



Dispute Review Boards

By **Safia Lakhani*** and **Joshua Strub****

In typical construction contracts, the parties approach the project consultant to make a decision regarding the contractual obligations of the respective parties. As the project consultant is an agent of the owner, the initial review process may be perceived as biased and dependent solely on the expertise of a party chosen by the owner.

In contrast, Dispute Review Boards (DRBs) provide opinions which are independent of party interest. DRBs have come to play an increasingly important role in large and complex construction projects, both in Canada and internationally. Projects that have involved DRBs in recent years include the \$15 billion Hong Kong airport, as well as in the comparatively smaller \$8 million Twin Falls Project in Idaho. Here in Canada, DRBs were integrated into the contracts underlying the \$1 billion expansion of Toronto's Sheppard Subway line.¹

While DRBs can range from 1-5 board members, most often, a DRB will consist of 3 members, with each party to the contract selecting one member who must be approved by the other party.² The selected and approved members will then choose a third member collectively to act as the Chair of the DRB.

The jurisdiction and role of the DRB can be varied in the contract on a case-by-case basis. However, DRBs are typically called upon to issue a non-binding opinion whenever there is a claim by one party that cannot be resolved with the other. In some cases, the board may intervene on its own, without the parties' consent.

While some believed that the existence of the DRB would actually lead to additional disputes, in practice, just the opposite occurred.³ The use of DRBs seems to have the effect of reducing the number of disputes by pressuring the parties to resolve the dispute amongst themselves without bringing it before the DRB. This may be because members of the DRB are often professionals with a great deal of experience in the type of project underway and interpretation of construction contracts. It has been observed that "...contractors are less likely to present exaggerated claims for the sake of increasing pressure on the owner/employer, and owners/employers are less likely to reject meritorious claims. Stated differently, both sides have a vested interest in preserving their credibility, which may suffer if they misbehave while the 'teacher is in the room'".⁴

The use of a DRB becomes slightly more complicated in the event that a claim, having previously been decided by the DRB, proceeds to litigation or arbitration. There is no clear answer as to whether the opinions of the DRB should be admissible at trial or arbitration.⁵

¹ See C. Chern, *Chern on Dispute Review Boards* (Oxford: Blackwell Publishing, 2008) at ps. 59-64.

² *Ibid* at p. 33

³ John W. Hinchey and Troy L. Harris, *International Construction Arbitration Handbook* (Thomson/West, 2008), at para 1:10.

⁴ *Ibid* at para 3:26.

⁵ Harvey J. Kirsh, "The Ins and Outs of Dispute Review Boards",

http://www.glaholt.com/files/the_ins_and_outs_of_dispute_review_boards_paper.pdf

The reported success rate of dispute resolution through DRBs is high. As of 2007 over 1,000 projects in North America used a DRB, and in 98.7% of those projects there was no arbitration or litigation.⁶

Nonetheless, while much of the literature on DRBs highlights their cost-effectiveness and high success rate, there are several important critiques of the DRB process to be made.

First, the strength of the decisions of the DRB depends heavily upon the credibility, knowledge and expertise of DRB members. These factors are variable, which means that the strength and credibility of the Board's decisions is contingent upon the makeup of the group.⁷ However, this is true of any dispute resolution process and is not unique to DRBs.

Second, the DRB resolution process does not rely on the rules of legal procedure. The absence of procedural protections may, in turn, result in a lack of confidence in the Board's decisions.⁸

Third, and relatedly, lawyers generally do not sit as members of DRBs. This can be viewed meritoriously by the industry as decisions are made by construction professionals alone. However, the fact that DRBs typically do not include legal professionals may detract from the strength of any decision that is heavily based in law, or in the interpretation of a contract.⁹

These critiques are important, not only because of the counter-perspective they offer to the dominant, widespread praise of DRBs, but also because they give insight into safeguards and additional precautions that might be adopted by the parties to enhance the efficacy of DRBs.

Parties to a project wishing to engage with DRBs should select highly qualified, capable board members. Parties can solicit board members through an advertised request for qualifications, and may also conduct personal interviews.¹⁰ Board members should also be kept abreast of project developments by way of periodic site visits, and the sharing of progress reports and meeting minutes.¹¹

The absence of procedural protections is more difficult to remedy. Nonetheless, this shortcoming is, in some sense, also one of the strengths of DRBs: it is the informality of the DRB process that makes it more cost-effective than litigation. Furthermore, DRBs exist as a function of the contract between parties. As such, the contract can contain provisions that mandate certain procedural rules and can similarly require that a DRB member be a lawyer, arbitrator, or other legal professional, thereby mitigating many of the potential dangers posed by the current DRB system.

There certainly seem to be downsides to DRBs, at least in the form that they often exist at present. However, DRBs exist as a function purely of the contract between parties. As such, the contract can contain provisions that mandate certain procedural rules and can similarly require that a DRB member be a lawyer, arbitrator, or other legal professional, thereby mitigating many of the potential dangers posed by the current DRB system.

DRBs continue to be an asset to parties wishing to advance their construction projects while mitigating disputes as they arise.

**Safia Lakhani, Student-at-Law*

***Joshua Strub, Summer Student, Glaholt LLP*

⁶ See "DRBF Practices and Procedures Manual", Chapter 1, Section 3 (revised April 2007), pages 2-3 (at http://www.drb.org/manual/1.3_final_4-07.doc)

⁷ Duncan W. Glaholt, "Reviewing Dispute Review Boards", 96 C.L.R. (3d) 167

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ Z.M. Matyas, A.A. Mathews, R.J. Smith, P.E. Sperry, *Construction Dispute Review Board Manual* (N.Y.: McGraw Hill, 1995) at 30.

¹¹ *Ibid* at p. 30.