

Rebuilding New Zealand: A Case for Dispute Resolution Boards

Nick Gillies¹

New Zealand is at the beginning of the largest construction boom in 40 years. Unprecedented demand, strains on capacity, and the sheer number of projects are likely to create significant dispute resolution challenges. In meeting those challenges, this paper evaluates Dispute Resolution Boards and advocates their wider adoption in appropriate cases as an alternative method of dispute avoidance and resolution.

Introduction

New Zealand sits on the cusp of the largest construction boom in a generation. One of the challenges (and opportunities) that this presents is how best to manage the inevitable increase in building and engineering disputes. Against that background, this paper discusses and aims to raise awareness of Dispute Resolution Boards² (DRBs) as an alternative method of dispute resolution.

The concept was developed nearly forty years ago, yet DRBs have been adopted in only a handful of New Zealand projects to date. It follows that there is scope to increase their use nationally. To achieve this will require buy-in from industry participants and support from the dispute resolution community.

The work of a DRB is in the nature of ‘spot arbitration’,³ with a board of independent persons empowered by contract to assist the parties and make determinations during the life of a project. What distinguishes it from other dispute resolution processes is that the board is already familiar with the project and benefits from considering issues contemporaneous with the works. As a result, there is an emphasis on avoidance as much as resolution, and DRBs have an impressive track record around the world.

The paper focuses on DRBs as a dispute resolution method in a New Zealand context. While traditionally suited to larger infrastructure projects (because of the associated costs), the paper also explores the idea of mini-DRBs for smaller projects, including whether central or local government, or professional organisations like AMINZ, have a part to play in promoting and facilitating the use of DRBs.

Economic and Industry Context

New Zealand’s economy is small and isolated. Although consistently one of the larger sectors of the economy, construction activity has traditionally been sporadic and low by international standards. However, a co-incidence of factors is now set to create ‘unprecedented growth’⁴ over the next decade.

1 By Nick Gillies, LLB(Hons), BCom (Economics). Nick is a senior construction and disputes lawyer with Hesketh Henry in Auckland, New Zealand. A version of this paper was presented at the 2014 AMINZ conference, Determinative Stream.

2 The terms Dispute Review Board, Dispute Avoidance Board and Dispute Adjudication Board have also been used.

3 *National Highways of India v Progressive – MVT (JV)* (2013) High Court of Delhi per Kaul J at 9.

4 Steven Joyce, Minister for MBIE, New Zealand Government Press Release, 20 November 2013 (www.beehive.govt.nz/release/construction-sector-vital-help-grow-nz-economy).

Those factors include:

- (a) The end of the GFC and relative performance of the New Zealand economy;
- (b) A backlog of infrastructure projects;⁵
- (c) A clutch of new commercial developments, especially in Auckland where there is a long-term shortfall in retail and office space;⁶
- (d) High net inward migration, which is expected to continue;⁷
- (e) The \$40-50b Canterbury rebuild;⁸
- (f) Seismic upgrading of earthquake-prone buildings;
- (g) Repairs to leaky buildings following the home weather-tightness crisis;
- (h) A chronic shortage of housing, particularly in Auckland and Christchurch;
- (i) University of Otago's recently-announced \$650m works programme, which will drive construction activity in that region;⁹ and
- (j) Business-as-usual building and engineering activity.

The construction sector currently contributes approximately 6.3% of GDP and employs 7.6% of the New Zealand workforce (or over 170,000 people).¹⁰ A joint industry/government study¹¹ forecasts that:

- (a) Annual construction activity will peak at \$32b in 2016 – 23% higher than the last peak in 2007 (\$26b) and 44% higher than in 2012 (\$22.3b).
- (b) Construction will grow by more than 10% pa for around 3½ years – 18 months longer than previous booms.
- (c) Auckland (which accounts for one third of New Zealand's construction work even with the Canterbury rebuild) will grow by 68% in the five years to 2018. Much of this will be driven by residential building, which is expected to more than double (from \$2.9b in 2012 to \$7.3b in 2017).
- (d) In Canterbury, total construction will increase from \$4.3b in 2012 to \$8.2b in 2015. Non-residential activity will peak later at \$4.7b in 2017 (a 122% increase from 2012).

5 For example: City Rail Link (\$2.86b, completion due 2021); Auckland Waterview Connection (\$1.4b, 2019); Wellington inner-city bypass (c\$200m, 2016), Transmission Gully (\$1.3b, 2020) and Auckland Airport redevelopment (\$29m, 2025; plus \$2.4b in capital expenditure projected for the next 30 years).

6 For example: Fonterra's new head office (\$92.6m, 2016), Wynyard Quarter hotel development (\$200m, 2017) and NDG Tower (52 storeys, \$350m, 2020).

