

# Dispute Boards

By Peter H.J. Chapman<sup>1</sup>

## What is a Dispute Board?

A Dispute Board or DRB (Dispute Review Board) can best be described as a 'job-site' dispute adjudication device, typically comprising three independent and impartial persons selected by the contracting parties. The significant difference between DRB's and most other ADR techniques (and possibly the reason why DRB's have had such success) is that the DRB is appointed at the commencement of a project and, by undertaking regular visits to site, is actively involved throughout construction. It becomes part of the project and thereby can influence, during the contract period, the performance of the contracting parties. It has 'real-time' value.

Adjudication<sup>2</sup> is a form of Alternative Dispute Resolution, ADR, an ill-defined phrase which appears to cover all forms of dispute resolution which are not arbitration or litigation. In adjudication, as with most ADR procedures, an independent neutral is introduced to assist the resolution process. Adjudication is a process in which the procedural rules of natural justice apply. The parties must know the case they are required to answer and be given a fair opportunity of so doing, reliant upon the impartiality of the tribunal. But, the judicial procedures adopted in the Courts tend to be time-consuming and impractical for fast-track methods such as adjudication. Consequently, it is perhaps better to view adjudication as being conducted in a 'judicial temper' rather than being a rigid judicial process.<sup>3</sup>

Adjudication must be distinguished from litigation, arbitration and mediation. Unlike litigation, adjudication is not generally controlled by legislation or a common law regime, nor is it administered by the state. Decisions are not immediately binding. Unlike arbitration, adjudication is not generally undertaken under the protection and within the confines of an Arbitration Act or subject to international conventions. Unlike mediation, adjudicators are required to decide matters in accordance with contractual and legal frameworks.

Adjudication closely resembles expert determination, differing perhaps in the degree of 'self knowledge' that can be used as a basis of a decision. The similarity between adjudication and expert determination is useful as case law associated with expert determination can give guidance as to how adjudication will be viewed by judges. This is covered below.

A DRB is a creature of contract; the parties establish and empower a DRB with jurisdiction to hear and advise on the resolution of disputes. In some contracts the DRB is required to make determinations which can be binding. In the UK the Housing Grants Construction and Regeneration Act 1996 requires adjudication to be available for disputes arising under almost all construction contracts. DRB's may be established to adjudicate such disputes and thus operate within the statutory requirement for adjudication.

The idea is for the DRB to be called upon early in the evolution of any serious dispute which cannot

be resolved by the parties, and then promptly to publish decisions or recommendations on how the matters in issue should be settled. It is usual that an opportunity remains for the matter to be referred to arbitration or to the courts if the DRB's decision does not find acceptance by the parties.

The origins of DRB's are found in the construction industry, however their ambit is far wider than construction and DRB's are now found in financial services industry, long-term concession projects, operational and maintenance contracts. The scope for DRB's is enormous.

### **The History of DRB's**

DRB's first evolved to meet the need in the construction industry for prompt, informal, cost-effective and impartial dispute resolution. The DRB concept originated in the USA where it has been used for over 30 years as a means of avoiding and resolving disputes in civil engineering works, particularly dams, water management projects and contracts for underground construction. The earliest reported use was on Boundary Dam in Washington in the 1960's, where the technical 'Joint Consulting Board' was asked to continue its operation and make decisions regarding conflicts, etc. The idea worked well and the die was cast.

As suspicions grew concerning the independence of an owner's agent fairly to determine disputes and costs in resolving claims by arbitration or the Courts increased the use of DRBs grew. In 1980, a DRB was used on a large international project in Honduras and, by now nearly 500 projects have been completed or are under construction utilizing DRB's. The total value of these projects is approaching of US\$ 60 billion. Although issues of confidentiality prevent an absolute determination, we believe that almost one thousand disputes have been the subject of DRB decisions but there have been few occasions (under 20 cases reported to date) where a DRB's decision on a substantive dispute has been referred to arbitration or the courts.

DRBs are currently known to be in operation in at least 12 countries (US, UK, France, Sweden, Denmark, New Zealand, Southern Africa, Uganda, Hong Kong, China, India and Bangladesh). They are ideally suited to the larger projects, to projects which are 'international' (i.e., contracting parties from differing domiciles) and to multi-contract projects such as mass transit railways, power stations and the like. A recent development is the establishment of DRB's for major concession projects lasting over several decades.

