Dispute Review Boards:
What the Case Law Says About Them

BY DANIEL D. MCMILLAN

Mr. McMillan is a partner in the Los Angeles office of Jones Day and is the co-chair of Jones Day's international construction practice. He is a frequent writer and speaker on issues of interest to the construction industry. The views expressed are solely those of the author and should not be attributed to the author's firm or its clients.

Though a success story, DRBs have been involved in litigation. This article looks at some lessons to be learned from these cases.

Dispute review boards (DRBs) are a specialized form of alternative dispute resolution (ADR) developed for the construction industry. Tens of billions of dollars worth of construction have been completed in the United States on projects employing DRBs, most of that construction for public projects. For more than two decades, advocates of DRBs have touted the process as a unique form of ADR with an unmatched record of assisting projects in reaching completion with no litigation over construction claims.

The small but growing number of cases involving DRBs, however, demonstrates that the DRB process is not immune from conflict. If DRBs are to be a valuable ADR tool, users of the process should be aware of lessons that can be gleaned from the available body of case law. The lessons highlighted in this article can help prevent unpleasant surprises and increase the likelihood that the DRB process will be successful in avoiding disputes or resolving them without litigation or arbitration.

Nature of the DRB Process

Understanding the typical DRB process provides important context for the lessons from the courts. The typical DRB is composed of three industry experts, usually engineers or architects, experienced with the type of construction involved in the project. Ordinarily, the owner and the general contractor (GC) each appoint one DRB member and the first two members select the third member. Regardless of who appoints a DRB member, the owner and the GC must approve all members of a DRB. Each member is obligated to be neutral and impartial.

DRBs are established by contract between the owner and the GC. Model DRB provisions are available from the Dispute Resolution Board Foundation (DRBF) and the American Arbitration Association (AAA).[1] In general, these provi-

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sions specify that the DRB is to be constituted at the outset of the project and that the parties must submit disputes to the DRB before proceeding to litigation or arbitration. On large projects, the DRB agreement often calls for the DRB members to receive project documents, make periodic site visits, attend project meetings with the owner and contractor, conduct informal hearings on disputes that are submitted to the board, and issue written recommendations for resolving disputes. These recommendations are not binding unless accepted by the parties or a party fails to reject the recommendations within the specified time limits. Most model DRB provisions provide that the DRB recommendations are admissible in subsequent proceedings should a dispute remain unresolved.

According to conventional wisdom, four primary features of the DRB process working in combination distinguish it from other binding and non-binding dispute resolution processes. The first of these features is the expertise DRB members have. Like arbitration and mediation, the DRB process allows the parties to select the neutrals who will serve on the board. The experts that are preferred are engineers and seasoned construction professionals who understand the technical issues that frequently arise on large projects. Many proponents of DRBs discourage appointing attorneys to the panel. However, as DRB practice continues to evolve, parties are increasingly seeing the value of having an attorney or retired judge experienced with construction law on the board. This is because legal and procedural issues are often intertwined with the resolution of technical issues. The expertise and status of the DRB members make it less likely a party will pursue marginal claims and ensures that parties are more likely to afford careful consideration to DRB recommendations.

The second notable feature is the early involvement of the DRB on the project. DRB members gain familiarity with the project and its problems from the outset. This knowledge base is developed from the DRB's review of project documents, periodic site visits and progress meetings. By contrast, mediators, arbitrators, judges and jurors become aware of the construction project only after the dispute arises.

DRBs are intended to address disputes when presented by the parties during the course of the construction process, not at the conclusion of the project, as is often the case in litigation or arbitration. This "real-time" consideration of disputes is meant to help preserve the working relationship between the owner and the GC by not allowing issues to linger unresolved. When dispute resolution takes place years later, after the project has stalled or been completed, the history of the project needs to be reconstructed for a judge, jury, or arbitrator, which can involve considerable time and cost to the parties. The DRB process is designed to avoid this problem by addressing disputes when the surrounding events or circumstances are fresh.

One case demonstrates that, absent some legally sufficient justification (such as waiver, estoppel or unconscionability), courts will not permit a party to ignore a DRB provision requiring exhaustion of the DRB process as a condition precedent to litigation.