7 Statistics New Zealand, *International Travel and Migration: August 2014*

8 www.treasury.govt.nz/budget/2013/speech/06.htm. Some public sector projects are already underway – eg: Justice and Emergency Services Precinct (\$325m, 2017), Christchurch Hospital (\$450m, 2017) and Central Art Gallery (\$100m, 2015). See also: www.cera.govt.nz/recovery-strategy/leadership-and-integration/public-sector-rebuild.

9 www.odt.co.nz/campus/university-otago/308321/uni-spark-building-boom.

10 MBIE Construction Sector Report (2013) at 10.

11 NZ Building and Construction Productivity Partnership, National Construction Pipeline Report (November 2013).

The signs are already evident. Statistics New Zealand's Q1 figures¹² (before the impact of the election cycle) revealed quarterly increases of 16% and 17% in value and volume respectively, with a rising trend over the previous ten quarters.

While the growth is welcomed, there is concern about a lack of scale and capacity among local firms.¹³ Approximately 87% of all construction-sector businesses employ less than ten workers and many are 'one-man-bands'.¹⁴ In Canterbury alone, the Canterbury Earthquake Recovery Authority (CERA) has acknowledged that there are not enough skilled workers and machinery to work on all recovery tasks at the same time.¹⁵ To some extent the gap may be plugged by foreign firms and workers, but they will take time to enter the market and may suffer from being unfamiliar with local conditions. In addition, the sector has been characterised as fragmented, risk averse and suffering a lack of competition.¹⁶ Meanwhile, the widening of tort law in New Zealand in recent years has encouraged scatter-gun claims.

Construction is already prone to disputation. As New Zealand moves into a period of significant construction activity, the risk of claims is likely to rise. A considered response is needed, as the usual methods of dispute resolution may not always be the most effective.

Dispute Resolution Options

The dispute resolution options that may be available to construction parties include:

- (a) Litigation;
- (b) Arbitration;
- (c) Adjudication;¹⁷
- (d) Expert determination;
- (e) Early Neutral Evaluation (ENE);
- (f) Mediation/conciliation; and
- (g) DRBs.

The merits of litigation and arbitration and their comparative advantages/disadvantages are well known. While they might be appropriate in the event of a 'full-blown' dispute, both consume considerable time and money and will normally only be a final option.

Adjudication brought a sea change in the resolution of construction disputes by providing parties with access to what is essentially a short-form arbitration process.¹⁸ Adjudication is believed to be the most

12 Statistics New Zealand *Value of Building Work Put in Place: March 2014 Quarter*, released 4 June 2014.

13 Note 10 at 11.

14 Note 10 at 48.

15 www.cera.govt.nz/recovery-strategy/overview/read-the-recovery-strategy/section-9-pace-of-recovery.

16 Note 10 at 10-11.

17 Subject to certain statutory limits, adjudication is available as of right under the Construction Contracts Act 2002.

18 An adjudication decision can be available within 20 – 37 days.

commonly used dispute resolution method in New Zealand for construction claims.¹⁹ Nevertheless, an adjudicator comes in ‘cold’ and not every issue is amenable to adjudication.²⁰

Expert determination and ENE are less common:

- (a) Expert determination involves the engagement of ‘a third party expert, with expertise in the particular subject-matter in issue, to give a determination upon that subject issue’.²¹ It has largely been displaced by statutory adjudication.
- (b) ENE is a preliminary, non-binding opinion by an independent person on particular issues in dispute, often to assist with negotiations.²²

Mediation/conciliation are also well known. They are usually only effective once a dispute is sufficiently advanced and for the purpose of achieving a global settlement. They are not normally suitable for discrete or stand-alone issues.

Each of these ‘traditional’ methods has its place. However, they are all inherently reactive – i.e. they are called upon only when there is a dispute. Commercial managers are usually reluctant to formally escalate a dispute during the works, with the consequence that ‘parties often find themselves tied up in endless negotiations throughout [a] project [as unpredictable events arise]’.²³

The DRB concept was developed as an intermediate step between inter-party negotiations and arbitration. It is complimentary to arbitration and has a broader function than adjudication.²⁴

The DRB Concept

A DRB is a board of independent members formed at the beginning of a project to ‘keep a weather eye’²⁵ on progress, help the parties avoid disputes and make recommendations during the works. The board does this by regularly visiting the site and meeting with the parties and, where necessary, attending special meetings to hear specific disputes.

A distinguishing feature of the DRB concept is its emphasis on dispute avoidance:²⁶

One of the main ideas of having DRBs is that they can look at disputes as they emerge and make recommendations to the parties with a view to “nipping in the bud” such incipient disputes.

19 www.buildingdisputestribunal.co.nz/ADJUDICATION.html.

