a fast, real time resolution to disputes therefore improving cash flow for sub contractors. Latham proposed that the adjudicator's decision be enforceable and binding until and unless overturned by subsequent arbitration or litigation. This was in response to general dissatisfaction, even by the judiciary, with litigation and arbitration as a means of resolving small construction disputes.[32]

Lord Justice Lawton is quoted[33] as saying

> "*The Courts are aware of what happens in these building disputes, cases go either to arbitration or before the Official Referee; they drag on and on, the cash flow is held up…that sort of result is to be avoided if possible."*

[28] Groton, Rubin and Qunitas, Op Cit
[29] The Arbitration Act 1996, Op Cit
[30] Sir Michael Latham, Constructing The Team, Op Cit
[31] Op Cit
[32] Supra at p6
[33] Ellis Mechanical Services v Wates Construction Ltd, 1976,2BLR57

In 1996 the Government implemented Latham's recommendation for statutory construction adjudication through legislation in the form of the Housing Grants, Construction and Regeneration Act 1996[34]. This gives each party to almost any construction contract a statutory right to the adjudication of any dispute or difference between them within 28 days, by an expert, neural, third party adjudicator. This legislation is active today in England and Wales and has been considered by many commentators[35] as an effective additional means for the resolution of construction disputes, helping to obviate some of the earlier problems of time, cost and resources perceived for arbitration and litigation.

However, the author finds it incongruous, that having made in his report the self obvious statement that the avoidance of disputes is the best solution and being aware of the initiatives and experimentation in USA with Standing Neutrals and the concept of dispute attrition, that Latham did not seek in his recommendations, to attempt to include some features which may deliver at least some of the benefits of dispute attrition.

There is, of course, always the prophylactic effect of the threat of third party resolution of disputes which has to some degree an effect on the parties to seek to resolve their own differences. It is in this context that mediation should, at least theoretically, be a significant tool to both support this prophylactic effect and as a legitimate and successful method of alternative dispute resolution. However, in spite of some success it has failed to make a major contribution to construction dispute resolution in UK. Faulkner, Spurin & Slaughter[36] consider this to be due to a mixture of the shortage of well regarded construction mediators in UK and the cultural background and custom and practice of mediation in a facilitative role mainly for interpersonal disputes or pure compromise resolutions. Effective construction mediation is considered by them as requiring mediators with substantial industry, technical and legal knowledge who approach construction mediation in a neutral yet challenging and risk based evaluative manner.

It is interesting to note the growth in the UK of a number of high profile mediation providers. Organisations such as The Centre for Dispute Resolution (CEDR) approach from a 'not for profit', charitable foundation position with a mission to encourage cost effective dispute prevention and dispute resolution in both commercial and public sector disputes and in civil litigation. Organisations such as Resolex are purely commercial businesses, developed from partnership between legal practice and project managers. They offer advice and advocacy in dispute resolution but also have developed and brought to market a Contracted Mediation service for project based industries.[37] The Resolex approach is novel in that it offers the traditional consensual benefits of mediation but also seeks to utilise mediation as a dispute avoidance or dispute attrition tool. They seek early intervention at pre dispute or dispute formation stage, claiming improved knowledge of the detail of any dispute and an increased opportunity for resolution if the dispute is dealt with contemporaneously. It is also novel in it's use of a 'resolution proposal' by one party, acceptance of which would resolve the dispute or it can be used subsequently at adjudication, arbitration or in court. Resolex seek to make it's mediation service a contracted mediation in which the parties make an agreement to mediate prior to any dispute arising.[38]

In this context Latham, the UK Government and the UK construction industry do not appear to have valued the concept of Standing Neutrals, neutral mediation and dispute attrition as highly as the USA. Indeed these ideas have now spread beyond the USA and into the international arena for major works promoted by World Bank and others, often utilising a DRB modified form of the FIDIC contract[39] .

The observations from this initial comparison raises the question as to whether the UK construction industry would benefit from a greater use of 'standing neutrals' and the dispute attrition type resolution techniques now widely used in USA and internationally.

These 'standing neutral' and dispute attrition techniques have in many ways crystallised and developed in the USA and internationally into a process generally known and accepted as Dispute Review Boards (DRB's).

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[34] The Housing Grants, Construction and Regeneration Act 1996 Op. cit.
[35] www.tonybingham.co.uk Op Cit
[36] Op Cit
[37] P Green and S Woodward, Contracted Mediation for project based Industries www.oxfordinform.com/scl/talks/green-woodward-rep.pdf accessed 14.09.02
[38] This point is examined further in Chapter Three
[39] Op Cit

CHAPTER TWO
WHAT IS A DRB?

The Construction Dispute Review Board Manual[40] observes that the first formal, recorded, definitive, reference and users guide on DRB's was published in 1989 by the American Society of Civil Engineers (ASCE) under the title *'Avoiding and Resolving Disputes in Underground Construction'*. The Guide was updated and revised in 1991 and again in 2000 modifying the title to *'Avoiding and Resolving Disputes during Construction'*. These guides contain a narrative description of the structure and process, a suggested specification and a model three party agreement.

A brief description of a generic form of DRB may be summarised from the documents as follows:

A DRB usually comprises a review panel of three suitably qualified, experienced, respected and impartial reviewers. The panel is established at the same time as the formation of the contract, before the works commence. The panel members are contracted jointly by the parties and are paid a retainer for their services over the duration of the project. A favoured appointment protocol mirrors the appointment procedure for a three person arbitral tribunal where each party selects one panel member. These panel members in turn select the third panel member who also acts as chairman. The board's terms of reference, jurisdiction and procedure are agreed in advance of the works and the board receives copies of the contract and contract documents and updated documentation as the works progress. The costs of the DRB are usually shared, by agreement, equally between the parties.

Throughout the project each of the panel keeps fully abreast of the works, its progress, technical matters and difficulties. The panel members meet, visit and inspect the site at regular intervals during the works in order to keep fully up to date with the project.

The DRB will meet regularly with the parties, regardless of the presence of differences or disputes, simply to build a working knowledge and relationship with the parties and the ongoing project.

During the project, any dispute or differences can be referred to the DRB by either party. Indeed as a matter of contract the parties have agreed to refer such differences and disputes to the DRB. The DRB will seek and receive submissions from each party in respect of the referred matter. The DRB will then meet and inspect the works as they feel necessary. The DRB may also, if they see fit, act in an inquisitorial role. The DRB will conclude that dispute by publishing their written findings in respect of a resolution of the referred dispute or difference.

The status of the DRB's findings has been agreed between the parties at the formation of the DRB's contract terms. The parties have a choice between the findings being recommendations, final and binding until changed by arbitration or litigation or immediately final and binding. The implications of the status of the DRB findings is an important aspect and is examined later.

The usual status of DRB findings in the USA is that of recommendations. Although the decision is not usually binding, the parties usually defer to the judgement of the board, which of course they created. To do otherwise would defeat the purpose of having a DRB. Where the DRB recommendations are admissible at arbitration or litigation, experience shows that the weight given to them varies in different jurisdictions. In the UK the courts tend to support or be influenced by expert's determination provided that it has been properly made[41]. In the USA the recommendations are considered highly persuasive by the arbitral tribunal or court. The parties have had an opportunity to be heard, they have empowered the DRB and respect their judgement. They recognise that the DRB members are technically skilled and have a good contemporaneous first hand knowledge of the project. The DRB's recommendations in respect of any particular referred dispute are usually available quickly, in reality quicker than other means of third party determination and the dispute has been dealt with at the job site, in real time whilst the work continues.

[40] Matyas, Mathews, Smith, Sperry Op. cit. : Note: the DRBF which sponsored the above manual was subsequently rebranded the Dispute Resolution Board Foundation in 2002. A revised manual is due for publication in 2003 together with a Practice Manual and Users Guide

[41] Drake and Scull Engineering Ltd v McLaughlin and Harvey plc [1992] 60 BLR 102

If by agreement the DRB's findings are non binding recommendations then either party may take further dispute resolution action by way of arbitration or litigation. However, again by contractual agreement the DRB's recommendations may be available to either party at arbitration or litigation as evidence, to the extent permitted by the law.

Experience in the USA of the use of fast track or standing arbitration panels, delivering legally final and binding decisions instead of the advisory recommendations of the DRB was found to simply intensify the legalisation, formalisation and use of lawyer advocacy in the process. This resulted in a slower and more costly procedure than the advisory DRB model, which is the very reason why a DRB type process was chosen in the first place, in an attempt to improve the speed and reduce the complexity and cost of decision making.

The panel members are usually absolved from any personal or professional liability arising from their DRB activities[42]. This mirrors the protection given to adjudicators and arbitrators in English legislation.[43] The DRB agreement and procedures adopted for many project usually discourages the use of lawyers, either as DRB members or as advocates in the proceedings.[44]

In summary, there are often nine key elements to the establishment and operating procedures for a DRB. The DRB Foundation (DRBF) on their web site list the following key elements[45]

- All three members of the DRB are neutral and subject to the approval of both parties
- All members sign a three party agreement obliging them to serve both parties equally and fairly
- The fees and expenses of the DRB members are shared equally by the parties
- The DRB is organised when work begins, before there are any disputes
- The DRB keeps abreast of job developments by means of relevant documentation and regular site visits
- Either party can refer a dispute to the DRB
- An informal but comprehensive hearing is convened promptly
- The written recommendations of the DRB are not binding on either party but are admissible as evidence, to the extent permitted by law, in later arbitration or litigation
- The members are absolved from any personal or professional liability arising from their DRB activities

In addition, it is worth considering that the objectives and measures of effectiveness of any contemporaneous job site dispute resolution system, including DRB's, should include seeking to achieve as many of the following as possible[46]:

- Availability: - The process should be readily available to resolve any dispute, of any kind, on a construction project
- Speed: - The process should commence as soon as an impasse, dispute or difference occurs
- Economy:- The process should be cost effective and economical
- Quality of decision:- The parties should regard any decision that is made as objective, expert, fair and entitled to respect
- Finality:- The end result of the process should be to achieve a final resolution of every dispute, so that at the completion of the project there are no disputes
- Project harmony and respect:- The system should foster a continuing atmosphere of harmony and co-operation in relationships between the participants
- Reduction of disputes:- The existence of the system should encourage participants to resolve their differences by themselves without having to submit them to the neutrals for determination
- Widespread use: - The system should be widely known and used
- Robustness:- The system should be robust enough to withstand the unusual pressures that can be exerted by the nature of the project, the participants or by particular disputes such as when the stakes are extremely high, a large amount of money is involved or the economic future of a participant is involved.