The third feature of DRBs, the non-binding nature of the panel's written recommendations, makes the process different from arbitration with its final and binding arbitration award, and from litigation with an enforceable, though appealable judgment. The admissibility of DRB recommendations in subsequent proceedings also distinguishes DRBs from mediation, since all mediation communications are treated as confidential and may not be used except in furtherance of settlement. Because DRB recommendations are admissible in subsequent proceedings relating to the dispute, parties can manipulate the DRB process to create evidence for use in litigation or arbitration. To prevent this kind of misuse, model DRB provisions are sometimes modified to make DRB recommendations inadmissible in subsequent legal proceedings.

Lessons from DRB Cases

There are about 13 substantive court decisions involving DRBs that can be easily accessed using traditional legal research tools, 11 of which are unpublished decisions.[2] The most significant of these cases, discussed below, contain a number of important lessons for DRB neophytes as well as sophisticated users of DRBs. These lessons

should be considered by drafters of DRB provisions and DRB users and their counsel, particularly counsel whose clients have disputes that must be submitted to a DRB, or who may become involved in litigation associated with the DRB process.

Condition Precedent

DRB provisions invariably require disputes to be submitted to the DRB before the GC or the owner files a lawsuit, or demands arbitration. A number of cases involving the DRB process have arisen where the party asserting a claim bypasses the DRB process and simply initiates litigation, or the party against whom a claim could be made delays the DRB process to stave off the filing of litigation.

In *BAE Automated Systems v. Morse Diesel International*, a federal court addressed the first scenario.[3] The result: The court stayed the litigation pending submission of the parties' dispute to the DRB.

The prime contract in this case called for all disputes between the owner and the GC to be submitted to the DRB prior to commencing litigation. The subcontract expressly incorporated the DRB process from the prime contract and required the subcontractor to "pursue and exhaust first said [DRB] procedure before commencing any other action for claims it may have arising out of its performance of the Work herein." The subcontractor bypassed the DRB and sued the GC. The court easily granted the GC's motion for a stay pending submission of the subcontractor's claim to the DRB because the subcontract expressly required submission of subcontractor claims to the DRB before commencing litigation.

The *BAE* case demonstrates that, absent some legally sufficient justification (such as waiver, estoppel or unconscionability), courts will not permit a party to ignore a DRB provision requiring exhaustion of the DRB process as a condition precedent to litigation. Of course, where the parties intend the DRB process to be a condition precedent, the language of the contract should be clear. Otherwise the parties risk having the court hold that the requirement is ambiguous and decline to enforce the DRB requirement. Specifying that the DRB process must be exhausted before initiation of litigation reinforces the intent of the parties and that is why it is often used in DRB provisions.

Waiver

There are several cases in which a plaintiff who has not submitted its claim to the DRB prior to commencing litigation asserts that the defendant waived the DRB process and cannot enforce the DRB requirement. The waiver argument has been successful in a few cases. But *John Carlo, Inc. v. Greater Orlando Aviation Authority*, a federal court case,[4] is not one of them.

In *John Carlo*, the parties submitted a "root removal claim" to the DRB and later accepted the DRB's recommendation favoring the contractor on the entitlement portion of the claim. However, the parties could not reach agreement on quantum. Another DRB hearing was scheduled to address that issue and certain other contractor claims. But that hearing never concluded because the contractor walked out, taking the position that it would be futile to continue in view of the statement by a member of the owner's team that he would advise the owner to file a false claim action against the contractor. Thereafter the contractor sent a letter to the owner formally withdrawing from the DRB process, even though it continued to negotiate other claims with the owner. When those claims could not be resolved, the contractor filed a lawsuit against the owner, which responded with a motion for summary judgment. The owner argued that the contractor had to first submit these claims to the DRB, since that process was a condition precedent to litigation, In the alternative, the owner asked for a stay of litigation pending completion of the DRB process.

The contractor asserted three arguments in support of its position that it did not need to present its claims to the DRB prior to commencing litigation. As its first argument, the contractor urged that the DRB was only meant to function during the "active construction phase" of the project and this had passed since the project had been substantially completed and all that remained were punch list items. The court rejected this position because the contract provided that the DRB "is to be in operation throughout the life of the active [construction contract] and, if needed, for a reasonable post-construction period following final acceptance of the project but not to exceed the date the [owner] administratively closes the Contract for construction of the project."