20 This includes issues that are both too small and too complex for adjudication.

21 Robert Gaitskell QC, *Adjudication – Its effect on other forms of dispute resolution (the UK experience)* ACLN #105 November/December 2005 at 9.

22 Note 21 at 11.

23 Pierre Genton, *The Dispute Review Board – Wishful Thinking or Reality*, International Law Forum, 1999 at 69.

24 The interplay between DRBs and adjudication is discussed further below.

25 *Mi-Space (UK) Ltd v Lend Lease Construction (EMEA) Ltd* [2013] EWHC 2001 (TCC) per Akenhead J at 16.

26 *Ibid.*

This is possible because of the board's familiarity with the project and its engagement with the parties during the works. The nature of DRB meetings and the board's ability to give advisory opinions or formal recommendations are also important features in relation to this.

DRB meetings are without prejudice, informal and partly inquisitorial. The parties may make presentations and or submit position papers. However, the board is not bound by strict procedural or evidential rules and will instead be free to investigate and consider issues in a flexible and open way. As Gerber notes:²⁷

The 'hearing' is conducted more like a site meeting than a fully-fledged trial or arbitration. Lawyers are generally not present, and expert witnesses [are] not necessary as the DRB members have been selected for their expertise in the type of project being undertaken.

The DRB is thought to create an environment that encourages the parties to deal with issues as they arise and in a way that allows them to maintain their commercial relationship as the project continues. If, however, a dispute cannot be avoided, the board can be asked to give a formal written recommendation. This will typically be limited to points of principle or liability, with the parties left to agree quantum in light of the recommendation.

If either party is dissatisfied with a recommendation of the board, they can refer the dispute to arbitration (or such other dispute resolution process as the contract specifies). This gives rise to the question as to whether the recommendation is binding unless or until it is referred to arbitration. There are generally three different models:

- (a) **Dispute Review Boards (DRBs):** The DRB makes 'recommendations', which can be non-binding or capable of becoming binding if neither party issues a notice of dissatisfaction within a stipulated timeframe (usually 28 days). If such a notice is issued, the recommendation is not binding pending an arbitral award. There is a growing body of opinion that DRB recommendations should always be non-binding on the basis that the board's reasoning will be persuasive and it allows the parties to maintain control. The DRB model was developed in the USA.
- (b) **Dispute Adjudication Boards (DABs):** The DAB only considers disputes that are referred to it. The DAB makes 'decisions' that are immediately binding, which may be enforced or overturned in arbitration.²⁹ This model was developed by FIDIC.³⁰

27 Paula Gerber, *The changing face of construction dispute resolution in the international arena: Where to from here?* (2000) ACLN Issue #73 at 6.

28 See for example: George Golvan QC, *Practical issues in the establishment and operation of a Dispute Board: Some reflections on Sydney's desalination Plant Project Dispute Resolution Board* BuildLaw 7 September 2010 at 2-3; Paula Gerber and Brennan Ong, *Look before you leap: Avoiding the traps and maximizing the benefits of your DRB* (2012) 28 CLJ 4 at 328.

29 For a discussion about enforcing DAB decisions, see: Gordon Smith and Glen Rosen, *Enforcing a DAB decision in arbitration* (2011) 27 BCL 305.

30 Under the FIDIC model the DAB does not get involved in dispute avoidance.

- (c) **Combined Dispute Boards (CDBs):** This is a combination of the two models above, and was developed by the International Chamber of Commerce. The CDB can make a ‘recommendation’, but may instead issue a binding ‘decision’ if one party requests this and the other does not object. Even if there is an objection, the CDB has a limited discretion to issue a decision.

In my view, the DRB model is best suited to New Zealand. The FIDIC DAB model is more commonly used on large international projects in the developing world and does not help the parties avoid disputes.³¹ The CDB model places too much power in the hands of the parties and opens the door to unnecessary arguments about whether the CDB exercised its discretion properly.

The DRB model, by contrast, is more likely to succeed in avoiding or resolving disputes without reference to arbitration because of the active involvement of the board during the project. The prospect of non-binding recommendations might appear to create commercial uncertainty, but the empirical evidence shows otherwise – they are almost always followed and very few are referred to arbitration.

A brief history of DRBs

The DRB concept had its genesis in the Boundary Dam project in the USA during the 1960s. After problems arose during that project, the employer and contractor agreed to appoint two professionals each to a four-person consulting board, which provided non-binding suggestions.

In 1972 the US National Committee on Tunneling Technology sponsored a study to develop recommendations for improved contracting methods.³² This paved the way for the first official use of a DRB on the second bore of the Eisenhower Tunnel in 1975 after the ‘financial disaster’ of the first tunnel.³³

The success of the Eisenhower DRB led to its adoption on other projects in the USA. In 1980 a DRB was used internationally for the first time on the El Cajon dam in Honduras.³⁴ The uptake of DRBs grew from there, and principally in the USA.