Without any doubt, DRB's are set to grow in popularity. Quite apart from their effectiveness in promoting early resolution of disputes - in the words of Lord Woolf 'lancing the boil'<sup>4</sup>. - there are three clear reasons why DRB will develop. First that in 1995 the World Bank, the foremost funding agency for large projects, published the World Bank Procurement Document that requires the establishment of DRB's for projects financially supported by the Bank. Secondly, in 1996, FIDIC, the Federation Internationale des Ingenieurs-Conseils, published an amendment to its standard conditions of contract recommending DRB's as a preferred method of dispute resolution. In 1999 FIDIC published new editions of its standard form documents (currently available in test editions) and the DRB provision is contained in all three of the FIDIC major standard forms. Thirdly, the new UK 'Adjudication' Act (Housing Grants, Construction and Regeneration Act 1996, effective May 1998) as mentioned requires almost all UK construction contracts to contain adjudication clauses. It has not taken the UK industry long to realize that, for the larger projects, a DRB is

preferable to individual adjudicators being required to determine isolated disputes. In construction contracts speed and consistency in decision-making is particularly important.

### **What are the parties hoping to achieve by using a dispute board?**

The construction industry has a reputation for disputes and conflict. Anecdotal evidence from Australia indicates that 50% of all legal cost associated with construction is expended in connection with disputes. In almost 10% of projects between 8% and 10% of the total project cost was legal cost. Not surprisingly, these projects have a high incidence of disputes. This expenditure, which globally represents an enormous sum each year, does not begin to take into account the hidden costs of disputes; the damage to reputations and commercial relationships, the cost of time spent by executive personnel, and the cost of lost opportunities. The situation is aggravated by the increased use of joint ventures both in consulting and in contracting. Such organizations are less autonomous and perhaps less able to negotiate settlements of their contractual disputes.

Every construction project is unique and perhaps this is why there is a general absence of 'corporate memory' in the construction industry. Regrettably similar type disputes arise on many construction projects and it is naive to think we can eradicate disputes by clever contract drafting (although this is not to say we should not try); differences will occur, many of which will involve sizeable sums of money. What parties want is a dispute resolution device that is considered fair, economic and will cause the least 'fall-out' damage. This is especially true for large projects where contract periods are lengthy and good inter-party relationships are thus important to performance.

Contracts do not always provide the necessary mechanisms to determine entitlements with certainty. Many disputes concern 'non-absolute' matters and, in such cases, the DRB can devise solutions which avoid 'win-lose' situations. Working relationships are less injured and site-level partnering can continue. Experience and statistics indicate that most DRB decisions are accepted by both parties and arbitration or litigation is avoided. Even if the DRB decision is contractually 'non-binding' (as many are) this does not appear to impair the efficacy of the decision. It is suggested that there are two main reasons for this; first that if the DRB's decision is admissible in later proceedings (as it often is) the parties know that an arbitrator or judge will be greatly influenced by a decision (on the facts) given by a panel of experienced, impartial construction experts who were familiar with the project during its construction. Secondly, there is the swings and roundabouts aspect. It is unlikely that over the course of a large project the DRB will always find in favour of the same party. It is probable that each party will be pleased with certain decisions and if they expect the other party to honour the favourable decisions, they are obliged to accept those that are unfavourable.

### **Composition of DRB's**

DRB panels of three are usual, but this composition is not mandatory. For small projects, which could not justify the expense of a three-man tribunal, a DRB of one person can be utilized. Both the World Bank and the new FIDIC conditions of contract encourage one-man boards for small contracts. Very large multi-discipline and multi-contract projects could necessitate a larger pool

from which a panel of one, or three or more members can be selected.

The Channel Tunnel project has a Disputes Review Board of five persons. Whilst all five members hear all disputes, the decision is made by a three-man panel comprising the Chairman and two of the other members (chosen for their particular expertise).

The new Hong Kong Airport has a group (Disputes Review Group, DRG) of six members plus a convenor to cover all the main contracts (about 20) awarded by the Hong Kong Airport Authority. A panel of one or three members is selected depending on the nature or complexity of the dispute. The members of the Hong Kong Airport DRG have been chosen to provide the range of expertise which may be necessary to comprehend the technical aspects of disputes which might arise. The Hong Kong Airport is now open but construction is now underway for a further passenger concourse and a second runway. The DRG has been extended to cover these new contracts.

The UK Highways Agency contract provides for a two-man dispute panel. An airport under construction within the UK has a one-man dispute panel.