The contractor's other two arguments fared no better. The contractor maintained that the owner waived compliance with the DRB provision by threatening to file a false claim action against the contractor. Though the court viewed the threat as inflammatory and inappropriate, it did not "evidence an intent by [the owner] to abandon or subvert the DRB process."

For its third argument, the contractor claimed

that the owner abandoned the DRB process by seeking summary judgment from the court and not submitting its liquidated damages claim to the DRB. The court did not find this argument compelling in light of the contractor's letter withdrawing from the DRB process. Likewise, the court did not consider the discovery conducted by the owner prior to its motion for summary judgment to evidence abandonment of the DRB process.

In the end, the court held "that completion of the DRB process was a valid condition precedent to suit and that satisfaction of that condition has not yet occurred." Accordingly, it stayed the litigation for 150 days to allow the parties to proceed with the DRB process. Thus, *John Carlo* highlights the reluctance of many courts to find a waiver of the DRB process.

A different result was reached in *El Dorado Irrigation District v. Traylor Bros., Inc.*[5] A federal district court found that a contractor's participation in litigation initiated by the owner constituted a waiver of the right to insist that the owner first submit its claims to the DRB.

The contract called for any "claim, dispute or other matter" to be decided by the project engineer as a "condition precedent" to "any exercise" of "rights or remedies." Then it required a claim or dispute to be submitted to a DRB if the parties are unable to resolve a dispute or claim. The contract defined the term "dispute" to include "all differences of opinion or disagreements regarding the scope of work."

In 2003, the owner filed a breach of contract lawsuit against the tunneling contractor alleging that the contractor built the tunnel out of alignment and failed to take corrective measures. Years later, the contractor moved for summary judgment, citing the owner's failure to comply with the DRB process before commencing litigation. The court denied the contractor's motion, ruling that it was "perfectly clear" the contractor had waived the DRB condition precedent by participating in three years of litigation, including the filing of 25 motions, before asserting the DRB argument. In addition, the court noted that the termination dispute did not need to be submitted to the DRB because, unlike most model DRB provisions, the construction contract expressly provided that termination of the contract terminated the operation of the DRB.

The *El Dorado* decision highlights the importance of modifying key language in standard form DRB agreements. By providing that the DRB no longer operates after termination of the contract, the owner was able to ensure that the outcome it sought would be achieved even without the benefits of circumstances establishing waiver by the contractor.

Another decision highlights the importance of modifying key language in standard form DRB agreements to provide that the DRB no longer operates after termination of the contract.

Another case in which a court found a waiver provides some important lessons. The case of *G & T Conveyor Co. v. Port of Seattle* involved the failure of the parties to timely name the members of the DRB.[6] Their contract contained several dispute resolution steps, including notice from the contractor of the basis for an adjustment in the contract price or time for performance, followed by various levels of meetings. At the end of this process, before commencing litigation, certain kinds of unresolved disputes had to be submitted to a DRB while others required mediation or non-binding arbitration. In terms of the DRB, the contract specified that the DRB be staffed within 60 days of the award of the contract, which occurred in June 2004. Neither party nominated a member to the DRB within this time frame.

In May 2007, three years after commencing work on the project, the contractor submitted a request to the owner for a multimillion dollar equitable adjustment related to 160 change orders. The owner acknowledged some debt to the contractor, but said it needed to investigate all of the change orders before making any payment. It also took the position that the contractor could not avail itself of the contract's dispute resolution process until the owner completed its investigation and came to a decision on the adjustment request. In June 2007, the contractor nominated its DRB member. The owner never named a member to the DRB.

In September 2007, the contractor filed an action seeking a judgment declaring that: (1) the owner must pay certain undisputed amounts, and (2) the owner either waived its right to proceed under the contract's dispute resolution process, or be ordered to comply with that process. Both parties filed cross-motions for summary judg-

ment. The owner's motion contended that the contractor could not maintain a lawsuit until completing the dispute resolution process mandated by the contract.

The court found that the owner had "effectively denied" the contractor's price adjustment request by drawing out the investigation into the change orders and thereby waived the right to make use of the contract's dispute resolution process. As to the DRB process, the court concluded that both parties waived their right to use that process by failing to nominate a member to the DRB within the time frame contemplated by the contract. Consequently, the court stayed the litigation and ordered the parties to comply with the dispute resolution process, but not the DRB provision.