In 1995 the World Bank made DRBs mandatory for IBRD-financed projects over US\$50m, with the Asian Development Bank and European Bank for Reconstruction and Development later following suit. That same year FIDIC³⁵ introduced the DAB model into its Orange Book,³⁶ and in 1999 into its Red Book.³⁷

31 For a critique of the DAB model, see: Derek Griffiths, *Do DRBs Trump DABs in Creating More Successful Construction Projects?* (February 2010) DRB Foundation Forum, Vol 14, Issue 1.

32 DRBF *Practices and Procedures Manual*, section 1.1. See also Nicholas Gould, *Dispute Boards* CES July/August 2011 at 32.

33 Nicholas Gould, *Ibid* at 32.

34 Toshihiko Omoto, *Dispute Boards – Resolution and Avoidance of Disputes in Construction Contracts*, JCAA Newsletter, No. 23 November 2009 at 1.

35 International Federation of Consulting Engineers or *Fédération Internationale Des Ingénieurs-Conseils*.

36 Design-Build and Turnkey Contract (Orange Book).

37 Conditions of Contract for Construction (Red Book). An optional amendment was introduced in 1996.

In 1996 the Dispute Resolution Board Foundation (**DRBF**) was established as an international non-profit organization dedicated to promoting DRBs.³⁸ The Dispute Resolution Board of Australasia Inc (**DRBA**) is the local chapter of the DRBA and was established in 2003.³⁹

Around half a dozen New Zealand projects have used DRBs to date,⁴⁰ including:

- (a) Matahina Dam strengthening (c\$50m, 1997-1998);
- (b) Manapouri Power Station Second Tailrace Tunnel (c\$275m, 1997-2002); and
- (c) Christchurch ocean outfall (c\$87m, 2006-2009).

Why are DRBs successful?

The DRBF maintains a database⁴¹ of DRBs from around the world dating back to 1975. As of 2006 it had logged 1,434 projects with a combined value of US\$96.3b.⁴² Out of these projects, 1,860 disputes were heard by the DRBs, of which only 52 (or 2.8%) were referred to arbitration or litigation. In other words, approximately 97% of all DRB decisions were accepted.

In New Zealand the available data shows a similar success rate: the Matahina DRB did not hear any formal disputes,⁴³ while the Manapouri DRB heard four, all of which settled.⁴⁴

In some respects the success rate is misleading. A project where the contracting parties are willing to establish a DRB at the outset is more likely to be well run and therefore less prone to costly disputes. Nevertheless, the empirical and anecdotal evidence is consistent that DRBs are effective. There are a number of reasons for this:

- (a) The board is already familiar with the project. Time and money is not spent getting the members 'up-to-speed', in contrast to other dispute resolution methods.
- (b) The board meets with the parties regularly and is available throughout the project. This means issues can be resolved quickly and easily and without needing to formally escalate a dispute.
- (c) The board makes decisions during the works, which has several benefits:⁴⁵

38 www.drb.org.

39 www.drba.com.au.

40 George Golvan QC, Note 28 at 12.

41 Note 38.

42 This is likely to only be a fraction of the true number due to confidentiality provisions and the fact that DRBF relies on information being volunteered.

43 The existence of the DRB is thought to have helped discourage any: Felicity Gregory, *On Site Dispute Resolution: Review Boards* (1999) AMPLA Yearbook 495 at 504; Steve Everett, Ron Fleming and Lelio Mejia, *Matahina Dam Strengthening Project management of Design, Consents and Constructions* (1998) 111 ANCOLD Bulletin 69 at 78.

44 Note 38, DRBF #227.

45 Quoting Paula Gerber (*The changing face of construction dispute resolution in the international arena: Where to from here?* (2000) ACLN Issue #73 at 6): "DRBs avoid the difficulty inherent in retrospectively reconstructing historical events".

- (i) They can see the works for themselves, rather than relying on documentary and witness evidence after the event.
- (ii) They can deal with issues while they are ‘live’.
- (iii) Witness evidence is more reliable.
- (d) The board should have technical expertise, which assists with rapid decision-making and obviates the need for expert witnesses.
- (e) The concept is flexible and can be tailored to the particular project.
- (f) The regular meetings provide a forum for parties to ‘vent’, allow gripes to be addressed before they develop into disputes and force the parties to confront issues as they arise. The mere fact of meeting in front of an independent board tends to ‘hose down’ tensions and discourage parties from being positional.
- (g) The very existence of a DRB can act as a deterrent to ‘frivolous, unfounded claims and also provides incentive for the [parties] to reach agreement on issues’.⁴⁶
- (h) Lawyers are kept out of the process (other than providing assistance in the background). This helps the meetings to remain informal and keeps costs down.
- (i) The board is pro-active. It helps to identify and resolve issues before they become disputes.⁴⁷
- (j) Early and effective decision making reduces the number of disputes that are referred to arbitration.

