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Forward Looking Dispute Resolution Through Dispute Resolution Boards

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Commentary

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Introduction

Given the number of parties involved in any large construction project and the fact that projects often cost more and take longer than anticipated, disputes over costs, timelines, responsibility for delays, changing plans, or any other aspect of the construction process are commonplace within the construction industry. The average construction dispute in North America is valued at nearly \$43 million – up 42% since 2021 – and takes over 15 months to resolve.¹ In an effort to reduce time and costs, parties to construction contracts are increasingly using Dispute Review

Boards (“DRBs”) as an Alternative Dispute Resolution (“ADR”) mechanism. A DRB is a group of experts tasked with expeditiously resolving construction disputes soon after they arise, with the objective of avoiding potentially lengthy and expensive arbitration or litigation on the backend. This article provides an overview of DRBs, explaining what they are, how they work, and how they can be implemented in appropriate circumstances to reduce the cost and time spent resolving construction disputes.

What is a Dispute Review Board?

DRBs are typically composed of three independent and impartial industry professionals selected at the inception of a construction project to help resolve disputes in real time through a variety of mechanisms, sometimes identifying and resolving issues before they even rise to the parties' attention. Parties can agree to the use of DRBs when they enter into construction contracts or at any time during the course of a project. Although less common in private, domestic US construction contracts, many US government construction contracts and international construction contracts require a DRB decision or recommendation as a necessary precondition to arbitration or litigation.²

There are three commonly recognized types of Dispute Boards: Dispute Review Boards, which give non-binding recommendations for resolving the dispute; Dispute Adjudication Boards, which issue binding decisions that may or may not subsequently be submitted to a court or arbitrator for final

resolution; and Combined Dispute Boards, which typically issue recommendations, but may also issue binding decisions at the request of a party.³ For the purposes of this article, “DRB” is used as a catchall term given the similarities among the various types of review boards and the flexibility that contracting parties have to structure a provision that best serves their mutual objectives.

The concept of DRBs emerged from the construction industry’s need to promptly, informally, and cost-effectively resolve disputes that commonly arise during project execution.⁴ The first account of a DRB was the “Joint Consulting Board” established for the Boundary Dam Project in Washington State in the 1960s.⁵ Following the success of this board and its inclusion in a report by the US National Committee on Tunnelling Technology titled “Better Contracting for Underground Construction,” DRBs became increasingly popular in North American civil engineering projects, particularly dams, water management projects, and underground construction.⁶ During the 1990s, DRBs became commonplace in international construction projects after being adopted as standard contractual requirements in World Bank and FIDIC construction contracts.⁷

How Does a DRB Work?

A typical dispute management process for a construction process can be lengthy and costly. Disputes may cause contractors to delay their timelines or architects to redraw their plans. Many disputes are tabled until the end of a project for resolution through long, expensive arbitration or litigation proceedings.⁸ In any case, they often deteriorate the trust between various parties. In contrast, all aspects of a DRB are tailored to the specific considerations of the project, with an eye toward disposing of issues as (or even before) they arise and narrowing the number of disputes that need to be adjudicated later.

As creatures of contract, DRBs can be designed according to the needs of the contracting parties. The main characteristics parties should include in a contract provision calling for the use of a DRB are the number and identities of the board members; whether the boards will be standing or *ad hoc*; the protocols for regular meetings of the DRB; the hearing procedures; and whether DRB decisions will be binding or non-binding.⁹

Contractual Provisions

Many professional bodies have published detailed forms and sample language for the contractual creation of DRBs, including the International Federation of Consulting Engineers (FIDIC), the International Institute for Conflict Prevention & Resolution (CPR), the Dispute Resolution Board Foundation (DRBF), the International Chamber of Commerce (ICC), ConsensusDocs, the Royal Institution of Chartered Surveyors (RICS), and the American Arbitration Association (AAA). The FIDIC, in particular, has played a large role defining the common features of DRBs, and the language regarding binding DRB decisions included in its 1999 “rainbow book” popularized the use of binding decisions in international construction projects.¹⁰

Members of the Board

Most DRBs are composed of three independent construction industry specialists or experts, although some parties opt to have only one board member to reduce costs or provide for additional members with specialized or greater expertise.¹¹ Parties typically include the number of board members in the dispute resolution provision and jointly decide on the members, though some parties opt to select one board member each and allow the two party-selected board members to select the third member. The composition of a DRB is critical because the DRB must not only resolve disagreements between the parties, but also gain the trust of potential parties to a dispute such that they will comply with the recommendations of the board, even if the proposal is not binding. DRB members tend to have considerable expertise interpreting construction documents and schematics and advising on projects similar to the one at issue. As such, board members are typically not lawyers, but rather professionals with deep industry knowledge and experience, although some parties may prefer that a lawyer with litigation or arbitration management expertise to serve as the foreperson.¹²

Standing or Ad Hoc

DRBs can be either standing boards appointed at the outset of a construction project or *ad hoc* boards appointed once an issue or dispute arises. In general, standing DRBs, whose members can be integrated into the construction process from the start, making multiple site visits, having periodic meetings, and

establishing trust with the owner and contractors before any issues even arise, tend to be more successful in driving construction as quickly and efficiently as possible.¹³ Incorporating DRB members early on allows them to anticipate disputes before they arise and can help parties avoid disputes altogether. In any case, members of a standing dispute board will generally require less time to get up to speed when disagreements arise than an external judge or arbitrator.