[42] Matyas, Mathews, Smith, Sperry Op. cit.
[43] S108 Housing Grants Act 1996 Op Cit and S29 the Arbitration Act 1996
[44] Groton, Roberts, Rubin, Quintas Op. cit.
[45] http://www.drb.org/concept.htm accessed 23.08.02
[46] Groton, Roberts, Rubin, Quintas Op. cit.

A short comparison of the structure, organisation and procedures of DRB's in USA as described by the DRB Foundation, the DRB Manual and the ASCE Guides[47] and those established on international projects shows very considerable similarities. This is not surprising as the first recorded DRB's was in the USA in the mid 1960's on The Boundary Dam and Underground Powerhouse Complex.

It was from these early uses and experiments in the USA that the international format and adoption of DRB's evolved. However, the process was not recorded internationally until it's use on the El Cajon Hydroelectric Plant in Honduras some years later, between 1980 and 1986[48] and with no other recorded use internationally for many years.

Traditionally, international construction has relied, in line with the UK system of contract administration described earlier, on an independent standing expert (the Architect or engineer), retained and paid by The Employer to administer and manage the contract and to make decisions regarding the outcome of disputes between the parties, the appeal of such decisions usually being formal arbitration between the parties. This process has been in place over very many years in the traditional FIDIC form of contract[49] for international work and in the ICE suite of contracts[50] for UK Domestic work. For international projects where a DRB is to be used Clause 67 of the FIDIC Contract is modified to reflect the use of the DRB where The Engineer is relieved of any responsibility to settle disputes. Instead, disputes are to be referred quickly to the DRB. This option is a requirement on World Bank sponsored large projects. The modifications to Clause 67 not only creates and empowers the DRB but also include an Annex A, which sets out the DRB's Rules and Procedures for that particular international construction project. This is comparable with the use of the ASCE's Guide Specification Avoiding and Resolving Disputes during Construction in US domestic disputes.

It is worth noting some key points[51], in addition to the various points considered earlier for domestic DRB's, which should be considered when seeking to establish an international DRB.

- Nationality:- To reduce even the possibility of perceived partiality it is recommended that DRB members should not have the nationality of either of the parties
- Language:- It is recommended that all DRB members be fluent in the language of the contract
- Indoctrination:- all DRB members should share the conceptual requirement for independence, equality and fairness
- Appointment:- consideration could be given to allowing the first two DRB members to be appointed by a nominating body such as the ICC or ICE
- Scope of services:- eg consideration of procedures which allows the DRB to act on minor matters without a site visit and the frequency of visits with consideration of the location of the project
- Remuneration:- Each panel member to paid the same in an identical, hard currency[52]
- Liability, jurisdiction and applicable law:- each of these matters will need to be considered and defined on a project by project basis
- Need for alternative or substitute members

The list of potential complications for international projects can be large and is somewhat dependant on the size, nature, location and legal landscape of the project and the sophistication, culture and experience of the parties. Very few of these potential difficulties is insurmountable and there will be, in reality, little difference in the nature and process of DRB's on any construction project regardless of it's type or location.

[47] All Op Cit
[48] Matyas, Mathews, Smith, Sperry Op. cit.
[49] Conditions of Contract (International) for Works of Civil Engineering Construction (Op. cit.)
[50] eg. The ICE Conditions of Contract Measurement Version 7th Edition September 1999, The Institution of Civil Engineers, The Association of Consulting Engineers, The National Contractors Association
[51] Matyas, Mathews, Smith, Sperry Op. cit.
[52] Parity should apply to the rate of remuneration not the total as the Chairmanship may involve greater billable hours

CHAPTER THREE
SOME LEGAL ASPECTS OF DRB'S

The legal status of any DRB is to a certain extent dependant upon the applicable law of the contract and the law and public policy considerations applicable to the location and jurisdiction of the project. The DRB is simply a creation of the contract between the parties to which the common law and principals of business to business contracts and the applicable legislation applies.

A contract term to refer all disputes and differences arising from the contract works to a DRB is underpinned by the principal of party autonomy. The parties to any business to business commercial contract are generally considered to have the right, subject to legality, to make agreements and form whatever contract terms they wish. In addition, many basic considerations such as the absence of duress, undue influence etc. must satisfied. Accordingly, two parties may enter into a contract for a construction project and include a contract term which requires either party to submit disputes to a DRB. This is analogous, in many ways, with the formation of an arbitration agreement contained in a contract.

All contract terms should of course be clear and unambiguous. Contract terms setting up the DRB arrangements, it's terms of reference, jurisdiction and authority are established by party agreement. This agreement is central to the dispute resolution for that contract and can be expected to be legally scrutinised and possibly tested severely at some time during the life of the DRB. This is particularly so, where there are closely contested, high value or commercially critical disputes between the parties.

In the majority of construction contracts the procurement procedure leading to a contract will follow a well established pattern. Usually an issue of tenders on behalf of the promoter (an invitation to treat), followed by an offer by each invited contractor to undertake the work described at an offer price or to a specified method of valuation and in compliance with the various terms, conditions and requirements contained in the contract documents. The promoter or Employer then accepts one tender and rejects the others. In this way the contract is then formed.

If this process is undertaken carefully and professionally, as one would expect for any significant construction works, then there should be little problem with satisfying the legal criteria for formation of a valid contract evidenced in writing, viz:

- Agreement
- Intention to create legal relations
- Consideration
- Capacity
- Purpose

In our examination of DRB's in the context of the UK construction industry we shall limit our interest to English law only. In order to consider the legal status of the DRB in a UK construction contract it is necessary to consider exactly what the DRB is asked to do, the procedures and rules it will adopt and the intended status of it's outcomes and findings. It will be necessary to consider the effect of English common law and current English legislation on the activity and status of the DRB.

Internationally some DRB's are subject to institutional involvement in their establishment, rules and procedures, such as the ICC and FIDIC[53] Unlike many UK arbitration procedures[54], which are often subject to institutional appointment, supervision and rules, DRB's in the UK do not yet benefit or suffer from institutional involvement. The creation, rules, procedures and powers for a DRB must all be contained in the contract which created it. That is not to say that the contract cannot include terms, conditions and procedures by reference to other documentation such as the FIDIC or ASCE Guide Specifications[55]. However, the use of non domestic models and documentation may raise issues of jurisdiction and conflicts of laws.

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[53] ICC, International Chamber of Commerce Arbitration Rules also FIDIC, Federation Internationale des Ingenieurs Conseils Conditions of Contract for Civil Engineering Works

[54] Eg Institution of Civil Engineers Arbitration Rules

[55] FIDIC & ASCE both Op Cit

Extensive research by others has failed to find any state law, rules or regulation in any country which would specifically regulate any DRB[56], unlike adjudication and arbitration in the UK which are both subject to specific legislation.

Accordingly the only legal context for the DRB is found in the applicable law of the contract and the legislation of the location or jurisdiction.

It is appropriate to consider the influence of English law on a number of the key aspects and operations of DRB's established for UK construction works. Firstly, the English common law of contract will apply to the establishment, the operation and the findings of the DRB. The English common law is extensive, complex and diverse and based upon the principals of judicial precedent and we will examine a small number of key aspects of the common law as they may effect the unique and specific operation and effectiveness of a DRB. The legal analysis of the detailed and specific application of English law is no different for a DRB than it would be for any of the other alternative dispute resolution mechanisms or indeed the application of any other contract or contract terms.

Privity of Contract

It is a general principal of English law that rights and obligations under a contract accrue only to those parties to the contract[57]. This however has been partly altered recently by The Contracts (Rights of Third Parties) Act 1999[58] which allows benefits to accrue in certain circumstances to third parties to a construction contract where the terms are expressed to be for the benefit of the third party. These rights are however complicated by the possible requirement of a close legal analysis of both burdens and benefits of the contract before a third party can rely on the Act. If parties wish to establish commercial third party rights and obligations under English Law, they would be best provided by clear and specific multi party contract arrangements rather than relying on the above act. It is the parties to a construction contract who agree to set up and operate a DRB for that contract, and only those signatory parties will be bound by the obligation terms of the contract. As demonstrated below, one of the key potential benefits of a DRB is in assisting and enabling the development of a collaborative, co-operative partnership culture for the efficient delivery of construction works. As discussed above[59], many construction works are complex requiring inputs of many different skills from a variety of sub contractors and suppliers.

Any contract between the Employer and the main contractor which includes a DRB will be of much reduced value unless the operation of the DRB is to apply to the entire contract network for the project. To be most effective, terms whereby each stakeholder, sub-contractor or major supplier has agreed to be bound by the DRB agreement are required.[60]

To establish such a comprehensive pan project DRB network, the DRB contract terms, originally proposed and established between the principal parties, must be reflected in each of the other sub-contracts, consultancy contracts or major supply contracts necessary to deliver the project. Bearing in mind the privity of contract principals discussed above, these contract terms will need to be specific in their construction and application to each of the many parties, in addition to being legally co-ordinated to form a comprehensive and enforceable pan-project network of DRB terms applying to each and every participant and stakeholder.

Such agreement is analogous to a multi party joint venture or the multiple signatories to a project partnering charter, which seeks to establish each and every party or stakeholders agreement to the aims, objectives and collaborative procedures of the partnering agreement and charter.[61] See Fig 1 in the Appendix for a typical multi party signed partnering charter. Indeed such a charter may sit side by side with a project DRB agreement for projects where the principals of partnering are adopted.

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56 Vinod K Agarwal, Alternative Dispute Resolution Methods, Dispute Review Boards, Doc No14, Chapter 1 March 2001, http://www.unitar.org accessed 9.09.02

57 Price v Easton (1833) 4B & AD 433

58 The Contracts (Rights of Third Parties) Act 1999

59 Supra p5

60 It appears that in the USA multi party DRB's are rare. However, the DRB or a supplimental DRB is sometimes empowered to address main / sub contractor disputes but without any link to the Employer or other stakeholders. Alternatively the main contract may require adjudication provisions to be put in place between the main and sub contractors

61 See Appendix, Fig 1 also Chapter 4 for the symbiosis of partnering and DRB's

Not an agreement to negotiate or agree

It is worth noting that in English Law any prior agreement between parties that forms a contract which contains a term whereby the parties agree to negotiate or to otherwise seek to agree at some time in the future is unenforceable. This may be considered as a contract to make a contract, where parties have simply agreed to negotiate. It has been held that a mere agreement to negotiate is not a contract[62].

It therefore does not impose any obligation to negotiate or to use best endeavours to reach agreement or consider badly any parties failure to accept offers, that with hindsight appear to be reasonable.

Similarly, any implied agreement to negotiate in good faith does not form a contract term[63] The position in law in the USA is similar where the rule is that when something is reserved for future agreement there is no legal obligation until that future agreement is reached[64].

