Dispute Review Boards: Key Issues, Recent Case Law, and Standard Agreements

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Due to the ubiquity of disputes on construction projects and the accompanying expense and disruption of litigation, the construction industry has struggled to find an effective and efficient process to resolve such claims. Several means of traditional, alternative dispute resolution (ADR) have been utilized. At present, the standard contracts of the American Institute of Architects (AIA), the most frequently used construction agreements, specify ADR through mediation and binding arbitration under the Construction Industry Arbitration Rules of the American Arbitration Association (AAA). For many practitioners, the preferred type of ADR is whatever was not used during the last construction dispute. However, dispute review boards (DRBs) have been developed specifically for the challenges of large construction projects and have become the ADR of choice on substantial, high-profile work across the country. For example, DRBs have been used to resolve disputes on the Massachusetts Central Artery/Tunnel project, the Los Angeles subway, and the new terminal at John F. Kennedy International Airport.

The increasing use, if not acceptance, of DRBs heightens the need for construction lawyers to become more familiar with the DRB process. This understanding cannot be gleaned solely from reading court decisions because the available case law remains relatively scant. Our research identified a total of two published decisions and five unpublished trial court opinions. Nonetheless, those rulings serve as an important reminder that DRB agreements, as all construction documents, must be carefully drafted or else collateral disputes concerning the DRB process itself may become the subject of litigation.

Model DRB provisions have proliferated in the past few years, thus requiring owners, contractors, and their respective counsel to differentiate between the available forms. This article highlights the nature of DRBs, the role of lawyers in drafting DRB agreements and in the operation of DRBs, the sources of available model DRB agreements, other resources regarding DRBs, and recurring issues that should be considered when selecting among the available model agreements.

General Description of DRBs and Their Process

DRBs are “a creature of contract.” Thus, the agreements creating them may alter various aspects of the DRB and its procedures. For ease of analysis, this section utilizes the most conventional form of DRB, rather than the many variants.

Fundamentally, the DRB process helps the parties to a construction project avoid and resolve claims without litigation or arbitration. The usual DRB consists of a three-person board of construction-industry experts who periodically visit the site, attend project meetings, conduct hearings on disputes between the parties, and issue written recommendations for the disposition of such claims. Typically, the owner appoints one board member (subject to approval by the contractor), the contractor appoints another (subject to approval by the owner), and the first two appoint a third (subject to approval by the owner and the contractor). This last appointee customarily serves as the chairperson. Each of the three members is to be impartial, neutral, and not an advocate for either side.

The DRB should be established at the outset of the project and preferably before disputes arise. Most boards meet and visit the site each quarter. The board’s familiarity with the project enhances its preparedness when disputes arise. During the periodic meetings, owner and contractor representatives update the DRB on the project’s status and alert the three members to potential disputes.

Either the owner or the contractor may request that the DRB conduct a hearing concerning a dispute. All model DRB provisions require that a party submit a claim to the board before initiating litigation. The DRB schedules and conducts an informal hearing in which the parties may make written submissions and oral presentations. After the hearing, the board prepares nonbinding recommendations. The parties are expected to use the DRB recommendations in an attempt to settle their dispute, while still being free to accept or reject them. In addition, most model agreements provide that the DRB recommendations are admissible into evidence in the event of subsequent litigation. In theory, the owner and the contractor should be inclined to accept the guidance of the board members, especially when the parties know that the opinions of these respected experts will be prominently featured as evidence in any subsequent lawsuit or arbitration. In reality, acceptance of DRB recommendations and the success of the DRB process depend largely on the owner and the contractor’s mutual trust and confidence in the board itself.

Unique Attributes of the DRB Process

The DRB represents a hybrid form of ADR, which shares some attributes of adjudication as well as some traits of mediation. Courts periodically have characterized DRBs as both types of ADR. But to characterize a DRB as one or the other—as fish or fowl—is to overlook certain of its critical attributes. Indeed, the traditional DRB process has a number of unique...
features that distinguish it from most other forms of dispute resolution, including mediation, arbitration, and litigation.

**Expertise of DRB Members**

The technical competence of DRB members enhances the credibility of their recommendations. In litigation, there is no assurance that the judge will have any familiarity with the type of project under construction. A lay jury will be even less equipped to assess technical issues associated with complex construction disputes, plus jurors are prone to information overload or simple boredom. Although arbitration and mediation afford parties the opportunity to utilize industry experts as arbitrator(s) or mediator(s), both lack a number of the other important features inherent in the DRB process.

**Project Familiarity**

The DRB members, in addition to being construction experts, develop knowledge about the particular project by reviewing the job documents, attending quarterly progress meetings, and making site visits. The DRB members have a frame of reference when a dispute arises, allowing the parties to make more focused presentations. In contrast, the judge, jury, mediator, or arbitrator first learns about the construction process after the claims occur, and therefore lacks the project familiarity garnered by DRB members.

**Real-Time Consideration of Disputes**

DRBs normally address disputes as they arise rather than waiting until the end of the project. This feature can minimize the damage to relations between the owner and the contractor, which occurs when claims linger and accumulate. "The availability of the DRB and its familiarity with the job enable prompt resolution of disputes, which furthers the goal of preserving cooperative relationships between the contracting parties." Traditional claim resolution takes place long after and far from the events forming the basis of the dispute. Much time and effort must be spent recreating those circumstances for the trier of facts and then sorting out which version to accept. Thus, DRBs combine job familiarity with real-time dispute resolution to allow the parties to concentrate on the technical issues in controversy.