The *Port of Seattle* case is the source of a number of lessons. Although DRB provisions frequently provide time limits for the nomination of DRB members and the establishment of the board, at times, owners and contractors informally defer establishing the DRB until site work commences or a dispute arises. *Port of Seattle* suggests that this may be risky. Nothing in the decision suggests that the parties intended to waive the DRB process by failing to timely nominate DRB members. Thus, as a drafting matter, it may be advisable to insert a clause stating that the failure of the parties to comply with the contractual time period for constituting the DRB shall not, alone, constitute a waiver or abandonment of the DRB process. Parties who have deferred establishing the DRB beyond the specified time period for doing so may want to consider amending their contract or, at a minimum, documenting in writing that they deferred designating the DRB members without intending to waive the DRB process. Otherwise, one party may argue when a dispute later arises that it may proceed directly to litigation because the DRB process has been waived.

Statute of Limitations

At least one case has held that a claim does not accrue for purposes of starting the statute-of-limitations clock until the conclusion of the contract's dispute resolution process, including the DRB process.

In *Honeywell International, Inc. v. Clark Construction Group*,[7] the GC subcontracted with Honeywell to provide labor and materials for fire, security and communications systems for a convention center. Nearly three years later, in January 2001, Honeywell submitted a claim for more than $8.7 million to the GC, which passed the claim on to the owner. In conjunction with the resolution of certain other issues with the owner, the GC and Honeywell agreed that the GC could resubmit the subcontractor's claim to the owner on or before Dec. 31, 2001, and that the claim would be resolved in accordance with the contract dispute resolution process. However, after resubmission, the claim remained unresolved and Honeywell filed a lawsuit against the GC. Meanwhile, the owner and the GC continued their negotiations. On Dec. 5, 2005, four years after the resubmission, the GC brought the owner into Honeywell's lawsuit asserting various claims, including breach of contract.

The owner responded by filing a motion for partial summary judgment based on the four-year statute of limitations, which it argued began to run no later than either (i) substantial completion on or about Aug. 31, 2001, or (ii) when the GC re-submitted the subcontractor's claim to the owner in January 2001—both of which were more than four years before the GC added the owner to the lawsuit. The GC sought to save its claims from being time-barred by arguing that the statute of limitations did not commence to run until its claim accrued and a claim cannot accrue until the conclusion of the contractual dispute resolution process, including the DRB process.

As a starting point, the court stated that a cause of action does not accrue under Texas law "until all conditions precedent to the parties' right to file suit have been satisfied." Under the contract between the parties, claims first must be submitted to the owner's construction manager; if the GC rejects the owner's decision, the claims must be referred to the DRB. The court held that "a final decision of the entire DRB is a 'condition precedent' to the Contractor's right to file suit against the Owner." Thus, the court further held: "The general rule that a cause of action accrues at the time of breach has been superseded by mutual agreement.… As long as [the GC] was involved in the dispute resolution process, it was operating under the terms of the Contract and no cause of action accrued." Since an issue of fact existed as to whether the parties were participating in the contractually specified dispute resolution process when they were negotiating in 2005, the court denied summary adjudication.

The *Honeywell* case is a good example of the indeterminacy that exists when a contract with a dispute resolution process fails to specify when a claim accrues. Absent express contract language, the parties are left to the vagaries of the law of contracts to assess whether and when a claim accrues for purposes of the statute of limitations. To eliminate doubt, parties may specify in their

contracts that a claim does not accrue until the conclusion of the DRB process. There is no perfect solution as parties seeking the protection of the statute of limitations may argue that the claimant unreasonably delayed initiation of the DRB process. In the *Honeywell* situation, the GC and the owner could have executed a letter agreement tolling the statute of limitations during the pendency of their negotiations and completion of the contractually required ADR process. This could have avoided the expense of litigating the statute of limitations issue.

