



Forum

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The Potential Use of Dispute Review Boards (DRBs) Outside the Construction Industry

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Introduction

Members of the DRBF are well aware of the significant contribution that DRBs have made in the construction industry toward the prevention and resolution of disputes and claims. This article will briefly analyze why DRBs work well to resolve almost all the disputes that come before them, and explore whether their use can be expanded beyond the construction industry to other commercial sectors.

What are the Key Features of a DRB?

The authors assume that most readers are familiar with how a DRB is established and implemented, so they summarize here only the key features of a DRB:

- The three members of the DRB are appointed for their extensive expertise in the type of project on which the DRB is established.
- The DRB members must not have conflicts of interest and function as objective, neutral third parties under a Three Party Agreement with the owner and contractor.
- The DRB is appointed at the beginning of the project, visits the project on a periodic basis depending on the pace of construction, and is kept apprised of the project's progress between site visits.
- At the periodic site visits the DRB explores with the parties all open issues and urges parties to resolve disputes that may eventually become formal claims.
- The DRB hears claims as part of an informal hearing process where the parties themselves (as opposed to legal representatives) present their positions.

- The DRB issues clear, understandable and detailed findings and recommendations that analyze the parties' arguments, the contract documents and project records, and the supporting information presented at the hearing.
- Because the DRB findings and recommendations are non-binding, the parties are free to accept them, reject them—or keep negotiating based on the parties' respective risk exposure based on the DRB's analysis.

What Makes DRB's Effective?¹

There are several factors that make DRBs effective, including the following:

- The parties are committed to the process
- DRB members are respected industry professionals
- DRB members are neutral and objective
- DRB members are chosen by consensus and costs are shared equally so that both parties have an investment, both managerial and monetary, in the process
- The DRB process starts at the beginning of the project and is in place throughout the lifecycle of the project
- As a result of its involvement in the project the DRB becomes familiar with the players, the issues and the project's history
- The DRB meetings allow periodic, open communication among all project participants that helps avoid issues becoming disputes

- The DRB meetings also promote the involvement of all stakeholders and senior decision makers
- The relatively informal hearing process permits the parties themselves (as opposed to their lawyers) an opportunity to present their sides of the dispute
- The hearing process is thorough, but focused—it is, therefore, much less expensive than arbitration or litigation
- The findings and recommendations are detailed so that the parties have the benefit of the DRB's evaluation of the dispute in all of its aspects
- The DRB makes its findings and recommendations within the four corners of the contract documents and based on the information presented by the parties
- The DRB findings and recommendations give the parties a basis on which to assess risk exposure and make better informed business judgments
- The findings and recommendations are non-binding, leaving ultimate control of the outcome to the parties.

Can DRBs Be Used Outside The Construction Industry?

There is absolutely no reason why DRBs cannot be used in other commercial fields.

The principles and philosophy of the DRB process apply equally to any commercial endeavor that has the following characteristics:

- A long term business relationship that lasts several years where issues may come up periodically, such as a long term manufacturing or commercial lease
- A business transaction requiring multiple steps, such as a manufacturing project requiring R&D,

testing, production and marketing

- A commercial endeavor that requires particular expertise and that may give rise to professional differences of opinion where outside expert opinions might assist the parties
- A commercial field that has customarily used arbitration to settle disputes, and could comfortably use the DRB process as a less formal, non-binding substitute with the same expert underpinnings as the arbitration process²
- A commercial project involving stakeholders from different cultures, with differing nationalities or differing business backgrounds

Examples of these types of projects where the DRB concept could be used are as follows:

- A land development project that involves a property owner, financing institutions, public entities that control infrastructure upgrades, a variety of prime contractors doing residential, commercial and light industrial sub-parts, and other stakeholders such as regulators or utilities.
- A new aircraft development project that involves research and development, multiple joint venturers (that may be from different countries), multiple financing institutions (that also may be a variety of national or international banks), diverse manufacturing subcontractors and locations, multiple sales groups, and multiple distribution channels, all of which may take several years from start (R&D) to finish (production).
- A public private partnership for a build-operate-maintain toll road that involves multiple parties (owner, concessionaire, financing institutions, constructors) and multiple phases such as design development/ permitting, construction, operation, capital maintenance and “hand back” requirements. Here, there could be two types of DRBs,

¹ A 2003 national survey of construction industry professionals (111 respondents) who had worked on construction dispute resolution, in aggregate, on 1,423 projects dealing with 1,695 disputes, found that 54% stated DRBs were appropriate for all types of construction projects; 35% stated DRBs reduced the bid price; and 99% believed that DRBs improved communications on a project. A study by the Florida Department of Transportation concluded that contracts lasting longer than one year with DRBs had less cost and time overruns than comparable contracts without DRBs. (Statistics courtesy of the DRBF).

² See Dettman K, and Miers, C., *The Use of “Adjudication DRBs” Where Parties Are Subject to Adjudication or Arbitration Processes*, DRBF Forum (November 2007).

one to handle the finance side, and one to handle the project delivery side.

- An owner controlled insurance program with multiple types of coverage, primary and excess layers, multiple carriers, and quota share arrangements.
- A privatization project where an owner contracts with a private entity and delegates its role of designing, building, and inspecting its projects.

Summary

A DRB is a non-adversarial project management technique that features a pro-active, real time, dispute avoidance and resolution approach during the course of a project. DRBs have a proven track record in the avoidance and resolution of disputes – returning control of the timing, the costs and the process of dispute resolution back to the owner and the contractor, where it has always properly belonged. The principles and processes employed by DRBs can be exported into other commercial arenas that have characteristics similar to the construction industry. □

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