In contrast however, there is pressure within the UK legal system through the Civil Procedures Rules (CPR)[65] and from the judiciary, for parties to seek to resolve their differences at an early stage and avoid the need for litigation by the use of Alternative Dispute Resolution (ADR). One of the well regarded means of ADR is mediation. The CPR Part One has over riding objectives which seek to encourage early out of court attempts to resolve disputes and the courts have the power, if so minded, to stay actions in court to allow time for mediation[66]. The courts in certain circumstance also have the power to impose cost penalties on those claimants who refuse to take part in mediation or who abuse the process[67]. This is an emerging and developing area of law and it would appear that the courts and judiciary seek to take a different view of mediation and agreements to mediate than the current law applied to contracts or agreements to negotiate.

It is considered that the courts take a different view of ADR generally and of mediation specifically, as they consider it a supervised activity. This may be as a result of significant differences between the processes of negotiation and mediation between parties. Whilst negotiation is a private unregulated exchange between parties, mediation could be considered as assisted negotiation in which an independent and neutral third party (the mediator), acts in a facilitative, guiding and questioning role. Such assisted negotiations are not simply between the parties in private but in front of the mediator who not only has knowledge of the negotiations but who can guide and assist the parties to reach their own mutually acceptable settlement.

A contract agreement to mediate has the general support of the courts as discussed above. Although this is a developing area of law, the case of Scott v Avery[68] established the general principal as far back as 1885. Published analysis[69] of the legal position reports that 'whilst the eventual jurisdiction of the court cannot be ousted, it can never the less be validly delayed or stayed, in that the parties can properly impose on themselves, by way of agreement, a series of intervening steps which have to be completed as a condition precedent to either party commencing litigation or arbitration.' Under S26(4) of the CPR the court has the power to direct a 1 month stay proceedings, extended if necessary in order to give time for the parties to mediate in an attempt to reach a settlement. In public law disputes the Queens Bench Division may refuse to allow Judicial Review until such time as the ADR process has been exhausted.

Of course, if the court is to consider that such an agreement provides a sufficient condition precedent to litigation and to order a stay in proceedings for meditation to take place, the clause requiring ADR must be precise and clear. Otherwise the problems of uncertainty raised in Watford v Miles[70] and Halifax Financial Services v Intuitive Systems Ltd in 1999[71] will defeat the agreement.

It should also be considered what inference the court will take if no mediation agreement exists or if a party fails to participate or abuses the mediation in spite of an agreed mediation clause in the contract. The court may pose questions such as "was there a mediation agreement?" If the answer is no the court may ask "why

[62] Courtney & Fairbairn Ltd v Tolaini Bros (Hotels) Ltd [1975] 1 WLR 297 at 301
[63] May & Butcher v R [1934] 2 KB 17 and Walford v Miles [1992] 2 AC.128 Neill 108 LQR 405
[64] Transamericana Equipment Leasing Corp v Union Bank 426 F 2d 273, 275
[65] Civils Proceedure Rules (CPR) 1998 S1(4)
[66] Ibid
[67] CPR S28 & S41
[68] Scott v Avery (1865) 5 HL Cas 811, 10ER 1121
[69] Mackie, Miles, Marsh & Allen, The ADR Practice Guide, Butterworths, London 2000 page 110
[70] Watford v Miles Op Cit
[71] Halifax Financial Services Ltd v Intuitive Systems Ltd [1999] 1 All ER Comm 303

not?" The court may wish to enquire if the parties have attempted mediation and may even seek to enquire of the mediator whether or not the process was abused by one party.

District Judge Monty Trent, a member of the Civil Justices committee suggests[72]

'That whilst the courts cannot as yet compel parties to participate in ADR processes the courts may none the less take a failure to engage in the process into account when awarding costs'

It should be noted that English law in this area continues to develop in respect of the use of ADR in an attempt to avoid litigation of public disputes. In the recent case of Cowl v Plymouth City Council[73] Lord Woolf and others stressed that the courts should make appropriate use of their ample powers under the CPR to ensure that the parties try to resolve the dispute with the minimum involvement of the courts. They considered that insufficient attention is paid to the paramount importance of avoiding litigation and the contribution which ADR can make to resolving disputes in a manner which both meets the needs of the parties and the public and saves time, expense and stress.

These examples show a determination by the courts to support the ADR process and to guide parties to and through ADR in the hope that the dispute can be settled without recourse to the courts. It is the failure to engage in the process which would influence the courts and may incur the cost penalty rather than a failure to reach a settlement.

It appears therefore that the courts will support an agreement to mediate and participation in a mediation process. However, as part of an ADR initiative neither negotiation or mediation has in English law as yet been given the status of an absolute condition precedent to bringing an action in court. Parties cannot be denied access to litigation simply by their failure to form a mediation agreement or to comply with such an agreement and participate in the process. The only current power that the courts can exercise in this matter is to suggest and recommend ADR and to support ADR with a suitable stay of proceedings and to impose cost penalties on parties who fail to participate or who abuse the process.

It is worth noting that unlike the UK, the courts in the USA have the power in some states to order parties to participate in a mediation prior to the court hearing in an attempt to settle the dispute. However, no one can require parties whether by mediation or negotiation, to agree.

The legal position of DRB activity in UK construction is dependant on the scope of services to be provided by the DRB agreement. The DRB agreement is not an agreement between the parties simply to negotiate, although the parties may be encouraged and not prevented by the DRB from attempting to negotiate a settlement of their differences.

The DRB agreement may however, contain a mediation agreement and empower the DRB to act as a mediator in assisting the parties to reach their own mutually acceptable resolution and to ensure that a suitable binding mediation settlement agreement is drawn up[74]. Of course mediation in the absence of a DRB or DRB mediation agreement could alternatively be provided by ad hoc agreement and appointment of a mediator or in the form of contracted mediation offered by external providers, such as Resolex, also discussed above[75]. The principal of contracted mediation by a DRB has not only been established but as an agreement to attempt to avoid litigation, the process is actively encouraged by the courts. The key condition being that such an agreement to mediate is made freely by the parties and cannot be imposed upon them and is not an absolute condition precedent to litigation. In addition, clear advice must be given in respect of the implications and risk of bias where any third parties act in a mediation role, followed by a quasi judicial decision making role is essential post Glenncott.

If informal advice from the DRB and negotiation between the parties fails to resolve the differences and formal mediation fails to resolve the dispute, the DRB may be required to make and publish to the parties it's findings in respect of a resolution of the substantive dispute set before them. The DRB agreement could provide that such findings are advisory recommendations or final and binding until and unless overturned by arbitration or litigation or immediately final and binding. Each such finding of the DRB would attract different legal requirements.

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[72] at NLJ No6880 page 411
[73] Cowl v Plymouth City Council 2001/2067 [2001] EWCA Civ 1935
[74] However, the DRBF in the USA is implacably opposed to DRB's undertaking any form of mediation role
[75] Supra p18

An agreement between parties that disputes between them be put to ADR either for mediation or for independent third party determination, in the form of a DRB is both therefor allowable and encouraged in law.

It may be of course that the simple presence of such an agreement influences the parties to seek to negotiate a resolution of their dispute prior to involving the DRB in order that it is not have third party involvement. This is one of the widely reported dispute attrition benefits of DRB's[76].

DRB Findings:- Recommendations, temporarily final and binding decisions or immediately final and binding decisions.

The DRB agreement once signed becomes a binding term of the contract between the parties and the referral of any dispute or difference to the DRB, subject to certain criteria, is enforceable. However, the status of the findings of the DRB may vary according to the detail of the DRB agreement and it is for the parties to agree what status they wish the DRB findings to have. There are a number of models or formats of DRB's from which parties may choose. Although structurally similar they differ in the extent of the DRB's powers and the status of the DRB findings.

The DRB may initially act in an advisory capacity to the parties with a brief to attempt to avoid disputes or the causes of possible disputes. The DRB may then act as a mediator to facilitate the parties own settlement of any dispute. If this mediation is not successful the DRB may then be required to issue findings regarding the dispute. These may be in the form of non binding recommendations or a decision which is final and binding until changed by arbitration or litigation or a decision which is immediately final and binding.

The merits of each form of findings is discussed in Chapter Four below. It is now appropriate to examine the legal aspects of each mode of operation of the DRB.

Mr Peter Chapman, one of the UK's leading experts on DRB's, in writing about the informal advisory operation of DRB's[77] considers that an advisory role can be fraught with potential problems for the unwary for the following reasons.

Under some forms of contract, the jurisdiction of the DRB takes effect only after an engineer's decision and the involvement of the DRB may be prohibited until a dispute reaches a relatively advanced stage. A DRB can however operate very effectively on an informal level where matters of concern and potential disputes can be brought to the attention of the DRB and the DRB may be able to assist and advise the parties in avoiding the matter becoming a dispute. However, the DRB should proceed in such circumstances with caution, as giving informal pronouncements or pre judgement of issues which may later be subject to a formal reference may prejudice the enforcement of any eventual formal DRB findings. The role of the professional advisors should also be respected and not usurped by the DRB's advice.

It should not be difficult however, for a skilled and experienced DRB to advise and steer the parties towards new understandings and help to clarify matters in contention. In many cases this will lead to the matters being settled by agreement. The informal advice of DRB's must be approached with caution. However, this type of advice is usually welcomed by the parties and is a valuable means of dispute avoidance and a key benefit of DRB's

The DRB may be called upon, empowered by the DRB agreement, to act as mediators for a dispute or difference between the parties. The DRB should of course contain a member or members skilled in mediation for this to be effective and the mediation should be undertaken in accordance with the accepted process and norms of commercial mediation, of which many are available[78] The resolution of a dispute between the parties by mediation will result in a formal written mediation settlement agreement between them. This settlement agreement forms a settlement contract between the parties and is enforceable in law if the agreement contains the usual required elements of offer, acceptance, consideration, intention to create legal relations and capacity. Such an agreement is enforceable even if the contract was negotiated on a without prejudice basis[79]

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[76] Matyas, Mathews, Smith, Sperry Op. cit

[77] Construction Disputes avoidance and resolution Ed Peter Campbell, Whittles Publishing 1997, chapter 5 by Peter Chapman

[78] eg. David Richbell, The CEDR Mediator Handbook, CEDR 2000

[79] Tomlin v Standard Telephones and Cables [1969] 3 All ER 201 CA

If litigation proceedings have commenced the settlement will be given the force of a court order, as if it were a judgement, by using a Consent or 'Tomlin' Order.

There are potential problems associated with secret knowledge and natural justice where a DRB acts as a mediator and where the parties fail to settle if the same person subsequently being asked to consider the same dispute and issue any form of binding decision. This is considered in detail later in this chapter.[80]

The major role of any DRB will usually be independent consideration of disputes referred to them by the parties and the publishing of findings in respect of the substantive matters in dispute. A significant legal aspect of DRB's to be considered it whether or not the findings of the DRB can have the legal status of a non binding recommendation or the binding status of a decision or award.