What are the potential disadvantages of DRBs?

Cost

The main downside of a DRB is cost. There are two parts to this: (a) the cost of establishing a DRB; and (b) the cost of running one.

The cost of *establishing* a DRB will almost certainly be the lesser of the two, but may not be insignificant either. The parties should take professional advice on whether the project is suitable for a DRB and, if it is, the contractual documents required to establish one. These costs are incurred by the parties themselves. The costs will vary depending on the complexity of the project and the extent to which standard terms are amended.

The cost of *operating* a DRB is principally the direct cost of the board members. Parties are free to negotiate whatever terms they wish. However, a common approach is to pay a retainer and a daily fee.⁴⁸

⁴⁶ Everett, Fleming and Mejia, Note 43 at 78.

⁴⁷ Ron Finlay, *Dispute Boards – Do they work?* NZSCL presentation, 11 February 2014, slide 15.

⁴⁸ See for example: Toshihiko Omoto, *Dispute Boards – Resolution and Avoidance of Disputes in Construction Contracts*, JCAA Newsletter, No. 23 November 2009 at 4; Nicholas Gould, *Dispute Boards*, CES July/August 2011 at 35; Gordon Jaynes, *Dispute Boards: East vs West* (November 2012) DRB Foundation Forum, Vol 16, Issue 4 at 14.

As an example, the FIDIC Red Book specifies a monthly retainer for: being available on 28 days notice for all site visits and hearings, becoming and remaining conversant with the project, and all office and overhead expenses in connection with the retainer. A daily fee is then payable for travel time (up to two days) and each working day (eg site visits, hearings, reading submissions and preparing decisions).⁴⁹ Travel and accommodation costs are reimbursable as expenses.

The board's fees and expenses are normally split 50:50 between the employer and the main contractor, although the employer may bear the full cost if the contractor has factored this into their tender price.

In addition, the parties will have their own overheads liaising with the DRB and preparing for visits/hearings. However, these would normally be incurred resolving the particular issue regardless of whether there is a DRB. Therefore, they are not normally included when assessing the cost and feasibility of a DRB.

The DRBF estimate that for a three person board:⁵⁰

DRB costs range from 0.05% of final construction contract cost, for relatively dispute-free projects, to a maximum of 0.25% for difficult projects with disputes. Considering only projects that refer disputes to the DRB or that had difficult problems, the cost ranges from 0.04% to 0.26% with an average of 0.15% of final construction contract cost, including an average of four dispute recommendations.

It is easier for larger projects to absorb the costs of a DRB. For a \$50m project, the upper end of the DRBF range (say 0.25%), equates to \$125,000. For a \$25m project, the cost might be \$50,000. For projects valued at less than \$25m, a one-person board might be more cost-effective, which I discuss later.

The dilemma for the parties is that the DRB represents a significant preliminaries overhead and yet they do not know whether or to what extent the DRB will be needed. As a result, there may be a temptation to omit a DRB or to put it on standby. However, as Omoto observes:⁵¹

Too often, even though the contract calls for a DRB, the parties see the DB as "too expensive" and because they have no disagreements at the beginning of the contract (the parties being "newly weds") so they postpone establishing the DB and say "We will establish the DB if we have a dispute which we cannot settle by friendly discussion." Or they establish the DB but insist that the DB Site visits be only annually instead of quarterly, so they can "save money". These attitudes reflect [a] lack of experience in use of DRBs and [a] lack of understanding that a properly established and maintained DB is one of the most valuable economies they can accomplish.

49 FIDIC Red Book and Note 48.

50 www.drb.org/FAQ.htm. By contrast, the American Society of Civil Engineers has suggested 0.4% to 0.51% (*Avoiding and Resolving Disputes During Construction*, Technical Committee on Contracting Practices of the Underground Technology Research Council (1991) at 10).

51 Note 34 at 5.

The costs can be managed to some extent to suit the particular project and should be seen as a form of insurance. Any party who has been through a significant and costly dispute is likely to view \$125,000 on a DRB for a \$50m project as a very worthwhile investment. It has also been suggested that bid prices may be lower ‘as the tender does not have to be inflated to factor in the risk of injustice or delay that may occur without the DRB’.⁵²

Ineffective DRBs

An ineffective DRB can be worse than not having one at all. The limited case law on DRBs is littered with examples of parties providing for a DRB in the construction contract but failing to actually appoint one, only to later fall out.⁵³ In other instances, a DRB may have been established but was operated in a way that renders it ineffective (eg by putting the board on standby, limiting their jurisdiction or including overly legalistic procedures). These failures are within the parties’ control and are therefore entirely avoidable. Creating and operating a DRB is discussed in the next section.