Under the Channel Tunnel Rail Link project, a US\$5 billion concession project in the UK on which construction started in October 1998, two panels have been established, a technical panel comprising engineers (who will give decisions on the construction related disputes) and a finance panel comprising accountants and financiers (who will give decisions on disputes concerning the financial provisions of the concession agreement). For another railway concession scheme, the Docklands Light Railway Extension to Lewisham, recently opened to the public, the technical and financial panels (each of three persons) are chaired by the same individual.

Discussions are currently in progress aimed at establishing long-term DRB's for concession infrastructure projects in Eastern Europe, the suggestion being that a board can have a 'moving membership' to suit the various stages of the project (construction, operation and maintenance, tariff indexation, economic trends, etc.).

### **Appointment and membership**

Typically, each party selects one member of the DRB, with the third member, who acts as chairman, being appointed by the parties or by the first two members. For DRBs to function well, a right of (reasonable) objection over the other party's selection should be included. Despite the first two members being party selections, each member is entirely independent. Appointment is not as party representative. The members are to serve both parties with total impartiality. A member's independence is paramount as a DRB which is perceived as partisan will not engender respect and its decisions are less likely to be acceptable. Consequently, whenever possible, active participation by the parties in the selection of members should be encouraged.

Another method of selection is for the parties to agree the identity of the chairman who, once appointed, works with the parties in selecting the other members.

DRB members should be chosen with care because the success of a dispute board depends on the parties' confidence in the expertise of the members, particularly that of the chairman, who must conduct the regular meetings and hearings fairly and firmly. In construction projects the majority of issues brought to the attention of a DRB have a technical content. In such cases, a member with

little or no understanding of such matters may fail to appreciate the extent of the dispute or contribute to the proceedings. Additionally, members need to be well versed in contract administration and confident in their ability to understand and interpret contractual provisions. It is usual for the DRB to publish its decisions with reasons. Confidence in the DRB would disappear if the DRB's interpretation of contractual provisions appeared bizarre or unsubstantiated.

However, there are many occasions when a dispute does not lend itself to absolute interpretations under the contract. This is where the DRB needs to give decisions which do not contravene contractual principles but which are robust enough to give clear and sensible guidance which is acceptable to the parties. The DRB should provide the parties with avenues that could lead to the resolution of their disputes at the earliest opportunity. This will enable the real project to proceed, unhindered by any contractual baggage.

Qualities essential for DRB membership include open-mindedness and respect for the opinions and experience of the other members. For DRB's on international projects, the members are in very close proximity throughout the site visits, during the hearings and deliberations. Harmonious relationships and mutual trust are very important. Whilst decisiveness may be a virtue, individuals possessing very dominant personalities may prove unsuitable as DRB members. DRB's are for team players and it is very important that all members are totally committed to the successful operation of the board.

Impartiality and objectivity are vital qualities and should not be compromised, or appear to be compromised, by a member having a professional or personal affiliation with an organization involved with the project. Terms of appointment sometimes prohibit persons who previously have worked for either of the parties to the contract.

Unlike an arbitrator or judge who walks away from the reference after the award or judgment, the members of a DRB remain with the project until completion. Being a member of a DRB is not a popularity contest and membership is not for the faint-hearted.

Appointment should be for the duration of the construction contract and termination of a member or of the Board should only be 'for cause' and then by agreement between the parties.

Finally, it is important that DRB members remember that they are not engaged as consultants and they should never attempt to redesign the project or advise the contractor how it should be constructed.

### **The importance of early appointment and of regular site visits**

The DRB should be established at the commencement of construction and should exist throughout the contract period. This is the feature that most differentiates DRB's from some other forms of adjudication. Some lending institutions make provision in their loan agreements whereby funds are suspended until the DRB has been appointed and has commenced its programme of regular visits to the project. In some contracts failure to appoint the DRB (within a certain period) constitutes breach and enables the non-defaulting party to apply for institutional appointments. The establishment of the DRB should not be left until a dispute has arisen or after the contract has been

completed. A DRB's main value is in being part of the project from the outset so that its presence can, from the start, influence the attitudes and behaviour of all those involved.

Early appointment and regular site visits enable the DRB members to become highly conversant with the project and actually observe the problems on site as they develop. Technical difficulties and their contractual ramifications can readily be appreciated and, should the DRB be required to make a decision, on a dispute, its close knowledge of the project and of the issues, should permit quick, well-informed, even-handed and consistent responses. As every arbitrator and judge knows, it is difficult to visualise factual circumstances that are said to have existed several years earlier merely by listening to others or by reading documents. If the disputes involve allegations of delay or disruption, or if ground conditions are in issue, even contemporaneous correspondence or photographs can be misleading. By having witnessed the technical and physical conditions prevailing at the time the difficulties of *ex post facto* determinations are avoided and the expensive task of reconstructing historical events reduced.