If the parties choose that they require the findings of the DRB to be in the form of a recommendation, such recommendations have little legal force and have only advisory or persuasive status. This is the normal DRB format for domestic DRB's in the USA and it's value should not be under rated, as it is reported that the process of agreement to submit disputes to a DRB and participation in the process delivers cultural and behavioural changes in interparty team co-operation and reduced adversity, which bring significant dispute avoidance and dispute attrition benefits to the project. In any significantly sized works there may be a number of disputes which arise and are referred to the DRB. If it were simply the case that the party against whom the DRB recommendation is made or who otherwise loses their argument, were blatantly to refuse to accept or comply with the recommendation, the whole DRB exercise for the project would be devalued and undermined and have been a waste of time, effort and fees. Such behaviour is counterproductive, hence once a party enters into the DRB process at the early stage of a project there is significant benefit in maintaining the agreement to abide by the recommendation. The lack of legal compulsion can indeed test a party's resolve or their commitment to the DRB process, especially if the disputed matter is of high value or of critical importance to the commercial well being of the party losing the recommendation.

One key elements of DRB's examined earlier[81] chapter is that the process should be respected and robust. In this sense the quality, fairness and impartiality of the process needs to be high in order to maintain adherence to the agreement by a losing party. It is often said about any quasi judicial decision in ADR, that it is the losing party that the adjudicator or arbitrator (or in this case the DRB) should seek to satisfy. If the losing party can accept the justness of the decision then the process has indeed succeeded.

A further consideration in respect of an agreement between the parties for a non binding recommendation is whether or not the DRB's recommendations should be available and admissible as evidence in any subsequent arbitration or litigation. This is a consideration for the parties who can, if they so agree, give the recommendations 'a without prejudice status' and the recommendation and other parties evidence cannot then be presented at any subsequent arbitration or litigation, although their own evidence could be reworked and presented in another forum. It would appear that where the recommendations of a DRB are inadmissible, they are often ignored rendering the DRB process ineffective.

Alternatively, the parties could be explicit about the availability and admissibility of the DRB recommendation at arbitration or litigation. A difficulty however may arise in potential challenges to the admissibility of the recommendation. This could be on the basis that the process by which the DRB reached the decision was in some way flawed, unfair, biased or contravened the principals of natural justice. In this respect, the DRb would de well to adhere to procedures where all communications between the parties and the board are either in writing (copied to the other party) or made in person to the board through the chairman and that both parties are present at all meetings with the board or on site visits. The board should never split up during site visits or meet parties privately unless empowered by both parties to do so.

Any subsequent arbitral tribunal or court may also question whether the recommendation has been based on a full assessment of both the facts and the law and whether the recommendation upholds the parties' rights or is simply an accommodation between the parties.

It would be for the arbitrator or the court to assess the DRB recommendation as evidence, possibly to examine the process and as a result to place whatever weight they considered appropriate on the DRB's recommendation.

[80] p38
[81] Supra p23

Perhaps surprisingly, it is in the use of non-binding recommendations that insight into the true benefit and role of the DRB can be found. By focusing on the legal status of the DRB it is easy to miss the value of a DRB in shaping, binding together and formalising the common shared cultural values and ideals of dispute avoidance and attrition to which the parties to the project aspire. The DRB forms a framework for a number of key beneficial processes to operate throughout the project and these will be considered in Chapter four.

An alternative DRB model is available, where the DRB findings are to take the form of a binding decision or award on the parties. Such a decision can be final and binding until changed by arbitration or by a court or the decision can be immediately final and binding.

It was upheld by the Court of Appeal in Cameron v John Mowlem Plc that a DRB finding is not in itself enforceable as an arbitral award[82] as it considered such a finding to have the status of an expert adjudicators decision and not subject to enforcement through the Arbitration Act. However, in Drake & Scull v Mclaughlin and Harvey plc[83] Judge Peter Bowsher QC held that a mandatory injunction, supporting the adjudicator's decision, was the appropriate legal enforcement remedy. Peter Chapman[84] notes that 'the decision of a DRB is akin to that of an expert if asked to make an expert determination. Whilst the English Courts have had no hesitation in reviewing and overturning determinations by experts if fraud or collusion can be proven, in the absence of this, the courts seem to be generally reluctant to intervene in the substantive issues of the dispute, even if the court thinks the decision is wrong. In Campbell v Edwards[85] Lord Denning stated: 'It is simply the law of contract. If two persons agree that the price should be fixed by a valuer on whom they agree and who gives that valuation honestly and in good faith, they are bound by it.' It is a matter in law of the expert answering the right question.

If they do this, then even if they answer the right question in the wrong way the court will generally support the decision. However, if the expert answers the wrong question, even in the right way the decision will be open to challenge. An agreement which provides for a DRB may state clearly that the decision of the DRB is to be treated as an expert determination (eg FIDIC Red Book Clause 67.2)[86] and is final and binding.

Accordingly, in the establishment of the DRB agreement care must be taken to be precise as to the status of the DRB decision. If a binding decision is required it must be established in the form of an expert determination (based on facts only) or expert adjudication (based on facts and law) or in the form of a process which complies with the 1996 Arbitration Act. In such circumstances, this process then becomes one of arbitration and what the parties have in fact done is selected a standing arbitral tribunal for the project at the start of the project and before any dispute arises.

There are many significant procedural and compliance requirements given by the Act such as the requirements to form a compliant arbitration agreement within the DRB agreement[87] and the designation of a seat of arbitration, etc. There are many opportunities within the scope of an arbitration under the Act for the parties to agree powers and procedures to be adopted by the arbitrator and these could be included in the DRB agreement. A DRB process whose findings are intended to be binding and enforceable through the Arbitration Act must be established and conducted in accordance with all of the mandatory requirements of the Act.

It is up to the parties to decide in advance if their DRB agreement is to permit informal advice, if it is to empower the DRB to act as mediator and whether the DRB findings are to be recommendations, temporarily binding or immediately final and binding. It is then necessary to construct the DRB agreement and processes in order that the parties wishes become enforceable in law to the extent required.

The problems of informal private meetings or mediation followed by a binding third party decision:- An issue of natural justice, secret knowledge & Glencott.

As discussed previously the mode of operation and procedure adopted by a DRB are in part characterised by the standing nature of the panel, who maintain an up to date knowledge of the project. They are available if

[82] Cameron A. Ltd v John Mowlem & Co plc [1990] 52 BLR 24
[83] Drake and Scull Engineering Ltd v McLaughlin and Harvey plc [1992] 60 BLR 102
[84] Op Citnotes
[85] Cambell v Edwards [1976] 1 WLR 403
[86] Op Cit
[87] Arbitration Act 1996 S5, S3 & S4 respectively

required to advise and interact with the parties to try to assist with dispute avoidance and dispute attrition. On many projects the DRB may take on the role of informal advisor and / or mediator to try to facilitate and enable the parties to reach their own mutually acceptable resolution. This may present certain legal difficulties if and when the DRB is asked to make a binding finding or award. The activity of the DRB can in these circumstances best be compared with mediation / arbitration (MedArb) of which there has been much debate in recent time.

Principally an arbitrator is bound by the 1996 Arbitration Act[88] to:

'Obtain a fair resolution of disputes by an impartial tribunal without unnecessary delay and expense' and

'Act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent'.

In fact these requirements although explicit in The Arbitration Act 1996 simply mirror the implicit requirements of natural justice which applies equally to experts and adjudicators. An arbitrator who firstly acts as a mediator between the same parties in the same dispute may be open to a legal challenge in respect of a failure to abide by these two requirements and indeed the principles of natural justice. The practice of arbitration is a less formal process than court and each arbitrator has the power to adopt appropriate procedures, viz: 'It shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter'[89]. The procedures adopted must comply with the overriding obligation to act fairly and impartially and to give each party reasonable opportunity to put and defend their case.

The procedure of mediation followed by arbitration of the same matter, between the same parties with the same third party neutral has been the subject of a recent case in English law, Glencott Development and Design Co Ltd v Ben Barrett & Son (Contractors) Ltd[90]

A Court must seek to balance the wishes and agreement of the parties with the need for natural justice and compliance with the law. The Achilles heel of Med/Arb is in terms of compliance with natural Justice: *Audi Alternam Partem* (every party should be able to be heard) and nothing *in Camera* (whatever has been said by one party should be heard by the other party). This may present some difficulty if the advisor or mediator subsequently become the adjudicator or arbitrator. A binding award where the arbitrator has secret knowledge not known equally to all parties by virtue of having taken part in private meetings or caucuses with the parties, may be subject to a challenge on the basis of natural justice or under S68 of the Act 'Challenging the award: serious irregularities'. This would be based upon the Arbitrator's failure to comply with his Section 33 (general duties of the tribunal) obligations to act fairly and impartially between the parties.

A simple solution in English Law was suggested in the Glencott case whereby the mediator / arbitrator carefully and specifically, preferably in writing, warns the parties in advance, of the possible problems and opportunities for challenge based on the breach of natural justice resulting from private meetings or caucusing and of secret knowledge. In addition to warning the parties it would be wise to gain their specific agreement to the Med/Arb process.

An alternative solution would be to refrain from private meetings and secret knowledge in the conduct of the mediation proceedings. This however presents other difficulties in so far as the effectiveness of mediation often depends on the work done in private discussions between each party and the mediator. These sessions are to explore the parties positions, viz a vie each other, and to undertake evaluative risk assessment to assist with each parties re-evaluation of their positions and their best alternative positions with a view to assisting identify potential settlement possibilities, offers and counter offers.

An informal advice role or mediation without private meetings may be less successful in reaching a mutually acceptable settlement. In the context of DRB's, this is again a matter which needs to be included in the DRB agreement if the parties wish the findings of the DRB to be any form of binding resolution of the dispute. The DRB agreement should contain explicit and clear words, as evidence at any later challenge, that there was an agreement that the DRB acting in an adjudication or arbitral role were empowered to meet privately

[88] The Arbitration Act 1996, Op Cit, S1 & S33
[89] Ibid S34
[90] Glencott Development and Design Co Ltd v Ben Barrett & Son (Contractors) Ltd [2001] B.L.R. 207

with either party and to retain secret knowledge and that the parties accepted the position in respect of secret knowledge and natural justice.

It could be argued that such an agreement was in fact an agreement that the DRB are empowered to depart from their obligation to act fairly and impartially, however in reality a specific agreement to private meetings or caucusing falls far short of such an implication. The alternative where the DRB is not so empowered, runs the risk of the DRB findings not being capable of being final and binding as required by the parties, as a result of legal challenge as described. This would severely undermine the value of the DRB and not reflect the parties wishes. It would of course be for the court within which the challenge is raised to decide the matter on the basis of the facts of the particular case. However, taking note of the Glencott case parties would be wise to prepare properly and obviate the possibility of challenge by simply adding a suitable warning and consent to their DRB agreement.