Res Judicata

A recent Florida court of appeal decision highlights the risk contractors face when they seek early judicial resolution of fewer than all of their claims and the contract requires all claims to be submitted by a certain date after acceptance of the work. In *AMEC Civil, LLC v. Florida Department of Transportation*, the contract between the owner and the contractor for construction of a large highway project provided for a DRB to make non-binding recommendations.[9] The contract specified that no litigation or arbitration could be initiated on any claim until after either final acceptance of all contract work or denial of final acceptance. It also required the contractor, upon completion of performance, to file all its remaining claims with the owner no later than 180 days after final acceptance.

In November 2001, a month after work began, the contractor submitted one claim to the DRB alleging the owner's failure to obtain a permit to allow night work. The parties did not accept the DRB recommendations. As its next step, in November 2003, long before completion of the contract, the contractor filed a lawsuit concerning its night work claim. The contractor continued to perform the contract while its lawsuit was pending. The owner issued its final acceptance in May 2006. At that point, the contractor submitted all of its remaining claims to the DRB. On Oct. 31, 2006, the contractor submitted a detailed list of the owner's contractual breaches and requested adjustments.

On multiple occasions, the owner sought continuances and stays of the contractor's night work lawsuit, asserting that all of the contractor's claims against it should be resolved in a single lawsuit. The trial court did not agree and permitted the night work lawsuit to proceed. In October 2007, following a jury trial in that lawsuit, the court entered a final judgment in the contractor's favor in the amount of $8.5 million. The contractor then filed a second lawsuit asserting the additional claims it had submitted to the DRB, on which the DRB had yet to issue recommendations.

The trial court agreed with the owner's position that *res judicata* and the doctrine against splitting causes of action precluded the second lawsuit. In a decision certain to cause much trepidation, the appellate court, over a strong dissent, agreed with the trial court. The majority's opinion held the construction contract to be a single, indivisible contract and ruled that all breaches should have been asserted in a single lawsuit.

The majority dismissed the contractor's argument that this result would be harsh and unfair because when the contractor filed the first lawsuit, none of its other claims had been fully heard by the DRB, and it would have been premature to supplement the allegations in its first lawsuit. The majority decision said, "[I]t was the Night Work Lawsuit that was premature… Filing suit before final acceptance was, indeed, arguably itself a breach. Only [the contractor's] strategic choice prevented the joinder of all claims."

The court concluded that both parties waived their right to use the DRB process by failing to nominate a member to the DRB within the time frame contemplated by the contract.

At the time of writing this article, the contractor appealed the *AMEC* case to the Florida Supreme Court. This case should be watched closely as its ramifications are significant. Contractors need to be mindful of the risk of bringing early litigation following a DRB proceeding on a limited issue that arises early in the project especially where the contract expressly requires that all claims be brought at the end of the project. Contractors do not favor such provisions, as they do not allow for final resolution of disputed claims until the end of the project. The trial court's decision in *AMEC* is quite harsh and the appellate court's affirmance is undoubtedly a surprising outcome to many.

Subcontractor Claims

Sebulster Tunnels/Pre-Con v. Traylor Brothers. Inc./Obayashi Corp. serves as a cautionary note

when imposing the DRB process on subcontractors with regard to their claims against contractors.[9]

In *Sehulster*, a purchase order with a subcontractor incorporated the DRB provisions of the contract between the owner and the contractor, requiring subcontractor "pass through" claims to be submitted to the DRB before initiating litigation. The subcontractor submitted a claim to the contractor, which the owner rejected. The subcontractor requested that it be allowed to appoint an additional member to the DRB. Upon denial of this request, the subcontractor did not present its claim to the DRB; instead it simply filed a lawsuit against the contractor and its sureties.

At trial, the subcontractor recovered a monetary award plus attorney fees totaling more than $4.6 million. On appeal, the contractor argued that the subcontractor's failure to submit its claim to the DRB barred any recovery because submission to the board was a contractually mandated condition precedent to litigation.

The appellate court disagreed, holding that the DRB process was unconscionable as applied to the subcontractor and therefore unenforceable. It reasoned that the purchase order imposing the DRB process was a classic contract of adhesion presented on a "take-it-or-leave-it" basis with no opportunity for negotiation. The court also found the DRB to be "presumptively aligned" with the owner and the contractor because they "appointed and compensated" the DRB members. The court said, "[F]rom the [subcontractor's] perspective, this overall process creates the potential that the DRB proceedings would have been nothing more than an opportunity for [the contractor] and the City to orchestrate a ruling in their favor that could be presented to a trier of fact in support of their position." The court broadly held: "An ADR clause in a contract that excludes one of the parties to a dispute from any voice in the selection of the 'neutrals' cannot be enforced; that provision conflicts with our fundamental notions of fairness and tends to defeat ADR's ostensible goals of expeditious and equitable dispute resolution."