Quality of DRB decisions

If suitable board members are selected, decisions of a DRB should be well-reasoned and persuasive. There may be some compromise arising from the speed of the process, but it is no different to adjudication and this is the *quid pro quo* of a fast and accessible dispute resolution process. The fact that very few recommendations are referred to arbitration speaks for itself.

Inadequate sanctions for non-compliance

As a creature of contract, a DRBs’ ability to sanction a party for non-compliance with procedural or timetabling directions is limited. However, given the informal nature of the DRB process this is unlikely to become a significant issue and the parties have little to gain from such conduct.

Construction Contracts Act adjudications

The statutory right to adjudication under the Construction Contracts Act 2002 already provides parties with access to a short-form arbitration process. This does not, however, make DRBs redundant in New Zealand. Admittedly, a DRB will probably displace the need for adjudications between the employer and main contractor and in this sense it competes with adjudication. However, a DRB has a much wider function and is more accessible than adjudication. Issues that might otherwise have been adjudicated can and probably will be heard by the board, along with more minor and more complex matters that are not suited to adjudication. A DRB also facilitates dispute avoidance, which adjudication cannot do.

If a party is dissatisfied with a board’s recommendation, they would be free to adjudicate the issue, rather than refer it straight to arbitration. The additional cost and the fact that the board’s written reasons should be discoverable are likely to deter this in most cases. If a party did elect to adjudicate, it would raise wider questions about the perception, performance and effectiveness of the board.

52 Note 45 at 6.

53 See for example: *Hutama-RSEA Joint Operations Inc v Citra Metro Manila Tollways Corporation* [2009] PHSC 447; *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] SGCA 33; *MI-Space (UK) Ltd v Lend Lease Construction (EMEA) Ltd* [2013] EWHC 2001 (TCC) per Akenhead J.

Creating and Operating a DRB

Two documents are required to establish a DRB:⁵⁴

- (a) **Specifications**, which are incorporated into the main contract and which provide for the creation and operation of a DRB; and
 - (b) **Tripartite agreement** between the employer, main contractor and each board member. Among other things, this defines the board's powers, sets out each party's responsibilities, determines the method of selecting and removing board members, gives the board members immunity and records their remuneration.⁵⁵
2. A detailed analysis of the contractual aspects for creating and operating a DRB is outside the scope of this paper. It is also largely unnecessary as several industry bodies publish model DRB provisions and associated guidance notes.⁵⁶ These are a good starting point and there is certainly no need to 'reinvent the wheel'. Care should, however, be taken to ensure that any provisions comply with New Zealand law.
3. Some of the key issues to be aware of and consider when creating a DRB are:
- (a) **Selection/composition:**
 - (i) A DRB usually consists of three members, although it can be more⁵⁷ or less.⁵⁸ It is essential that the parties have confidence in the DRB members,⁵⁹ which is why care must be taken to ensure they are appropriately qualified / experienced, independent and impartial. Actual or potential conflicts of interest should be declared during selection,⁶⁰ and both parties must be comfortable with each board member.
 - (ii) There are different methods for selecting board members. Joint selection allows for a cross-section of skills, but may not work if one party is more dominant. Another common method is for each party to nominate one board member, and those individuals then select the third (who acts as chair), subject to each party having a veto. Another common method involves one party proposing a list of candidates from which the other chooses.
 - (iii) Ideally, a DRB will bring a range of skills. For a three person board, I would favour a construction lawyer, an engineer and one other. The third member could be a programmer, a quantity surveyor or another engineer depending on the nature of the project.

54 Note 32, section 2.11; Brennan Ong and Paula Gerber, *Dispute Boards: Is there a role for lawyers?* (2012) 5 CLJ 4.

55 Note 32, section 2.11; Ong and Gerber *ibid*.

56 For example: DRBF (including its Australasian chapter, DRBA), ICC, ICE (UK) and FIDIC (for the DAB model).

57 The Channel Tunnel project had a five member board, and the Hong Kong Chep Lap Kok International Airport had a Dispute Review Group of six plus the Governor from which panels of three were selected as appropriate.

58 Single-member DRBs are discussed below.

59 Felicity Gregory, Note 43 at 497.

60 The DRBF recommends a strict criterion for assessing conflicts, which may not be entirely suitable for New Zealand where there is much more inter-connectedness.