The alternative is where the DRB is unable to meet the parties privately, discuss problems and advise in confidence or advise in a dispute avoidance role. The parties should realise that this creates a severe dilution of the full DRB role of dispute avoidance, attrition and resolution. To have the DRB restricted in such a way would devalue it's role and it would be questionable as to whether such a restricted DRB was worth the time, cost and effort. It is also always open to the parties to engage a mediator, independent from the DRB and the parties, to assist with a particular disputed matter.

Agreement to exclude legislative rights?

Finally, an important legal consideration for DRB's in the UK construction sector, under English Law, is the effect of and the relationship of the DRB process with the 1996 Housing Grants Act[91] (the Act). This act gives any party to a construction contract (as defined in the Act), a statutory right to refer any dispute or difference to adjudication at any time. The Act lays down minimum basic requirements for compliant adjudication provisions, which may be incorporated into any construction contract. Failure to include compliant adjudication provisions into the contract terms is not a bar to a party's right to adjudication as the Act make provision for just such circumstances by providing a default set of adjudication provisions and rules through the Scheme for Construction Contracts[92] (the Scheme). The adjudicator's decision under the act is enforceable, final and binding[93] until such time as the decision is overturned by arbitration or litigation. That is to say that the decision and remedy is enforceable, for instance by payment of monies ordered by the Adjudicator and that any reversal would require a further remedy such as ordered

re-payment. It is not the case that the adjudicators remedy is stayed pending a final decision by an Arbitrator or the court.

The Act and the Scheme provide a statutory right of adjudication. Accordingly, it is not possible for parties to avoid or deny such a right in any contract between them. The right to adjudication of any construction dispute or difference therefore exists in parallel with any DRB agreement or obligations between the parties. Accordingly, in addition to a party's agreed and established contractual obligation to refer any dispute or difference to the DRB, there exists a parallel right that either party may refer any dispute or difference to adjudication at the same time.

Such an action of course whilst a right of the parties, would be contrary to the sprit of the DRB agreement and effectively wreck the DRB process. This is another indicator of the consensual and co-operative culture, which is central to the success of a DRB.

There would be little benefit to the project or the parties in the longer term, if after establishing a DRB by agreement one party subsequently seeks to bypass the DRB by seeking other avenues such as adjudication to resolve the dispute which they may consider more favourable to their position. This of course may be particularly tempting for a party when large sums of money are at stake, or where the findings are of significant commercial importance or where they have lost faith in the DRB or the DRB process possibly by having lost previous disputes on the same project.

A party exercising their right to adjudication in parallel to the DRB would in addition to the organisational and cultural difficulties presented to the project add a number of legal complications depending on whether

[91] Housing Grants, Construction and Regeneration Act 1996, Op Cit
[92] The Scheme for Construction Contracts (England and Wales) Regulations 1998
[93] Macob Civil Engineering Ltd v Morrison Construction Ltd [1999] BLR 93

the DRB findings were meant to be binding or not. If the DRB findings were recommendations then the adjudicator's decision would take precedence and be binding unless and until overturned by arbitration or litigation. If the DRB findings were immediately final binding this would in fact be an arbitral award and would supersede any adjudicator's decision under the act once the DRB decision were published. Difficulties arise where the DRB findings are required to be temporally final and binding, in a similar way to a statutory adjudication. There is possibility of two different decisions, one by the DRB and one by the statutory adjudicator. This is discussed in more detail below.

There is also the matter of timing to be considered when considering such parallel actions. The Housing Grants Act[94] generally requires the adjudicator to make his decision within 28 days of its referral, which in the settlement of disputes by traditional arbitration or litigation is very quickly indeed. One of the benefits of the DRB outlined earlier is that it is a standing panel who maintain a high level of current up to date knowledge of the project and the nature and circumstances of potential or emerging disputes.

The DRB may indeed have had some involvement in attempts at dispute avoidance or mediation between the parties regarding the dispute in question.

For all but the largest disputes it would not seem unreasonable for the DRB, with detailed contemporaneous knowledge of the dispute to be able to provide their findings either in terms of recommendations or a binding decision more quickly that the 28 days allowed for statutory adjudication. Furthermore, in view of their detailed contemporaneous knowledge of the project and the dispute, the DRB decision may be a better informed and hence a more acceptable decision. Whereas an adjudicator appointed at the time of referral of the dispute will have no previous knowledge of the parties, the project or the dispute and will have a steep learning curve. In reality the statutory adjudicator may never within the 28 day time scale be able to gain a level of knowledge that the DRB will already have.

It is not unusual for adjudicators to be named in the contract for major works at the time of formation of the contract (as recommended by Latham).[95] However, such adjudicator are not usually required to maintain contemporaneous knowledge of the project and disputes and hence they still do not have the level of project knowledge that the DRB will hold and all that is gained is a speedier referral.

It may be therefore that the statutory adjudication is in fact 'beaten to the decision' by the DRB. The position is then clear if the DRB decision is an immediately final and binding arbitral award. The adjudication is dead.

However, if the DRB findings have the status of a recommendation this presents further difficulty if one of the parties persists with a statutory adjudication on the same matter, in that the adjudicator's decision will override the recommendation until changed at arbitration or litigation. Alternatively the DRB decision may be temporally final and binding similarly to the statutory adjudication decision, the parties are then faced with two decisions possibly contradictory regarding the same dispute one binding by contractual agreement and the other temporarily binding by statute. This would present some difficulty for the project and would probably need to be resolved by the courts. The arbititral tribunal and the court would have access to the DRB findings but the adjudicator would not. Such a position is best avoided by suitable construction of the DRB agreement and process as described below.

The starting point and test for statutory adjudication under the act and for the jurisdiction of an adjudicator to make a binding decision, is the existence of a dispute or difference between the parties. If a DRB finding had been published it would be necessary to consider carefully whether or not a dispute or difference continued to exist between the parties. Again the wording and construction of the DRB agreement is central to determining this point. If the parties agree by contract that they are obliged to refer any dispute or difference to the DRB and that the findings have a temporally or immediate final and binding status, it is arguable that a dispute or difference does not exist, having been decided by the DRB. Therefore there is no dispute to refer to statutory adjudication. The alternative argument is that there always remains a statutory right to adjudication of any dispute. Of course the difference may now be about acceptance of the DRB findings rather than the substantive dispute. This would most likely require resolution by the courts.

[94] Op Cit
[95] Op Cit

An alternative problem arises when the status of the finding is that of a recommendation. The parties have the opportunity to accept the recommendation, in which case a dispute or difference does not exist between them and the adjudication is dead for lack of a dispute to adjudicate. The difficulty comes about when the recommendations cannot be accepted by one or both parties. The choices available to a party who does not accept the recommendations, in English law include statutory adjudication (which may or may not have begun), ad hoc or contracted arbitration or litigation.

In any case the DRB process will be broken and effectively dead. The same arguments presented earlier in respect of the availability and admissibility of the DRB recommendations and evidence at adjudication subsequent to the DRB findings, would apply as for arbitration and litigation.

Of course there is no reason why the parties in the formation of the DRB and agreement of the process, cannot seek to make the DRB decision compliant with the Act, naming adjudicators as a member of the DRB. Such provisions recognise and face up to the possibility of statutory adjudication by one of the parties and seek to accommodate such challenges within the process.

The process then in fact adds a supplementary chance to make the finding of the DRB binding as a statutory adjudication decision. This to many may seem to be an anathema, particularly to those who hold the cultural co-operative and consensual ideals of DRB arrangements in high value. However, it may indeed assist to make the DRB more robust in the context of English law by helping it overcome challenges which may destroy the DRB process and therefore assist in its overall long term survival and success. This may indeed create a particularly hybrid form of DRB to operate for UK domestic projects, out of the necessity that it sits with and survives English Law and the Housing Grants Act.

In the USA there has developed a further DRB variation, where a one person DRB is appointed on smaller projects. There is no reason why a single adjudicator named at the commencement of the project could not carry out a standing DRB role. Although this would result in a loss of available broad expertise for the resolution of any dispute when compared with a 3 person DRB. It has not as yet been tested judicially but it may be that the parties rights under the Housing Grants Act[96] to refer any dispute to an adjudicator could be deemed to be compatible with a provision to refer the dispute to a one or three person adjudication panel (DRB). That is provided that the panel is suitably constituted, empowered with procedures which comply with the statutory requirements of the Act.

[96] Op Cit

CHAPTER FOUR

How and why do DRB's work?

There is clear and impressive evidence that DRB's work and that their usage successfully reduces the incidence of disputes and almost eradicates the number of dispute which are decided outside of the project DRB process. According to the Dispute Review Board Foundation information leaflet published on 6th October 2002 [97], up to September 2002, 98% of construction disputes using DRB's were settled without proceeding to litigation. These disputes involved 916 projects and 1108 disputes valued at over $45.7 billon. Faulkner, Spurin & Slaughter[98] report earlier that by January 2002 DRB's have been used on 822 projects of a gross value of $38.7 billion with a total of 1038 formal written recommendations. These figures, on relatively close dates, show the rate of growth of the use of DRB's. Of the 1038 referred disputes only 31 of those recommendations were pursued beyond the DRB. resulting in a 97.1% settlement rate. This is greater than mediation but slightly less than the much more costly and time consuming processes of arbitration and litigation. It is also reported that engineers in one US State assert a 17% cost reduction per mile of highway and reported completions ahead of schedule, resulting directly from the use of DRB's on their projects.

The use of DRB's is reported by Peter Chapman[99] as increasing rapidly, since 1990 the number of DRB's appointed has tripled. In 1997 projects in USA, UK, France, Sweden, Southern Africa, Uganda, Hong Kong, China, India, and Bangladesh were all utilising DRB's.

A general review of litrature about DRB's indicates that DRB's are successful for two general reasons.

Firstly as a dispute avoidance, dispute attrition and dispute resolution mechanism.

Secondly as an essential part of an overall project partnership culture where the DRB acts as both an integrating mechanism for the team and a cultural and behavioural norm and indicator.

It is appropriate that we examine each of these aspects of the DRB in turn.

DRB as a dispute mechanism

A DRB can best be described as:

'A job site dispute resolution panel, typically comprising three experienced and respected independent persons who are selected by the contracting parties. The DRB are appointed at the start of a project and make regular visits to the site and hold regular meetings with the parties'.

Within this description we can identify a number of the key features, which enable the DRB to be successful in both dispute attrition and dispute resolution.