It is said that a judge clings to contemporaneous material like a drowning man clings to the wreckage. The DRB's enduring association with the project provides the members with this valuable contemporaneous knowledge.

### **Routine operations**

Experience indicates that the routine visits to the project of a DRB become a focus for the parties and their professional advisers. Claims and potential claims are subject to regular (albeit general) review and are not permitted to lie and fester, surfacing again as major disputes some time later.

The frequency of site visits depends upon the nature of the work, the construction activities in process, and the number of potential or actual disputes. In technically complex construction projects, or those where ground conditions are known to be suspect, or where contract interfaces and rates of progress could become issues, visits should be relatively frequent, perhaps three monthly. This frequency can reduce to six months or more as the work progresses. Whenever appropriate, site visits should be combined with hearings of disputes (which would normally be conducted on or near the site).

A typical programme for a visit would be for the DRB to be given a brief progress update followed by a site inspection, particularly of those areas where potential difficulties exist, (e.g. rock quality in a tunnel drive). The parties would be given ample opportunity to provide the DRB with further information on such issues, not by way of contractual argument, but so that the DRB can better appreciate the consequential effects to the project and the steps the parties and their advisers are taking in mitigation. Further site inspections of particular areas could take place in the light of information received. The DRB can also convene sessions with the parties during which the DRB asks questions or seeks additional information. These sessions often stimulate remarkable interaction between the parties and it is not unusual for issues to be clarified and new understandings develop as a result.

In cases when a dispute has arisen, the hearing of the dispute would commence on site once the routine visit is over. Hearings are described below.

It can be advantageous for the DRB to prepare a report at the conclusion of each regular site visit. This should state what occurred and make suggestions as to how matters of concern could be progressed to settlement.

Apart from the regular visits to the site, DRB members should be kept informed of construction progress on a regular basis, usually by being sent copies of, or extracts, from the routine progress reports. It is vital that the member takes the trouble to read and digest the contents of these reports (and to keep them accessible and in good condition for later reference should a dispute arise). The amount of time (and storage space!) required should not be underestimated. Total familiarity with the project is essential when visiting the job-site and a member who has not read the reports will soon be discovered. But a member's obligation is not just to read reports; DRB members must be available at short notice to read materials, convene hearings and prepare decisions. This availability is paramount and warrants the retainers which members are usually paid. The DRB agreements usually specify a period from notification within which the hearing is to be convened. For the members of the DRB to request deferrals of the hearings because of inflexible schedules defeats a principal benefit of the DRB. Consequently, individuals should not accept invitations to serve on a DRB unless they have the availability to fulfill these important obligations.

Construction disputes often originate at the sub-contractor level. A DRB established under a contract between an owner and main contractor (or concessionaire) can be empowered to hear disputes arising at lower levels of the contracting hierarchy. Clearly, such arrangements need to be structured at the time the sub-contractors are engaged.

### **Informal operations**

Under some form of contracts, the jurisdiction of the DRB engages only after an event occurs, such as the owner's engineer giving a formal decision under specified clauses of the contract. Consequently, the formal involvement of the DRB may be prohibited until a dispute has reached a relatively advanced stage.

A DRB can, however, operate on an informal level. During the routine site visits matters of concern and potential dispute are brought to the attention of the DRB and grievances can be aired and a dialogue established between the parties, under the watch of the DRB. However, caution must be exercised and the DRB should not give informal pronouncements or attempt to pre-judge issues that may later be the subject of a formal reference. It is not difficult, however, to steer the parties towards new understandings and thereby help clarify matters in contention. This role of the DRB has obvious similarities to mediation or conciliation.

But it must be stressed that the informal operation of DRB's should be undertaken with circumspection. The role of the professional advisers should not be usurped by injudicious statements from the DRB. Nor should the formal role of the DRB be prejudiced. With this said, the informal operation is usually welcomed by the parties and is a valuable means of dispute avoidance.

## **The Costs**

When compared to the likely costs of arbitration, DRB's do seem to offer good value. It has been estimated that three-man DRBs can cost between 0.05% and 0.3% of total project costs. Clearly, the larger the project the easier it is to justify the expense of a DRB but one man panels could be considered for the smaller projects at very modest costs. It is usual that the cost of a DRB is shared equally by the contracting parties, some users viewing the expense of a DRB as an insurance premium against more costly procedures.