- (b) **Commencement/termination:** A DRB should be engaged at the outset of the project, before site works have begun and while the parties are still in the 'honeymoon' phase. Unfortunately, parties often get pre-occupied with the works and never get around to forming the DRB, or put them on standby until there is a dispute. The benefits of the DRB are then lost. Similarly, the DRB should remain in place until the works have been completed and, ideally, the final account has been closed out.
- (c) **Replacement:** The prevailing view is that neither party should be able to unilaterally terminate the appointment of a board member, but the parties should be free to do so by agreement. If one party is dissatisfied with a board member, the loss of continuity will almost certainly be outweighed by the adverse impact of that party losing confidence in the particular board member.⁶¹
- (d) **Powers/jurisdiction:** Placing limits on a DRB's jurisdiction (eg by imposing monetary limits (floors or ceilings) on the value of the disputes they can hear, or by restricting the type of issues they can determine) is not recommended. These can result in distracting and unnecessary jurisdictional arguments. The DRB should generally be trusted to hear all issues.⁶²
- (e) **Procedure:** Some model provisions include suggested operating procedures, which can be adopted / amended. Among other things, it is important that:
- (i) The board visits the site and meets with the parties regularly (usually quarterly), and that the parties do not have the ability to cancel these site visits and meetings;
 - (ii) Board members receive regular progress reports to keep up-to-date with the project. To minimize the burden on the contracting parties and prevent 'spin', these should be project documents rather than reports prepared especially for the board;
 - (iii) Special meetings can be convened on short notice and at either party's request to hear specific issues/disputes. It is recommended that lawyers are excluded from the regular meetings and hearings;
 - (iv) Communications with the board are confidential and without prejudice, except for formal recommendations, which should be discoverable in any subsequent proceedings. This acts as a further deterrent to further actions; and
 - (v) Recommendations should be made within a specified time frame and be supported by written reasons.
- (f) **Advisory opinions:** Some DRBs provide for the members to give a quick and sometimes oral opinion on the merits of a particular issue. This can give the parties a steer and act as a stepping stone before formally referring a dispute for determination by the board. Advisory opinions are non-binding, without prejudice and disregarded in the event of a formal DRB hearing.

61 Note 32, section 2.9; Gerber and Ong, Note 26 at 319.

62 Fraud is one exception.

- (g) **Decisions:** As already noted, there are competing views as to whether DRB recommendations should be non-binding.⁶³ There is no hard and fast rule and the choice will depend largely on the project and the sophistication of the parties.
- (h) **Sub-contractors/sub-consultants:** A DRB should not be used to resolve disputes between the main contractor and its sub-contractors. Imposing the DRB on sub-contractors in circumstances where they were not involved in the selection of the board members and are not a party to the tripartite agreement is problematic. It will also unnecessarily complicate the DRB process.

DRBs in New Zealand

DRBs have been used successfully in New Zealand but remain uncommon. The low uptake can be attributed to:

- (a) The small number of significant projects;
- (b) A lack of promotion or education within the industry. Construction professionals are unlikely to advocate a method which they know little or nothing about; and
- (c) Cost, particularly in circumstances where the benefits are unknown and intangible.

In answer to this, central and local governments need to take a leading role as the employer for most infrastructure and all public works projects throughout the country. Overseas experience shows that government agencies (especially transport authorities) tend to be early adopters, which has a flow-on effect. Parties that have experienced substantial claims also tend to be open to the DRB concept.

Second, improved awareness and education within the industry is essential. Parties are more likely to consider using a DRB – among the suite of dispute resolution options – if they understand how they work, when it is appropriate to use them and the benefits of doing so. Training may extend to employers and contractors who have committed to using a DRB, as well as prospective DRB members.⁶⁴

Third, the cost of a DRB can be managed in different ways. Having accepted model provisions in accordance with New Zealand law would help and the DRBA is a good starting point in this respect.

Admittedly, a three-person DRB is expensive and this remains a major obstacle to more widespread use of DRBs.⁶⁵ Reducing the number or frequency of DRB site visits or putting the board on standby is not the right way to reduce costs. Parties would be better off using adjudication than incurring the cost of a DRB on this basis.

One variation that is becoming more common is a single-person DRB.⁶⁶ This is suited to smaller projects that cannot justify a three-person board. That said, a one-person DRB is not without its limitations or risks. The single board member will not have the same breadth of skills or expertise as a three-person board. It is also more difficult for a single person to maintain the confidence of both parties throughout

63 For reasons why non-binding decisions work, see George Golvan QC, Note 28.

64 The DRBA offers training from time-to-time: www.drba.com.au.

65 Gerber and Ong, Note 28 at 335.

66 See for example: Note 32, section 2.11.3.7; Gerber and Ong, Notes 28 (at 336) and 55.

a project, especially if they are making findings against one party. However, these limitations / risks are not considered to outweigh the overall advantages offered by the DRB concept.

There are no settled views on when a one or three person DRB should be used.⁶⁷ Parties should not be afraid to consider DRBs on smaller projects. The following is a suggested rule of thumb:

- (a) >\$50m: A three-person DRB should be used unless there are good reasons for not doing so.
- (b) \$25m – \$50m: A one or three person DRB should be considered.
- (c) \$5m – \$25m: A one-person DRB should be considered.