Meeting Protocols

Without regular meetings, DRBs are little more than non-binding arbitration panels. The contracting parties may decide how frequently DRB members will attend meetings at the site, taking into account the costs, complexity of the project, or other considerations. At these meetings, the parties may discuss potential roadblocks, timelines and schedule status, budgetary concerns, progress since the last meeting, or any potential source of disagreement.¹⁴ Typically DRB meetings will be treated as confidential settlement negotiations to support parties' willingness to collaborate openly.¹⁵ By looking forward to potential issues, DRBs are sometimes able to resolve them before the parties are forced to spend time and money addressing them and potentially causing their working relationship to deteriorate.

Hearing Procedures

DRBs typically employ less-formal procedures than most adversarial forms of dispute resolution. Where there is a standing review board, either party may raise a disagreement to the board. Hearings may be scheduled quickly, and many contracts require them to be held within eight weeks of the dispute being submitted to the DRB.¹⁶ During a hearing, parties may proffer evidence without complying with evidentiary rules, argue their positions without having to submit written motions, and state their cases without the assistance of lawyers. Unlike most arbitrators, DRBs may also decide to perform their own independent investigation of issues without submissions from the parties in the interest of efficiency.¹⁷ After the hearing, the board will issue a reasoned recommendation that seeks to persuade the parties to follow that guidance.¹⁸ DRBs must issue their recommendations quickly to carry out their general objectives. For example, FIDIC forms instruct DRBs to resolve disputes within 84 days.¹⁹ DRBs may even issue their decision immediately following a hearing – before they even leave the

site – and subsequently follow up with a reasoned recommendation in writing.²⁰

Binding or Non-Binding Decisions

A major difference between standard domestic US and international DRBs is that, historically, domestic US DRBs tend to favor non-binding recommendations while international DRBs tend to favor binding decisions.²¹ Non-binding "recommendations" are intended to persuade parties to accept the board's conclusions. Parties then use these recommendations to negotiate their own mutually agreed-upon resolutions. Many DRB clauses provide that parties will comply with DRB decisions and specify a timeframe for dissatisfied parties to submit a notice of dissatisfaction, after which the decision becomes final.²² Studies show, however, that most parties tend to comply with DRB recommendations.²³

Parties must also agree on the admissibility of DRB recommendations in a subsequent arbitration or litigation. When recommendations are admissible, parties may be more likely to devote additional time to preparing for hearings and consequently may delay DRB proceedings, which can reduce the DRB's speed and flexibility.²⁴

Because DRBs are creatures of contract and have no statutory or other legal authority, even binding decisions can be difficult to enforce. While arbitrators and judges overwhelmingly tend to follow a DRB's recommendations, they may hesitate to enforce a DRB's decision without examining the merits, requiring re-examination of the documents, testimony and other evidence already submitted to the DRB (in essence a rehearing or a mini-trial) and thereby reduce the potential cost savings that made the DRB an attractive ADR mechanism in the first place.²⁵

How Effective Are Dispute Review Boards?

Empirical studies of DRBs have found them to be quite effective at reducing the cost of resolving construction disputes. A study of construction projects employing DRBs between 1975 and 2000 by the Dispute Resolution Board Foundation found that of 1860 disputes recorded in 1434 projects during that period, only 52 disputes (approximately 8%) progressed to further dispute resolution.²⁶ A similar study performed between 1990 and 2009 assessing \$130 billion of contracts containing DRB provisions found

that 98% of these projects were completed without any litigation or arbitration, and in the remaining 2%, the DRB's findings were ultimately upheld in arbitration or litigation.²⁷

Despite their upfront costs, there also is research demonstrating that DRBs appear to be less expensive in the long run. A study of 46 DRB contracts in effect between 1990 and 2004 found that the total amount spent on DRBs across all of the contracts amounted to .02% of the total project costs.²⁸ In those projects, the cost of the DRB holding formal hearings and issuing recommendations amounted, on average, to \$31,034 per dispute, which is "basically the cost of one motion in a court case."²⁹

The popularity of DRBs in public works projects – especially in the international context – speaks to their effectiveness. DRBs are now used by World Bank in all of its international development projects, and have been used on several high-profile projects around the world, ranging from the Hong Kong Airport to the "Big Dig" Central Artery/Tunnel in Boston, which has been described as the "largest and most complex urban transportation project in United States history."³⁰ DRBs have been used in all 50 states, and are mandatory for construction projects of a certain size under public infrastructure construction procurement laws in Florida and California.³¹

DRBs are not, however, a perfect solution for all construction disputes. Due to their large upfront costs, DRBs can be expensive even if there are no disputes to resolve. By some estimates, DRBs can cost up to \$75,000 a year even if there are no formal hearings, leading some practitioners to opt for *ad hoc* review boards to reduce costs.³² Parties also sometimes misuse DRBs, delaying their submissions to the DRB or declining to use them at all. Parties may opt to delay or decline to submit their disputes to DRBs where they find that preparation for a hearing is too time consuming, they find the DRB's recommendations unpersuasive, they view the DRB process as adversarial as opposed to collaborative, or they are unsatisfied with the proposed settlements or other recommendations. However, there is research demonstrating that delayed submission to a DRB diminishes a DRB's effectiveness, which appears to be greatest when the board addresses issues before parties spend considerable time and resources

to perform their own investigations.³³ Parties also sometimes refuse to comply with a DRB's recommendations. In those situations, when DRBs hold hearings and issue recommendations but the parties nevertheless contest the results in arbitration proceedings, the DRBs may ultimately cause the parties to incur unnecessary expenses.