Furthermore, the costs of a DRB are offset by the lower bid prices that are known to result when contractors prepare tenders on DRB contracts, particularly when working overseas. Obviously, a tenderer will include DRB costs in their tender but they should not need to inflate their prices to cover what, without the DRB, may be a risk of injustice or delay. In cases where the DRB actually replaces the owner's engineer as the first-tier adjudicator (for example, under the FIDIC regime), the terms of reference under which the engineer is appointed may omit certain of the dispute resolution function, thus producing some savings further to off-set the cost of the DRB.

Perhaps one of the most significant aspects in considering the expense of a DRB is the massive difference between preparing a dispute for a DRB hearing and the trial preparation costs (discovery of documents, case management, the 'claims teams' engaged by both parties) associated with arbitration and litigation - costs that are never recovered in full, even by the winning party.

But although the cost of resolving a particular dispute may be less with a DRB than by arbitration or litigation, the parties do expect something for their money and a proactive, enthusiastic and well-informed DRB will achieve far more and give better value than one which is entirely reactive.

## **Hearings**

When either party considers a dispute should be put to the DRB, that party, (usually the Contractor, but not always), initiates an application. It is not unusual for the hearing to be required within six to eight weeks of the application - under the new UK legislation the time period is far shorter (28 days).

A hearing before a DRB is far less formal than an arbitration hearing or an action in court. It is more like a site meeting. Typically, although there are many variations, each party would have presented 'position papers' to the DRB and to the other party some days before the hearing date. These position papers should not attempt to be legal 'pleadings'. The objective is for each party to commit to paper its understanding of the disputed issues (of fact and contractual entitlement) and to state reasons why it considers its opinions are correct. By this means the issues should become crystallised, for the benefit of the DRB and the parties themselves. The position papers should avoid the 'attack-defence' routine, which inevitably leads to confrontation and can result in the real issues of the dispute being lost in procedural skirmishes.

The position papers may cite contract provisions and refer to relevant documents but they should be relatively slim submissions. A bundle of supporting documents, preferably agreed by the parties, can be provided. If the need arises, further information can be supplied. If a dispute

concerns both principle and quantum, these matters can be heard separately. This separation can be particularly beneficial in cases where an employer has not evaluated quantum or has refused to analyse the contractor's proposed quantification on the grounds that the claim, in his view, has no contractual merit. In such cases, a decision on the principle alone may be the first stage in what may become a two-stage process. This often encourages the parties to resolve the quantum issue themselves, without further involvement of the DRB. It is sensible for the DRB to have an idea of the quantum involved when considering principle alone.

Both parties should be present throughout the hearings and the DRB should not, in the author's opinion, receive confidential information on a dispute from either party. Adjudication differs from mediation or conciliation in this important respect.

At the hearing, representation by the parties should be kept to an absolute minimum; no audience, just those persons whose presence is vital to the proceedings. Unless special reasons exist or the parties request, there should be no video recordings, no tape recordings, no minutes. Parties may wish to make their own notes, but generally no transcript is made.

At the commencement of the hearing, each party would be required to outline its position paper to the DRB, possibly agreeing to certain facts contained in the other party's paper. The DRB would then raise initial questions and may ask a party to respond to particular points. Usually, each party would be given an opportunity to submit a brief rebuttal paper, but the hearing should not become confrontational and the DRB needs to be quick in controlling a party shaping up for a fight. Witnesses of fact may be called, but cross-examination would generally be through the DRB. In certain situations there may be benefit in cross-questioning by the other party, particularly if technical matters are in issue. Use of expert witnesses<sup>5</sup> is unusual as the DRB members are themselves construction professionals who bring wide experience to the project. However, party experts are not unknown in DRB proceedings and may, in certain circumstances, add value.

After the position papers and rebuttals, the DRB would normally adjourn the hearing to hold private discussions, possibly reconvening to make further enquiries until such time as the DRB feels adequately informed of the issues and of the facts. It is important that each party feels satisfied that it has been given adequate opportunity to present its case. Particularly when decisions are non-binding, eventual acceptance of the DRB decision depends on the parties' confidence in the DRB process. However, the DRB must be firm in preventing repetition. It should thus be evident that the DRB process is more inquisitorial than the adversarial processes of arbitration and litigation. Under the new UK adjudication act, the adjudicator is under an obligation to make any necessary inquiries before reaching his decision.

Once the hearing meetings are closed, the DRB sets about preparing its written decision. The DRB will, before publishing the decision, deliberate on all it has heard and read during the hearing, review the contract documentation and consider the particular circumstances of the dispute. It is not unrealistic for a DRB to hear a dispute and publish its decision whilst still on site. Some decisions may take longer, particularly where quantification of time and costs are involved, but the touchstone of DRB adjudication is prompt settlement.