- Contemporaneous operation
- Consensual
- Neutral
- Speed and value

Contemporaneous operation

The DRB is established at the start of the project before any disputes have arisen. The DRB board members are paid a retaining fee to make themselves available over the duration of the project. The DRB members attend site, inspect and view the works and meet regularly with the various parties. They are also provided with regular reports and updates on the project.[100]

This is unlike the vast majority of dispute resolution mechanisms where the structure and people are not activated or involved in the project until the dispute has developed sufficiently to be referred by a party for resolution. This feature gives a DRB a unique advantage over the usual models of adjudication under the Housing Grants Act[101], Arbitration or litigation, which although they all utilise neutral third parties, the neutrals have no contemporaneous knowledge of the project or the development of the dispute. Having good up to date knowledge of the project, the parties and the dispute, can yield a number of benefits.

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[97] Appendix Fig 3
[99] Op Cit
[100] Matyas, Mathews, Smith, Sperry Op Cit
[101] Op Cit

Firstly, the DRB are able to assess and deliver a finding quickly as they have no learning curve and do not require as much time to research and understand the dispute. Secondly, the DRB members will have an intimate knowledge of the dispute and its circumstances, which it is difficult and in many disputes impossible, for any third party, appointed after the events giving rise to the dispute to gain. Finally, the DRB members, by their regular attendance at site, have a better chance of being considered a part of the project team and their findings are often better received and accepted by the parties. It is likely that that the findings of the DRB are possibly more accurate as a result of their contemporaneous investigations and that they will be considered by the parties as fairer and somehow more connected to the real time activity of the project.

The process of contemporaneous knowledge and adjudication owes much to the traditional contract management techniques of expert adjudication by the project Architect, Engineer or Contract Administrator, which have been extensively used in the past and are still used in many forms of contract. However, the DRB has the significant benefit that the DRB members are totally neutral and independent of the parties and they perform no other roles and have no other commercial relationships within the project. This obviates many of the criticism of the traditional management and dispute adjudication system discussed in Chapter One.[102]

Consensual process

As described in Chapter Two above, the DRB will usually comprise a board of three experienced and respected experts. These experts are not usually lawyers[103]. The consensual aspects of the DRB are two fold:

Firstly, the parties themselves have agreed that a term of the contract between them establishes the DRB and that all disputes and differences between them will be referred to the DRB, who will issue a finding on the matter. As discussed above[104] this may be a recommendation, a temporarily binding or a finally binding decision. So, unlike statutory adjudication or litigation, both of which may be commenced unilaterally by one party the DRB represents a meeting of minds or consensus as to how disputes will be handled. This agreement between the parties at the very start of the project is influential and significant in the way parties consider and value the operation and findings of the DRB and could be considered in part a reason why DRB's are successful.

Secondly, the parties themselves have a significant part to play in the appointment of the DRB members. As described earlier,[105] each of the parties usually appoints a member of the DRB and the two party appointed members then agree between themselves on the selection and appointment of the third DRB member, who often acts as chairman. This is also a well established process for the appointment of a three party arbitral tribunal as provided for in many institutional rules.[106] The DRB process mirrors and in part draws legitimacy from these institutional arrangements. Again the parties' involvement in the appointment of the DRB members improves their commitment and acceptance of the process and the DRB findings. The choice of the tribunal whether DRB, adjudicator or arbitrator is one of the distinguishing features of ADR when compared with the process of litigation where a judge is allocated without reference to the parties. Parties may of course choose an adjudicator or arbitrator by agreement.

However, if this appointment decision is left until the dispute has developed sufficiently for one or both parties to seek third party resolution, the parties relationship is often so strained and non co-operative, it is often necessary for adjudicators or arbitrators to be nominated by appropriate institutional nominating body rather than by the agreement of the parties. The parties may of course agree to name an adjudicator and / or arbitrator at the start of their contract. This delivers similar benefits to the parties choosing the DRB members at the start of the project.

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[102] Supra p10

[103] The DRBF however, has recently accepted that there is some value in the DRB Chair being a dual qualified construction specialist and attorney

[104] p33

[105] p19

[106] eg ICC Arbitral rules Op Cit

Neutral

A benefit of the DRB process is the actual and accepted impartiality and neutrality of the DRB members. As discussed above this is a significant benefit improving the acceptance of the DRB findings by the parties and obviates the perceived and often real, lack of total impartiality and neutrality associated with the project architect or engineer acting in a dispute resolution role. Of course neutrality and impartiality are fundamental to any third party dispute resolution mechanism to comply with the requirements of natural justice and to ensure the legality and legal support for the findings. As such the appointment process for DRB members must result in appointment of impartial and neutral DRB members, which in addition to securing its legal status helps to yield the objective benefits of respect, commitment and acceptance for the DRB process and findings. Under DRBF rules independence is compromised where the member has had any contractual relationship with either of the parties during the past 30 years. However, The World Bank limits this to 6 years. DRBF Rules and Code of Ethics also place a duty on the appointee to decline any nomination which may breach such independence criteria. Furthermore, they provide that the other party has a right of veto to any appointment

The process may of course be subject to abuse where a party seeks to appoint a partisan member of the DRB. This is also an established criticism[107] of the system of appointment of three person arbitral tribunals.

By utilising suitable recognised procedures for the selection and appointment of a three party tribunal with a chairman chosen by the other two tribunal members, careful adherence to established standards and use of carefully drafted contracts for DRB members, the grounds for such potential criticism may be obviated. The contract of appointment for DRB members will be between the parties and the individual member. The contract would be wise to address the matter of independence of the DRB members from the parties and from the project. The agreement could mirror the requirements of the ICC Rules. Tweeddale & Tweeddale[108] comment on this aspect of independence in the ICC Rules as follows:

Article 7(1), sets out a basic requirement that 'Every Arbitrator (*DRB Member*) must be and remain independent of the parties'. This confirms the principal of natural justice that the tribunal should be free from any connection with the parties or the subject matter of the dispute. It is suggested that the meaning of independent is determined by reference to whether there is a 'real danger' of bias rather than to the 'real likelihood' of bias,

R v Gough [1993] AC 646. Each arbitrator is required to sign a statement of independence and to disclose all such matters as may call into question his or her independence. The obligation of disclosure continues throughout the course of the appointment

Advice and mediation

A further benefit of DRB's which contributes to their success and why they work is the ability that that the DRB be permitted to act in an advisory role. The parties when setting up the DRB terms in the contract and agreeing the DRB's terms of reference and procedures to be adopted are able to empower the DRB to act in an advisory role, this may be prior to a dispute arising and before the DRB is required to act in any quasi judicial role. Against the context of the DRB visiting the site regularly, having regular meetings with the parties and generally keeping fully up to date with the project, the DRB are potentially well placed to advise. In addition, the DRB members have been chosen by the parties for their skill, knowledge and experience in the particular form of construction and contract processes, which qualifies them to offer opinions and advice to the parties.

Care however, is needed to ensure that the DRB only responds, formally or informally, to issues raised by the parties. The DRB can only make findings of entitlement and quantum but not on 'ways and means'. However, by the use of open questions the DRB can prompt if any other issues require attention, although issues not raised by the parties cannot be considered by the DRB. Similarly, it is possible for the DRB to be invited, as observers, to partnering meetings, however, the DRB is precluded from taking an active part. The DRB could however summarise or reiterate on any aspect of the meeting and enquire as to whether or not it may give rise to any issues that may appropriately be referred to the DRB.

[107] Tweeddale & Tweeddale A Practical Approach to Arbitration Law, Blackstone Press , London 1999 p334 -336

[108] Ibid p 334

The potential benefits of early pre dispute advice by the DRB are twofold:

Firstly in the avoidance of disputes, resulting from advice that the DRB are able to offer at the pre dispute stage. By being up to date with the project they are able to pick up and address early warning signs of potential disputes and try to prevent them from escalating. Such advice and interactive involvement in the dispute area of the project is not always successful at obviating all disputes but can assist in the attrition of disputes, reducing the number, size, scope and value of the issues unresolved and disputed between the parties.

Secondly, even if a difference between the parties escalates to a dispute the DRB may, if suitably empowered by the parties, act as mediator in an attempt to facilitate a mutually acceptable negotiated settlement. The legal implications of private meetings and secret knowledge together with the necessary warning and specific party consents were fully discussed in Chapter Three.

The ability to advise and possibly mediate is a contributory factor to improved dispute avoidance, attrition and resolution and the overall success of DRB's.

Quick, good value process

Finally, DRB's work because they make good commercial sense and the parties create them because they want them to work quickly and inexpensively. They are established to serve a commercial contract and in order to be regarded with value they must serve the needs of the parties and bring business efficacy to the resolution of disputes.

Being able to solve differences and disputes quickly and at reasonable cost on the job site during the course of the works has distinct commercial advantages. It maintains cashflow by the avoidance of tying up disputed cash until some uncertain and unknown outcome at some time in the future. It also avoids the need to commit significant technical and expert resources to an often long and drawn out traditional full arbitration or litigation.

It is reported that[109] the cost of a DRB is considerably less than other dispute resolution mechanisms and may be offset against the savings in the costs of technical and legal input into what are very often long drawn out and overly formal and legalistic processes of arbitration and litigation. The cost of a 3 man DRB can be reasonable well predicted, starting with say the fixed costs of four periodic sessions of visits and meetings per year based on DRB members average remuneration with expenses of about $2000 per day, plus their monthly retainer plus the variable costs of time spent on disputes.

It is reported[110] based upon research of actual DRB case histories that the average cost of a DRB is less than 0.5% of contract value, falling to 0.12% for larger projects, which is far less than the cost of arbitration or litigation. Chapter One above highlighted the fact that industry was dissatisfied with both arbitration and litigation for construction disputes citing the length of time required to resolve a dispute plus the overly formalistic and legal wrangling and processes adopted. It is however, hoped that the new 1996 Arbitration may go some way to reducing the formality, time and cost of arbitration.

It can be concluded that, simply as a pure dispute resolution mechanism, DRB's are both a success and add benefits and value to projects. Such benefits include the contemporaneous nature of the DRB's knowledge, evaluation and decision making, the consensual nature of the process, the true neutrality and independence of the DRB members, their ability to avoid and reduce the number and severity of dispute and the increased speed and reduced cost at which they operate.

The DRB as an aid to cultural change, team building and project partnering

The principals and process of DRB's can be developed further than their use simply as a stand alone agreement and mechanism for dispute attrition and resolution described above.

There are other potential benefits of the DRB which are less direct, maybe less immediately obvious and more difficult to directly identify and describe. They relate to how the decision to form a DRB and the DRB process itself can help to shape the overall culture, values and behavioural norms of the parties and hence the project.