The Canterbury rebuild

The Canterbury rebuild is a special case that is arguably crying out for a ready-made dispute resolution solution. Of this, Prime Minister John Key has said:⁶⁸

*This is the largest and most complex, single economic project in New Zealand's history.
The scale of the rebuild is unprecedented.*

The obvious starting point is for DRBs to be mandatory for all public projects valued in excess of \$50m and to be considered, where appropriate, for lower-value public projects.⁶⁹ Beyond this, there are going to be scores of commercial developments in Christchurch that would benefit from an off-the-shelf DRB solution. As most of these are unlikely to be suited to a three-person board, a one-person solution is required. For such a scheme to succeed it would need to be easily available, cost-effective and have the confidence of the parties.

One possible way to achieve those requirements is to develop a scheme that offers:

- (a) pre-approved DRB candidates across a range of disciplines;⁷⁰ and
- (b) model provisions tailored to the Canterbury situation.

For a fixed fee parties could access the scheme. This would allow them to incorporate the model provisions into the construction contract and to select a DRB member from the stable of pre-approved candidates. The fee might also include the cost of the DRB member visiting the site and meeting with the parties at specified intervals, or there could be a separate fixed fee for this. Any other attendances required by the DRB member (eg hearings, writing recommendations, etc) would be additional to the parties at pre-determined rates. This would keep the cost and effort of establishing the DRB to a minimum and would mean the parties were only committed to the initial fixed fee. The vetting process would need

67 Thresholds of \$25m, \$50m and \$100m have been mooted. Caltrans, for example, use three-person DRBs for projects valued over US\$10m and one-person DRBs on projects valued between US\$3m and US\$5m and longer than 100 days duration.

68 www.bloomberg.com/news/2013-04-28/christchurch-quake-rebuild-soars-33-to-nz-40-billion-key-says.html.

69 CERA is understood to have left a place holder in its tender documents for some public projects to date, in contemplation of potentially using a DRB. DRBs therefore seem to be in the mix but without a clear government policy on their use. CERA's and other government websites concerning the Canterbury rebuild do not appear to include any discussion about dispute resolution [as of 27 July 2014].

70 Such as: law, engineering (geotechnical, civil/structural and mechanical & electrical), programming and quantity surveying.

to be robust and reliable so that parties have confidence in the pre-approved candidates subject to checking for conflicts.

To mitigate the technical limitations of a one-person board, a second board member with the requisite skills could be brought in on an ad hoc basis to assist the DRB member hear a dispute that falls outside their expertise. This procedure could be akin to that used under the Commerce Act 1986 when an economist sits with a High Court judge.⁷¹ In the event of disagreement between them, the DRB member would decide.

There are a number of obvious practical challenges before such a scheme could get off the ground. For example, it would need to be developed and underwritten by an industry or government body, or perhaps as a joint initiative. There would need to be confidence that the private sector would use the scheme, and that starts with leadership from government on public sector projects. Any such scheme should also go hand-in-hand with more training.

More than anything, this idea is intended to illustrate the importance of thinking about different dispute resolution options in the Canterbury context and, in particular, how DRBs might be used more widely to reduce the number of claims arising from the rebuild and the national construction boom.

Conclusion

The DRB concept is not a panacea, and nor is it intended to replace arbitration or litigation. However, as New Zealand enters a period of significant construction growth, it should be given greater consideration as a complementary dispute resolution method.

The particular DRB model that seems best suited to New Zealand is the US-style Dispute Review Board model whereby the board members take an active dispute avoidance role and may make recommendations, which can be binding or non-binding. Any recommendation that is not accepted can be referred to arbitration, although the data suggests that less than 3% of DRB decisions are re-heard.

The chief reason why DRBs have been successful is their pro-active, dispute avoidance function, which sets them apart from other dispute resolution methods. By investing in a DRB up front, employers and contractors are more likely to resolve problems before they turn into disputes, and where disputes do arise, the DRB is available immediately.

The main disadvantage of DRBs is their cost in circumstances where parties do not know at the outset whether or to what extent problems may arise. Yet the reality is that very few construction projects complete on time, in budget and without complications.

To assist with minimising costs, there are a number of model provisions available for establishing a DRB, although these need to be tailored to New Zealand law. If the size and scale of a project do not justify the usual three-person DRB, a one-person board can be a suitable alternative. The Canterbury rebuild seems particularly amenable to a tailored solution and this paper advocates one that involves a single-person DRB for smaller public and private sector projects. Any such scheme would need to be led by the industry and possibly government.

There has never been a better time to bring DRBs into New Zealand's dispute resolution lexicon.

71 Sections 77 and 78 of the Commerce Act 1986.