It is clearly preferable for the DRB to act as a single entity and give unanimous decisions. Whilst provisions may allow the DRB to give majority decisions (with minority opinions), this would be

unusual and unsatisfactory. If differing views are held by the members, these can often be incorporated within the decision without adversely affecting the final outcome. Unanimous decisions engender confidence in the DRB process and are more likely to result in a settlement. Under some DRB provisions, arbitration is only permitted in the event of a non-unanimous DRB decision.

The DRB's product is its decision document and this should be drawn up carefully, with particular attention to ensuring that a party knows why it has failed on a point or issue. As a general rule, the decision should be written for the unsuccessful party's benefit (not forgetting that both parties can win and lose points within a DRB decision).

### **DRB procedures**

To achieve maximum benefit from a DRB, the procedures adopted for the hearing of any dispute should be simple, easily understood, fair and efficient. To impose multiple steps of review and negotiation prior to or during the DRB hearing can lessen the likelihood of success by increasing confrontation. In particular, procedures should facilitate the prompt reference of the dispute to the DRB.

Strict rules of evidence are not followed in DRB hearings. All documents that are to be referred to during the hearings should have been provided to the DRB and the other party prior to the hearing. For a party suddenly to produce a wad of correspondence upon which it relies without having given due notice will inevitably delay the procedure. In practice, there are occasions when discussions or questions at the hearing require a party to produce further evidence. In such cases, the DRB should allow the other party an opportunity to consider and reply to the new material. This is normally possible after a few hours recess, or by the next morning. If more difficult questions arise, the DRB can reserve its decision pending receipt of written responses. The DRB should ensure that neither party is prejudiced by an 'ambush' but, at the same time, try to prevent the submission of non-essential material that carries no substantive weight and merely confuse the issues. This judgment is one of the most difficult aspects of the DRB's operation. The balance between fairness and expedition is not easy.

### **The advisory opinion**

The DRB can, with the agreement of the parties, be asked to give an advisory opinion which is similar in nature to an award or judgment on a preliminary point in arbitration or the courts. The advisory opinion can be used when the parties need guidance on a contractual interpretation that is preventing the settlement of a dispute. By referring this interpretative matter to the DRB (who may agree to deal with the matter on inspection of documents only) further hearings on the dispute may be unnecessary.

### **Keeping safe**

A DRB decision cannot usually be directly enforced as a final award as can an arbitral award. In *Cameron v John Mowlem [1990] 52 BLR 24*, the adjudicator had decided that under the JCT DOW form of sub-contract (where an adjudicator is appointed to decide matters of set-off) Mowlems should pay to their sub-contractor an amount withheld by way of set-off. Mowlems refused to comply with this decision and Camerons applied to the court under Section 27 of the Arbitration

Act 1950 for leave to enforce the adjudicator's decision as a judgment of the court. The Court of Appeal held that the decision of an adjudicator is not enforceable as an arbitral award. This judgment stopped short of telling us how the decision of an adjudicator, acting within jurisdiction, can be enforced. In *Drake and Scull Engineering Ltd v McLaughlin and Harvey Plc* [1992] 60 BLR 102, a case also concerning the DOM/1 contract, Judge Peter Bowsher QC held that a mandatory injunction supporting the adjudicator's decision was the appropriate remedy. The case did not necessarily approve the adjudicator's decision on the merits, merely saying that it was a decision that was within his power to make. These cases appear to indicate that the assistance of the court may sometimes be necessary in seeking summary judgment or injunctions to enforce a decision that has become binding or is automatically binding. This raises the question of how such a court action could be defended. The decision of a DRB is akin to that of an expert if asked to make an expert determination. The English courts have had no hesitation in reviewing and overturning determinations by experts if fraud or collusion can be proved. Absent this, the courts seem to be generally reluctant to intervene in the substantive issues of the dispute, even, it seems, if the court thinks the decision wrong.

In *Campbell v Edwards* [1976] 1 WLR 403, Lord Denning stated:

*'It is simply the law of contract. If two persons agree that the price of property 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. Even if he has made a mistake they are bound by it ...unless there is fraud or collusion.'*

In *Nikko Hotel (UK) Ltd. v NEPC plc* (1991) 28 EG 86, the Court stated that if the expert had answered the right question in the wrong way the decision would still be binding. However, if the expert answered the wrong question then his decision would be a nullity.