[109] Matyas, Mathews, Smith, Sperry Op Cit
[110] Ibid

Over the last 10 years there have been significant efforts to engender change in the UK construction industry as a result of dissatisfaction and reduced performance stemming, inter allia, from an adversarial culture, poor team performance and generally poor relationships between the various project stakeholders. These were examined briefly in Chapter One. Key efforts to engender change were suggested in The Latham Report[111], The Egan Report[112] and the subsequent development of the Rethinking Construction and Construction Best Practice Programmes.

Latham made a number of recommendations which were subsequently acted upon, some of which were structural and legislative changes, such as adjudication under the Housing Grants Act.[113] However, other recommendations sought to improve the culture, attitudes and team spirit present within construction projects.

One of Latham's recommendations was to engender change to develop a partnership culture between all stakeholders in a project. The title of the report 'Constructing the Team' sets the scene for the cultural changes recommended. Latham's diagnosis of the ills of the UK construction industry can be summarised as adversarial attitudes, a lack of shared goals and objectives, plus fragmentation and separation of roles, responsibilities and knowledge.

In addition to making recommendations in respect of the supply side construction team Latham seeks to include the client or promoter firmly within the 'construction team'. The DRB is a creation of just such a team, established and empowered by both the client and the contractor.

Two of a number of key themes throughout the report are co-operation rather than conflict and new arrangements between the many project stakeholders. The DRB process seeks to satisfy both of these themes. The Report further recommends that construction contracts should set out effective terms and conditions, including a specific duty on all parties in the process to deal fairly with one another in a sprit of co-operation and teamwork. The DRB process also seeks to satisfy this objective.

Recommendation 24 of Constructing the Team suggested that longer term relations between contractors and public authorities might be achieved where appropriate, using Partnering arrangements. Indeed the report recommended experimenting with Partnering, provided that the initial appointment was made through competitive tendering, the arrangement was for a set period and targets were agreed. Latham has given his support to Bennett and Jayes,[114] who describe partnering as: 'a set of management principals designed to achieve co-operation between the construction firm and the client'. The purpose of partnering for the duration of a project is to create a management mechanism with regular meetings between the parties in order to improve the construction process continuously.

In this respect the DRB process satisfies these objectives and attempts to reduce the negative effects and impact of the adversarial process of disputes and dispute resolution.

The report in dealing specifically with liability, arbitration and the need for legislation makes a number of recommendations to aid confidence in his proposed contractual reforms and to promote a teamwork approach. Latham proposed a Construction Contracts Bill, however, this has not materialised. He recommended a statutory process of adjudication which has been implemented and he sought reform of arbitration, as it is criticised on the grounds of complexity, slowness and expense.

Since the Report, the 1996 Arbitration Act has come into force and has gone someway to improving the process of arbitration giving the arbitrator far greater control to tailor the process to the specific circumstances.[115]

It is worth noting that Latham's ideas did not extend to any specific mechanism for dispute avoidance or attrition past the general partnering principals to reduce adversity and improve co-operation. In the light of the examination above of the direct benefits of the DRB process, it is considered that Latham possibly lost an

[111] Op Cit
[112] Op Cit
[113] Op Cit
[114] Bennett & Jayes, 1995
[115] Note that the Housing Grants Act 1996 and the Arbitration Act 1996, whilst both promoted by government were developed by two independent committees who had no interaction and appear not to have considered the others document in their preparation.

opportunity to promote and encourage the use of DRB's in the changing UK construction Industry. The report did recommend the adoption of adjudication, as a post dispute resolution mechanism, although Latham did recommend that the adjudication procedures and the adjudicator be identified at the start of the project. He further noted that arbitration and litigation of disputes were best reserved for resolution of any remaining disputes after completion of the works.

Since the Latham report a number of changes have begun to occur.

Firstly, The Housing Grants Act has become law, providing a statutory right to adjudication of any dispute or difference for any party to a construction contract at any time. The adjudicators decision being final and binding until such time as it is changed by arbitration or litigation. Whilst adjudication yields a recognised benefit by the rapid resolution of disputes, it does little to avoid or decrease the incidence or severity of disputes and does not have the benefits of contemporaneous knowledge of the DRB which may reduce the quality and acceptability of statutory adjudication decisions.

Secondly, the principal of partnering has begun to develop and gain ground. A report on partnering, 'Partnering in The Team'[116], was produced and published by the Construction Industry Board in 1997 and provided an early blueprint for the adoption of partnering techniques and arrangements by parties. The adoption of partnering has been steady but slow, although adopted on a proportion of projects these are still, in 2002, only a small minority of UK construction projects.

The definition of Partnering given in the Report is the definition proposed by the Reading Construction Forum:

'Partnering is a management approach used by two or more organisations to achieve specific business objectives by maximising the effectiveness of each participants resources. The approach is based on mutual objectives, an agreed method of problem resolution and an active search for continuous measurable improvements.'

In the context of the suitability of DRB's as part of the partnering process, how can the DRB help to support and engender such cultural values and change?

The first step along the road to partnering is a meeting of minds, that the parties wish a relationship which is co-operative and project centred rather than adversarial and self centred. In this context the agreement to establish a DRB process for the project is hugely symbolic. The agreement of the parties that they will co-operate in seeking to avoid and reduce disputes with the assistance of the DRB and the agreement to co-operate in referring all disputes and differences to the DRB, significantly contributes to the commitment to a partnership culture for the project. Of course the agreement and provision of a DRB does not in itself create a project partnering agreement. However, where a project partnering agreement is to be established, the DRB arrangements may be one of the constituent agreements and a significant indicator of intent and commitment to the overall partnering process.

On the other hand even where a project partnering agreement is not sought or appropriate for the project, the benefits of the DRB as both a beneficial and pragmatic dispute management system exist. Also the DRB stands as a symbol of commitment to a co-operative and project focused culture, where parties will seek to resolve their differences quickly and efficiently.

The key themes or pillars of partnering identified by the Reading Construction Forum[117] are shown graphically in Fig 2 in the Appendix. These are:

- The identification, recognition and acceptance of mutual objectives.
- The commitment to problem resolution
- The commitment to continuous improvement.

The DRB contributes to each of these objectives and importantly assists in moving the project towards overall win – win relationships between the parties. That is to say the project benefits from each of these objective and the commercial position of each of the parties is improved. There is of course a fine division between a commitment to co-operation and working together to resolve differences and simple pressure to compromise or to give away rights. The process should not be confused with a dilution of the parties' legal

[116] Partnering in The Team, Construction Industry Board, Thomas Telford Publishing, London 1997
[117] Op Cit

or contractual rights and should not be seen as a simple negotiated compromise or at worst being pressured into a blatant 'horse trade'. It is in this aspect of the assertion of rights that the eventual authority of the DRB to make and publish findings in respect of the dispute is helpful.

Mutual objectives

The DRB establishes mutual objectives in seeking to minimise disputes and to resolve those disputes that do arise quickly, fairly and at minimum cost. There is a recognition that the agreement is based on longer term goals rather than simply on a dispute basis and that the process if approached in the agreed spirit will yield a balanced overall result.

The DRB seeks to address and review the objectives by regular meetings and communication, the process approached properly and with a willingness to co-operate and build a team culture will engender improved communication, discussion of needs and mutual confidence.

Problem resolution

The DRB process agreed as part of a partnering agreement provides an agreed systematic and stepped approach to the problems of differences and disputes. Approached in the spirit of co-operation and partnership it seeks solutions rather than attributing blame and seeking to penalise the guilty. It engenders co-operative discussion and requires mutual acceptance that the principal of adversarial attitudes wastes time and money.

The system seeks to uphold the principal of equality of rights between the parties and resolutions which as based upon those rights whilst at the same time seeking over the life of the project win – win resolution of differences which benefit both the project and the various different commercial interests of the parties.

Continuous improvement

The goal of continuous improvement is central to partnering. It seeks to add value, eliminate waste and identifies and aims for best practice. It seeks to specify targets and measure progress and performance against those targets. The DRB is able to act and be effective in this context in a way which the traditional ADR processes of adjudication, arbitration and litigation are not. In the context of the DRB a reduction and eventual elimination of disputes may be a worthy target, which would simply not be possible by dispute resolution mechanisms alone. In terms of the benefits of the DRB, an estimate of cost and time saved by the commitment and efforts of the parties to the DRB process will serve as one of the effective measures of success.

In seeking to establish a project with a DRB agreement the parties are firstly committing themselves to a process which seeks to deliver the benefits of early and continuing attention to dispute avoidance and attrition and the benefits of early attention to disputes and differences.

Peter Chapman reports[118] that an Australian survey identifies that 50% of all legal costs associated with traditional construction contracts without DRB's are expended on disputes and that in 10% of projects legal costs took up 10% of project costs. Those parties seeking to put DRB's in place are attempting to reduce the incidence of disputes and the time and cost of dispute resolution. This in itself is a worthwhile preventative action.

If this is coupled with either a formal partnering arrangement or simply a commitment by the parties to endeavour to seek the benefits of co-operation and partnership, the role of the DRB can take on an increased scope and significance. The DRB can act as a catalyst for cultural and attitudinal change.

The DRB can, in such a conducive project climate, act in a fuller role, advising on dispute avoidance, in a dispute attrition role by reducing the number, scope and value of disputes referred on and as mediators of such disputes to seek a mutually acceptable resolution. Only finally, when those steps are exhausted will they act in an evaluative and quasi judicial role issuing their findings on a particular dispute. It may be that the experience and benefits gained by the parties from the DRB process will spill out beyond the dispute arena and encourage and enable the parties to more easily adopt the wider co-operative and non adversarial aspect of partnering.

[118] Op Cit

CHAPTER FIVE

The future for DRB's in UK Construction

The UK construction industry has many dispute resolution mechanisms available to it. They may be considered as a staircase of increasing cost and complexity, Viz:

- Expert Determination, within the contract by the Engineer, Architect or Contract Administrator.
- Mediation, facilitation by a neutral third party in an attempt at the parties reaching their own mutually acceptable solution.
- Adjudication, now most often in the form of one party exercising their statutory right to adjudication. Quick, final, binding experts decision, enforceable until overturned by arbitration or court.
- Arbitration, only available through an arbitration clause in the contract or by agreement between the parties, it is considered slow, complex, legalistic and expensive. Although changes in arbitration under the 1996 Arbitration Act may improve the industries experiences at arbitration.
- Litigation, available to all at any time, unless subject to a stay for arbitration, it is slow, rigid, formal and expensive.

The resolution of construction disputes does not have a single universally applicable process which is suitable for all projects or disputes. In reality, the parties and their advisors seek the process which they consider most appropriate to the dispute in hand. The industry generally appears to have a jaundiced view of the entire dispute resolution landscape and considers that it is left with the choice of which is the lesser evil from which to choose. Often commercial parties would prefer rough but fair, rapid and inexpensive peer justice to long protracted, finely argued and expensive hearings.