The DRB process was designed to resolve disputes between owners and contractors. Contractors frequently submit subcontractor pass-through claims to the owner and, if unresolved, submit them to the DRB as claims by the contractor against the owner. Depending on the terms of the subcontract and any liquidation agreement, a subcontractor who does not want to wait on the DRB process ordinarily may file a lawsuit (or arbitration) against the contractor without regard to the DRB process, which typically would not address subcontractor claims against the contractor. As in the *Honeywell* case discussed above, the contractor may feel impelled to bring the owner into any such action. To avoid the difficulties raised in these circumstances, owners and contractors may seek to require subcontractors to submit their claims to the DRB before initiating litigation. The *BAE* case discussed above held that DRB provisions incorporated into a subcontract are enforceable against the subcontractor. But *BAE* predated *Sehulster* and did not address the issue of unconscionability or the enforceability of the DRB process as against the subcontractor. For this reason, parties who make the DRB process applicable to subcontractors should consider the *Sehulster* case and how to make the DRB process less vulnerable to legal challenges.

Removal of DRB Members

The first published decision concerning DRBs, *Los Angeles County Metropolitan Transportation Authority v. Shea-Kiewit-Kenny*, addressed a dispute over the removal of a DRB member.[10] The DRB provisions in the contract allowed the appointing party to remove its DRB member "for cause." The owner took advantage of this provision and gave notice of the removal of its DRB appointee. The contractor objected on the ground that cause did not exist. When the owner's appointee did not honor the notice of removal, the owner filed a lawsuit seeking a declaratory judgment that it had cause to remove its DRB member.

After a bench trial, the judge determined that the owner had established six independent justifications showing that it had cause for removal, including improper *ex parte* communication reflecting prejudgment of a dispute submitted to the DRB. The California Court of Appeal affirmed, holding that substantial evidence supported the trial court's finding. In reaching this decision, the appellate court stated, "[L]oss of confidence in [a party's appointee to the DRB], if objectively verifiable by reference to facts material to the [appointing party], would be sufficient 'cause' for … termination."

The *LACMTA* case demonstrates that the conduct of a DRB member can undermine confidence in the DRB process. The response to this case has been the creation of a code of ethics for DRB members and DRBs and the use of operating procedures that specifically limit *ex parte* communications.[11]

When drafting DRB provisions, the parties should consider whether DRB members should be removable "for cause" or "without cause."

The argument in favor of a "no cause" standard is that parties cannot be expected to respect DRB recommendations where there has been a loss of confidence in one or more DRB members. Replacement of DRB members comes at a price—namely, the loss of project familiarity of replaced members. The "for cause" standard is intended to ensure that DRB members are not removed for insubstantial reasons, and to guard against a revolving door DRB. The AAA's DRB rules provide a "for cause" standard under which the AAA decides whether cause has been established.[12] This approach reduces the likelihood of litigation over removal of DRB members.

Conclusion

DRBs have been quite successful in avoiding or minimizing disputes that require later adjudication and can be expected to continue to have appeal to public owners. Despite this track record of success, sometimes litigation ensues and sometimes that litigation concerns the DRB process itself. The lessons from the DRB case law provide guidance for drafters of DRB agreements, DRB members and DRB users who wish to avoid mistakes that can lead to litigation. These cases also highlight pitfalls when litigation arises over the DRB process and how to avoid traps that can leave one disenchanted with the DRB process. Consideration of the DRB lessons from the developing body of DRB case law will better ensure that the DRB process fulfills the expectations and needs of both owners and contractors. ■

ENDNOTES

[1] See generally, *Practices and Procedures: Dispute Review Boards*, *Dispute Resolution Boards*, *Dispute Adjudication Boards* (Dispute Resolution Board Foundation 2007) available at www.drb.org/manual_access.htm; American Arbitration Association, Dispute Resolution Board Guide Specifications (effective Dec. 1, 2000) available at www.adr.org/index2.1.jsp. For a discussion of the available forms of DRB documents, see Daniel D. McMillan & Robert A. Rubin, "Dispute Review Boards: Key Issues, Recent Case Law, and Standard Agreements," 25 *Const. Law*. 14 (Spring 2005).