In *Jones v Sherwood* [1992] 1 WLR 277, the court stated it would not intervene unless the expert had made a fundamental or material departure from his instructions, for example, if the expert valued the wrong asset. In essence the court said that it needed to be able to see that there was a mistake from just reading the decision and not by reviewing it in the light of other evidence.

In *Healds Foods Ltd v Hyde Dairies and Others* [1994] (unreported, 23 November QBD, Commercial Court), Potter J. was concerned with the true meaning of the phrase, "save in the case of manifest error" which is often used to qualify the extent to which an expert's determination is final and binding. He found that there was insufficient evidence of manifest error and that the Defendants had failed to establish, on the balance of probabilities, that the accountant (expert) had departed from his instructions.

So the court's view is that absent fraud or collusion, the decision of the expert will be sacrosanct unless he has departed from instructions or has answered the wrong question.

An agreement which provides for a DRB may state categorically that the decision of the DRB is to be treated as an expert determination (e.g. FIDIC) and is final and binding. However, an interesting question arises as to whether the decision of the DRB can be enforced contractually if, after a decision has been made there is a reference to arbitration (which cannot be heard for some time as it must wait until after substantial completion). In such cases it is likely that the courts will enforce the DRB decision pending arbitration unless the court is convinced that the arbitration can commence immediately. There is often express provision in the contract that the DRB decision

will be binding in the interim, even if a reference to arbitration has been served. This is an important matter that should be addressed when the DRB agreement is drafted. In the recent case of *Macob Civil Engineering v Morrison Construction Ltd. [1999]* Dyson J upheld the right to have the adjudicator's decision immediately enforced either by way of an injunction or by means of an application for summary judgment.

### **Why do DRBs work?**

At the end of the day, DRB's generally succeed without recourse to law. The parties must live with their DRB for long periods and it is evidently counter-productive to chase off to the courts on every small matter whilst the contract is ongoing and the DRB is still operating. Inevitable, *a fortiori* in the UK under the new adjudication act, the courts will become involved in adjudication and in DRB matters and it is hoped that the line of reasoning followed by the courts relating to expert determination will be adopted. Early indications such as in *Macob Civil Engineering* (see above) are encouraging

From the available figures it appears that DRBs are effective in avoiding arbitration and litigation and bringing the parties to settlement. If less than one score out of nearly 1000 disputes have failed to settle, the record for DRB's is good and would indicate that parties accept the 'judgments' of DRB's as fair - or at least as fair as they could expect from an arbitrator or a judge.

With a DRB in place, it is evident that the parties will themselves take efforts to resolve potential disputes and reduce matters in contention. The DRB is thus an effective dispute avoidance device. Its very existence (the 'long shadow' of the DRB) minimises the outbreak of disputes and fosters co-operation between the parties, often providing the impetus for amicable settlements. The damaging 'duel of egos' is avoided. Claims and defences are more carefully prepared and more credible as there is a natural desire not to appear foolish before the DRB, or be seen as unhelpful or exaggerating. The parties thus undertake their own 'reality check'. Fewer spurious claims are advanced, fewer meritorious claims are rejected. Dealing is more open and the procedural posturing, so common in arbitration or litigation, is rarely evident.

Parties are less inclined to send acrimonious correspondence which can damage relationships. They are aware, possibly subconsciously, of the DRB's reaction to such exchanges. The parties' approaches are thus tempered by their perception of the DRB's view of their behaviour. Attitudes remain positive not adversarial.

By the owner adopting the DRB approach in the bidding documents, tenderers are given a strong indication that fair play will prevail. This promotes openness and the partnering spirit. Furthermore, engineers, whether they are engaged by owners, engineering consultants or contractors, have very strong paternalistic feelings towards their projects. With the parties having to report to the DRB during the site visits, co-operation towards the common goal is encouraged and mutually acceptable solutions emerge.

When a dispute does arise, it is given early attention and addressed contemporaneously. This avoids the commonly encountered situation of the engineer being too busy to address a voluminous claim. An inclination to reject in any event is not unknown, possibly in the hope that such action would make the claim go away. Delays occur which can result in aggravation, acrimony and the

development of entrenched views. Opportunities to negotiate and settle are lost. The DRB prevents this by its regular review of progress on claims. Parties' fantasies do not turn into expectations. Issues are isolated and contained, not being allowed to snowball into unmanageable proportions. One needs only to remember the Kariba II dam debacle in Zambia to realise how contractual conflagrations develop.