Conclusion

DRBs operate under a "pay now, argue later" framework that is particularly well suited for the litigious construction industry. This forward-looking dispute resolution mechanism can help parties avoid disputes entirely, or, at a minimum, avoid costly litigation or arbitration. For that reason, many owners and contractors find DRBs to be well worth the upfront investment.

Endnotes

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types of Dispute Boards. International Chamber of Commerce, *Dispute Boards*, <https://iccwbo.org/dispute-resolution/dispute-resolution-services/adr/dispute-boards/> (last visited July 1, 2025). *See also* CYRIL CHERN, CHERN ON DISPUTE BOARDS (2d ed. 2011) 25 – 26.

4. *See* CHERN at 8.
5. Michael T. Kamprath, *The Use of Dispute Resolution Boards for Construction Contracts*, URBAN LAWYER (Oct. 5, 2014) (citing Jesse B. Grove & Richard Apuhn, *Comparative Experience with Dispute Boards in the United States and Abroad*, 32 CONSTRUCTION LAW 6, 6 (2012)).
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8. *See, e.g.*, Thomas S. Marcey, *Enforcing ADR—The Experience with Contractually Mandated Dispute Resolution Boards*, CONSTRUCTION BRIEFINGS (September 2014).
9. For a longer consideration of each of these topics, *see* Bill Franczek, Deborah Mastin, and Marissa Downs, *Dispute Review Boards and other Instruments in the Owner's Dispute Avoidance Toolkit*, AMERICAN BAR ASSOCIATION FORUM ON CONSTRUCTION LAW, 13 (Jan. 16, 2025).
10. Patterson and Higgs, *Dispute Boards*.
11. Of course, parties may opt to use more or fewer board members. The World Bank and updated FIDIC's suggested contractual language calls for one board member to resolve disputes arising from contracts of less than \$10 million. In contrast, the Hong Kong International Airport Project, which totaled \$15 billion, created a six-member pool from which board members were chosen depending on the dispute and the members' expertise. Franczek, Mastin & Downs at 13 (*citing* Bates, Albert, Torres-Fowler, R. Zachary, *Dispute Boards: A Different Approach to Dispute Resolution*, Comparative Law Yearbook of International Business).
12. Sarah B. Biser, *Overview of Dispute Review Boards in the Construction Process*, GLOBAL DISPUTE RESOLUTION INSIGHTS (November 22, 2021) <https://globaldisputeresolutioninsights.foxrothschild.com/2021/11/overview-of-dispute-review-boards-in-the-construction-process/>.
13. *See, e.g.*, Dispute Review Board Foundation, *Dispute Board FAQs*, <https://www.drb.org/index.php?option=content&view=article&id=91:db-faqs&catid=20:site-content> (last accessed July 1, 2025) (“The most common DB is the standing Board with three members chosen jointly by the owner and the contractor. . . All standing Boards offer significant dispute avoidance benefits.”).
14. For further discussion of the kinds of discussions that take place during regular meetings, *see, e.g.*, Biser, *Overview of Dispute Review Boards in the Construction Process*.
15. *See, e.g.*, New Jersey Department of Transportation, *Dispute Review Boards*, https://www.google.com/url?sa=i&url=https%3A%2F%2Fwww.nj.gov%2Ftransportation%2Fcontribute%2Fbusiness%2Fprocurement%2Fdocuments%2FNJDOTDRBGuideline7622.pdf&psig=AOvVaw0r_C3mavprqzJ7gSH25gHA&ust=1751507413803000&source=image&cd=vfe&opi=89978449&ved=0CAYQrpoMahcKEwjY2bDbh52OAxAAAAAHQAAAAAQBA, at 13 (last visited July 1, 2025).
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20. Chapman at 9.
21. Francek, Mastin & Downs at 4 (citing Michael T. Kamprath, *The Use of Dispute Resolution Boards for Construction Contracts*, URBAN LAWYER (Oct. 5, 2014)).
22. Patterson and Higgs, *Dispute Boards*.
23. Kathleen M. J. Harmon, *Case Study as to the Effectiveness of Dispute Review Boards on the Central Artery/Tunnel Project*, 18 J. LEGAL AFF. & DISPUTE RESOL. ENG'G. & CONSTR. 18, 19 – 20 (2009).
24. *Id.* at 25.
25. *Id.* See also Chapman at 10.
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28. Harmon, *Case Study*, at 24.
29. *Id.*
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