It is in fact from these very routes that commercial arbitration was born and from which arbitration today has strayed in terms of high costs, procedural complexity and the time taken to issue an award.

The DRB can offer the UK construction industry another tool for the management and resolution of disputes. The DRB tool is however multi functional and can offer to the industry the benefits of dispute avoidance, dispute attrition and dispute resolution all in one, as described earlier. This is something which the currently available ADR dispute resolution processes cannot do, simply because they are not structured or empowered to act until after the dispute has developed sufficiently for one party to refer for resolution. In addition, as already noted in Chapter Four, the DRB process also influences, enables and encourages the development of a culture of co-operation and partnership.

It is reported informally by Peter Chapman, the UK representative of the USA based Dispute Review Board Foundation (DRBF), that DRB's are in use on about 25 projects in the UK. This represents a low adoption which has not really extended beyond very major projects or experimental demonstration projects. It is in major civil engineering infrastructure projects in the USA and internationally that the DRB has had the largest penetration[119] and hence success. The use of DRB's on Civil Engineering projects outnumber building and process projects by about 8 to 1. That is not to say that DRB's are not equally suitable for other forms of construction and building, but it reflects the origins of DRB's on major civil engineering projects supported by specification and guidance from the American Society of Civil Engineers.[120]. The development, acceptance and uptake of new procedures and mechanisms such as DRB's will of course be greatly assisted by success on UK projects and the reporting of their use and success by the technical press and academic papers. However, DRB's will only develop into widespread and frequent use when parties to construction contracts are aware and convinced of the commercial benefits that their adoption will bring.

Some opportunities for DRB's in the UK

In view of the documented success of DRB's on major infrastructure project in the USA and worldwide, the best prospect for growth of the use of DRB's in the UK is probably by their greater usage on large UK infrastructure projects. By their very nature such projects are usually promoted and sponsored by government, public sector bodies or privatised utilities.

[119] Matyas et al, Construction Dispute Review Board Manual Op Cit, appendix A p89
[120] Op Cit

It was suggested by Latham that UK government should act as a catalyst for change by becoming a best practice employer and promoter. There exists a significant opportunity for beneficial cultural and structural change within the industry, if UK government were to adopt new but proven management and dispute resolution techniques on their infrastucture projects. This should include partnering and DRB's. As audited publicly accountable projects infrastructure projects also provide an excellent mechanism for measuring and reporting the effectiveness and benefits of the DRB. Once the wider industry is able to seek the tangible and audited reported benefits they will wish to learn more of DRB's and the process of wider adoption has begun.

As result of changes in government policy and procurement strategy, increasing numbers of large projects are being procured under the Governments Private Finance Initiative (PFI) or through Public Private Partnerships (PPP). Such projects are however, still commissioned and sponsored by government, even if they are funded by others. The government therefore holds a hugely influential role in being able to capitalise on the opportunities which DRB's present. In fact the use of PFI or PPP procurement for major public works introduces a greater commercial element into the works, whereby the concessionaire seeks to maximise commercial benefit and reduce risk which presents and ideal environment for the adoption of DRB's. The PFI and PPP initiative also bring government and the industry closer in longterm relationships (up to 30 years) for projects. This presents yet a further opportunity for government to demonstrate the benefits of partnering and DRB's to their private sector partners. Hopefully this will encourage the private partners to want seek the demonstrated benefits on other private sector projects hence multiplying the use of DRB's into mainstream UK construction.

There are other opportunities for DRB's in UK Construction on large private projects, such as BAA's Terminal Five at Heathrow Airport and term or framework contracts both for new building and maintenance. Many large blue chip companies seek the benefits of longer term multi project relationships with UK construction companies. Current examples include multiple contracts to build new stores between one retailer, one consultant and one contractor, also longer contracts and joint ventures within the petrochemical, industrial or utility sectors.

Many of these relationships depend on trust and co-operation and probably already operate some form of internal co-operative dispute resolution mechanism. There is opportunity for such mechanisms to be improved and developed into DRB's. Government and industry sponsored initiatives such as the current Rethinking Construction and Construction Best Practice Programmes can be hugely influential in promoting the benefits of DRB's. They can identify and sponsor demonstration projects of best practice and innovation. There exists an opportunity through such initiatives for DRB's and their benefits to be given a higher profile.

Some barriers to DRB's in the UK

There are however many potential barriers to the acceptance, choice and adoption of DRB's into main stream UK construction. It is worthwhile to look briefly at the main types of resistance which must be overcome.

There appears to be is general cultural resistance to all change within the industry as construction is a mature and established sector, with long and well established methods and views. Adoption of new ideas takes time and will only be as a result of the industry understanding and valuing the potential benefits. The margin of benefit over cost and effort must be perceived by participants as worthy of the risk and in adopting new ideas.

The role of consultants, advisors and lawyers is influential in the sector, advising on risk, and costs attached to various contract forms and procedures. Within the UK construction industry a large dispute support industry of lawyers and advisors has developed, fed from the adversarial and dispute orientated culture which exists.

It could reasonably be expected that such a group, out of self interest, would tend to resist changes, such as the adoption of DRB's, which reduces the cost, time and resources required to resolve disputes. In addition there appears to be general resignation throughout the industry in respect of the perceived inevitability of disputes and a cynicism regarding dispute resolution coupled with a feeling of initiative overload in respect of new resolution initiatives. Such attitudes would need to be overcome or at least be recognised in order to gain a wider acceptance of DRB's

In respect of the costs of DRB's, traditionally the judgement between cost and value within the industry has been a difficult one. It would be reasonable to consider that the perception of any additional potential cost associated with a DRB would be a barrier to acceptance and adoption. Pending a full demonstration that the value of DRB's far exceeds their cost and delivers lower cost and improved value when compared with the status quo, that is likely to remain the case.

It is however, a sophisticated analysis to compare the cost of a DRB with the alternative cost of prosecuting or defending DRB referred disputes at arbitration or litigation, as the more successful the DRB is in dispute avoidance and dispute attrition the less would be the comparative traditional dispute costs for the project. The certain base cost and unknown variable costs of the DRB will be compared with the perception of only the possibility of uncertain costs if the dispute cannot be settled and arbitration or litigation is necessary.

In order for DRB's to be accepted and adopted the commercial cost-benefit gain will need to be clearly and robustly demonstrated.

As we examined in Chapter Three, there are potential legal obstacles and perceptions which have to be satisfactorily addressed. The right to statutory adjudication under the Housing Grants Act is an immovable barrier. Any DRB system which is to find widespread acceptance and adoption will have to be designed to account for the requirements of the Act or the DRB agreement should clearly identify to the parties the opportunity and the danger to the effectiveness of the DRB of parallel statutory adjudication.

In other respects, the transfer of DRB models either from the USA or from international projects will require that the DRB agreement be modified to be compliant with English and EU law and that the agreement obviates conflict with acts and statutes such as The 1996 Arbitration Act and The Contracts (Right of Third Parties) Act 1999.

Whilst ADR is becoming more widely accepted within the UK construction sector there is an underlying culture both in construction and in the UK in general, of dispute resolution by litigation and a belief in the English legal system and a view that if all else fails 'I'll see you in Court'. Whilst this is unlikely to pose a significant barrier to DRB's at the high value, major project level, it is none the less a general barrier to the adoption of ADR and hence DRB's to smaller and lower value work.

There have been challenges to ADR[121] under Article 6 of the Human Rights Act[122] which provides for a public trial. It is considered that the temporary decision in adjudication and the consensual nature of the DRB or arbitration agreement, effectively obviates any challenge to binding ADR under the Human Rights Act. However, the requirements of the Act remain and as DRB's do not benefit from specific supporting legislation and procedures, (analogous to that given to arbitration by the 1996 Arbitration Act), the DRB agreement must be a clear, formal, legally comprehensive, stand alone document to ensure that it is legally robust enough not to be challenged by claims under the Human Rights Act.

The Future for DRB's in the UK

There appears to be both room and demand in UK construction for a dispute resolution system that also delivers the benefits of dispute avoidance and dispute attrition and a system which delivers results quickly and at a lower cost. The UK indicators of dissatisfaction with the existing system appear to be similar to the USA and it is reasonable to consider that the industry will be prepared to adopt DRB's in the same way.

The future success for DRB's in UK will depend on the formulation and adoption of a UK specific model which takes account the specific effects and requirements of English and EU law and which is also sensitive to the context and culture of the UK construction industry.

The future is also dependant on promotion and support for a UK model of DRB's by key client groups in major public and private civil engineering works. It seems less likely that DRB's will be accepted and adopted on UK projects by a pure organic growth. The process will be very much assisted and is considered dependant upon the support of government, industry support groups and the professional and academic institutions. It would seem necessary that government sponsors a number of public and private sector demonstration projects possibly coupled with academic research, monitoring and reporting of the benefits delivered by the DRBs.

[121] www.tonybingham.co.uk, commentary on Elanay Contracts Ltd v The Vestry accessed 10.10.02
[122] The Human Rights Act 1998

Of course in order for this to happen government, major utilities and infrastructure providers and major private clients must be convinced of the value of DRB's themselves.

Over recent years the focus of construction dispute resolution has been on the new statutory adjudication provisions of the Housing Grants Act and interest in how the new 1996 Arbitration Act is effecting the practice and perceptions of arbitration. The debate, post Latham, seems to have focused on partnering as the route to delivering the benefits of dispute avoidance and attrition. There have also been some recent developments from the judiciary in respect of their views that mediation should be more widely utilised in order to seek resolution prior to litigation. However, there appears to have been little interest or debate in more structured systems to avoid or reduce disputes such as the use of DRB's. It is in this area that there is considerable effort required to raise the topic of DRB's into widespread contemplation and discussion.

It is a considered view by some UK commentators that the introduction of statutory adjudication has resolved the time and cost problems in construction dispute resolution.

This may be so, but it does not address any aspect of dispute avoidance or attrition, it does not provided for improved decision making as a result of contemporaneous knowledge and it does not assist in enabling the co-operative project models so often held up as the ultimate objective. It is in these areas that the DRB has a valuable role to play without prejudice to the adjudication for those who want or require it.

The immediate future for DRB's lies in debate, demonstration and promotion of the concept to government, the public sector and major private clients. Such initiatives will probably be left to the government / industry organisations such as the Rethinking Construction Initiative and to the academic and institutional sector who by research, publishing, seminars and conferences may be able to raise awareness, debate and interest in DRB's.

Ultimately of course, as in all matters commercial, acceptance and adoption will only be sustainable by the actual delivery of cost, resource and time reductions on real projects, for real clients and real contractors. In this respect the initiatives to enable, encourage and report the use of DRB's on major projects and on demonstration projects will be central to the future growth of the use of DRB's in the UK construction industry.

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