Because of the DRB's familiarity with the project and the speed with which disputes come up for hearing, facts are better understood by those presenting and adjudicating the dispute. Reconstruction of historical circumstances is greatly reduced. In most projects, senior construction personnel rarely remain after construction activities complete - they are eager to move to their next job, often depriving the arbitrator or judge of the benefit of their first-hand knowledge of events. With such individuals on hand, greater certainty prevails and the parties are usually content that the material germane to the issue has been revealed. Even unfavourable decisions are more readily accepted in good faith, particularly as it is most unlikely that all decisions go the same way (the 'swings and roundabouts' concept).

For meritorious claims, acceptance of the DRB decision results in earlier payments to the contractor, easing cash-flow difficulties. With claims resolved as they arise, finalisation of the Contract Account is usually quick and retention funds may be released earlier. Both parties can draw their bottom lines and get on with operating their core businesses.

The confidential and low-key procedures preserve good site relationships, vital for the remainder of the project. Face-saving settlement options are provided (with the DRB being blamed for adverse decisions!) and neither party is being seen as having to back down. The 'pay-up or we'll stop work' scenario, guaranteed to put an end to project partnering, is avoided.

Do DRBs offer such easy and inexpensive resolution options that they encourage disputes? This does not appear to be the case as many 'DRB projects' have no disputes whatsoever. On a large project in London, the DRB has yet to be required to make a decision on a dispute. The Contractor freely admits that this is because the DRB is seen patrolling the site during the quarterly visits. Both parties are trying very hard to prevent the DRB being used, neither wanting to be proven wrong!

### **The Chairman's Role**

The role of the chairman is paramount to the success of a DRB. He must chair all meetings and know precisely which issues should receive most attention during the limited time during which the members and the parties are together. He must understand the contractual and the technical issues involved and be prepared to lead discussions between the parties (during informal meetings and during hearings) and between DRB members (during board deliberations). He must strive for consensus and be prepared to view the issues through the minds of his fellow board members (who will, inevitably, have different experiences and bring different perspectives to bear on the matters in question). During the hearings he must ensure fair play and enable a party who is poorly represented adequate opportunity to present and defend its case. He must not be arrogant, short-tempered, over-familiar, too talkative, patronising or inconsiderate - particularly where parties are conducting the proceedings in a language that is not their mother tongue. He must be firm but not autocratic. The parties have not set up a DRB to have their knuckles rapped if they

omitted to take an action that, with the benefit of hindsight, appears sensible. The chairman should not allow a 'blame-culture' to develop.

Nor should a chairman undertake all the work or attempt to be a "one-man-board" by ignoring the others. He should share the work between the members, reserving for himself those areas where he feels he is best able to contribute, delegating other matters to his colleagues in the knowledge of their capabilities.

The chairman's role is not easy but it is absolutely vital that it is undertaken with integrity and competence. If a DRB fails to provide the service expected by the parties, much of the blame will rightly fall on the chairman.

### **International aspects**

On international projects (i.e., those where the contractor is not of the same domicile as the employer and is working outside its country of origin) it is very likely that the members of the DRB will be of different nationalities. Translation of all written and spoken material into a foreign (non-English) language is not unusual and it does not take much imagination to foresee the difficulties in communication. It does take patience and consideration on the part of the DRB to ensure that the parties, party representatives and each member of the DRB fully understands each and every step of the proceedings. In many instances, certainly during the development of DRB's, many of the participants in the DRB process will lack experience. Guidance and assistance from the tribunal will be essential.

### **The Future**

Adjudication is taking up a prominent position in the construction dispute arena. More DRB's will be established and, it is hoped, prove successful in reducing and resolving construction disputes. The merits of this form of adjudication will become evident and we should see the popularity of DRB's grow. The costs of arbitration and litigation remain very high (despite some welcome changes in the UK under the Arbitration Act 1996 and under the new Civil Procedure Rules 1999. Commercial pressures alone will encourage more economic settlement options.

<sup>1</sup>Peter H.J. Chapman is Chartered Civil Engineer & Barrister in London.

<sup>2</sup>Het begrip "adjudication" in dit artikel is in de meeste gevallen gekoppeld aan dat begrip in de Britse Housing Grants, Construction and Regeneration Act 1996, in werking getreden 1 juli 1998. Voor een korte nadere toelichting zie het artikel van J. Rozemond hierna, Red.

<sup>3</sup>per Lord Moulton in Local Government Board v Arlidge (1915) AC 120

<sup>4</sup>Keynote Speech 'Adjudication a New Deal for Disputes' ICE 20.10.97

<sup>5</sup>witnesses of opinion who are considered knowledgeable on technical topics which bear on the dispute