[2] The following DRB cases are not specifically discussed in this article: Multiple cases involving the Massachusetts Central Artery Tunnel DRBs: *Massachusetts Highway Dep't v. Perini Corp.*, Nos. 00-4096, 01-0906, 00-5700, 2001 Mass. Super. Lexis 412, at *1 (Mass. Super. Ct. Aug. 13, 2001) (DRB process modified so that certain decisions are binding); and Nos. 00-4096 BLS, 01-906, 01-1796, 01-3925, 01-4452, 00-5700, 2002 Mass. Super. LEXIS 110, at *1 (Mass. Super. Ct., March 20, 2002) (DRB has jurisdiction to decide whether certification of claim by contractor is a condition precedent to the DRB process). The other cases are: *Kiewit-Atkinson-Kenny v. Massachusetts Water Res. Auth.*, No. 01-4233, 2002 Mass. Super. LEXIS 304, at *1 (Mass. Super. Ct. Aug. 19, 2002) (case addressing request by contractor under state public records act for certain documents after owner rejected DRB recommendations and litigation ensued regarding disputes); *Kiewit-Atkinson-Kenny v. Mass. Water Res. Auth.*, No. 01-1920 BLS, 2002 Mass. Super. Lexis 329, at *52-*53 (Mass. Super. Ct., Sept. 3, 2002) (court denies owner's motion for summary adjudication of certain claims relying in part on DRB recommendations rejecting owner's position); *St. Paul Fire & Marine Ins. Co. v. Valley Forge Ins. Co.*, No. 1:06-cv-2074, 2009 WL 789612 *2 (N.D. Ga. March 23, 2009) (legal expenses related to DRB process are costs of defense under comprehensive general liability policy where contract between owner and contractor "specified that the parties would empanel a [DRB] in accordance with the procedures of the [AAA] to resolve all disputes, claims and other controversies between the parties").

An unpublished California appellate opinion, which is not citable to a court under California rules, addresses a number of DRB issues. *Certified Coatings of Calif., Inc. v. Shimmick Constr. Co./Obayashi Corp.*, No. A120531, 2009 WL 311527 (Cal. App. Feb. 9, 2009).

[3] No. 01 Civ. 0217, 2001 U.S. Dist. LEXIS 6682, at *1 (S.D.N.Y. May 21, 2001).

[4] No. 6:06-cv-164-Orl-22, 2007 WL 430647 *3 (M.D. Fla. Feb. 3, 2007). The *John Carlo* court adopted the recommendations of a Magistrate Judge. *Id.* at *1.

[5] 2006 WL 902561 (E.D. Cal. Apr. 5, 2006). The *El Dorado* case also illustrates that litigating a termination dispute on a public works project can be especially contentious and expensive. See *id.* at *5, where the court said, "As this court has noted a number of times, this case has been extremely heavily, possibly excessively, litigated by both parties."

[6] No. C07-1380, 2008 WL 682242 *1 (W.D. Wash. March 7, 2008).

[7] No. SA-06-CV-0125-XR, 2006 WL 2932217 (W.D. Tex. Oct. 11, 2006).

[8] No. 1D09-1211, 2010 WL 1542634 (Fla. App. 1 Dist. Apr. 20, 2010), reh'g den. Aug, 5, 2010, appeal filed, No. SC10-1699 (Fl. Sup. Ct.. Sept. 10, 2010).

[9] 111 Cal. App. 4th 1328 (2003).

[10] 59 Cal. App. 4th 676 (1997). The author represented the owner in this case both at trial and on appeal.

[11] See e.g., *Practices & Procedures*, *supra* n. 1, §1, ch. 1, at 1, which provide in Canon 1 of the DRBF Code of Ethics: "There shall be no *ex parte* communication with the parties except as provided in the DRB's Operating Procedures."

[12] AAA Guide Specifications, *supra* n. 1, provide in § 1.02(F): "The AAA shall determine whether the Board member should be disqualified and shall inform the Owner and the Contractor of its decision, which shall be final and conclusive."