**Nonbinding Recommendations**

The written recommendations of the DRB do not bind the parties, absent express or tacit acceptance by the owner and the contractor. In contrast, litigation and arbitration result in a judgment or award that, unless set aside through an appeal, resolves the dispute. Participants in those processes do not have the option simply to reject the results. In this respect, DRBs function like a mediation or facilitation. However, unlike traditional mediation, DRBs frequently issue findings much like a judge's statement of decision following a bench trial or an arbitrator's reasoned award. The DRB provides the parties with written opinions reflecting the views of three construction experts. Most DRB agreements provide that those findings are admissible into evidence in subsequent litigation or arbitration. Even if the DRB provisions specify that the recommendations are not admissible, the parties still will review them, and they very well may influence how to settle the dispute. In view of the advisory nature of DRB conclusions, it is important for the board to maintain the confidence of the parties as that trust influences how parties receive and evaluate DRB recommendations and the success of the DRB process itself.

**Proliferation of Model DRB Provisions**

Ordinarily, two documents must be utilized to create a DRB. First, DRB specifications usually are added to the construction contract. These provisions normally concern qualification and selection of DRB members; the operation of the board; the timing of meetings; the conduct of hearings; and DRB recommendations and their admissibility into evidence in the event of litigation. Second, a contract (often referred to as a (Three-Party Agreement) is executed among the three board members, the owner, and the contractor. This agreement specifies, among other things, the responsibilities of the board, the procedure for removing and replacing a member, their compensation, and the manner of resolving disputes related to the Three-Party Agreement. The combination of DRB specifications and the Three-Party Agreement can be referred to as “DRB provisions.”

The Construction Lawyers need not draft DRB provisions from scratch because several model documents exist. Indeed, the number of exemplary Three-Party Agreements and specifications has grown and more are emerging. Available forms vary in subtle ways; however, the purpose of this section is to identify certain primary model DRB provisions, not to exhaustively catalogue their differences. As appropriate, some of the more significant variations, such as the standard for removal of DRB members, are highlighted in subsequent sections of this article.

Until 2000, there were three primary sources of model DRB provisions constituting successive generations of the same source documents. In 1989, the American Society of Civil Engineers (ASCE) published an exemplary Three-Party Agreement and DRB specifications (the 1989 ASCE Guide). Two years later, the ASCE issued an updated booklet with a slightly modified model Three-Party Agreement and DRB specifications (the 1991 ASCE Guide). In 1996, many of the same people involved with the development of the 1989 ASCE Guide and the 1991 ASCE Guide published the Construction Dispute Review Board Manual, which again included a revised Three-Party Agreement and DRB specifications (1996 DRB Manual). These three sources,
especially the 1989 and 1991 ASCE Guides, have served as the primary forms for Three-Party Agreements and specifications in the United States.

In the same year that the 1996 DRB Manual was published, the Dispute Resolution Board Foundation (DRBF) was established. Its mission is “to promote use of the [DRB] process, and serve as a technical clearinghouse for owners, contractors, and Board members in order to improve the dispute resolution process.” In May 2004, the DRBF published a portion of its guide practices and procedures, which was followed in September 2004 with the publication of its model Three-Party Agreement and DRB specifications. The DRBF’s model DRB provisions are meant to serve as a revision to the model provisions in the 1996 DRB Manual and constitute the fourth generation of documents tracing their lineage to the 1989 ASCE Guide. The DRBF’s model provisions contain a number of notable differences as compared to prior model provisions, including the manner in which board members are selected and the standard for their removal.

Since 1996, several other organizations have developed new form DRB specifications and Three-Party Agreements, including the AAA and the International Chamber of Commerce (ICC). Effective December 1, 2000, the AAA issued its own model documents, as well as a roster of DRB panelists. The AAA specifications and Three-Party Agreement deviate from the 1989 ASCE Guide, the 1991 ASCE Guide, and the 1996 DRB Manual, for example, in the manner in which board members are selected and how challenges to members are handled.

More recently, in May 2004, the ICC published its own “Dispute Board Documents.” Its version of the Three-Party Agreement is entitled “Model Dispute Board Member Agreement” and it references a series of rules governing the operation of ICC dispute review boards. Three types of “Dispute Boards” exist under the ICC regime. The first example, called a “Dispute Review Board,” employs recommendations that may be rejected. The second type is a “Dispute Adjudication Board” whose “Decisions” ultimately may be disregarded by a party, but the contractor and owner remain bound by the determinations until the dispute is resolved finally by arbitration or litigation. The ICC offers a third approach, known as “Combined Dispute Boards,” which (as the name implies) merges features of the ICC’s “Dispute Review Boards” and “Dispute Adjudication Boards.”

Each of the available model DRB provisions has its own peculiarities. Parties utilizing the DRB process should recognize the differences and should not assume that one DRB model agreement is identical to another.

**DRBs and the Role of Attorneys**

The DRB process is designed to curtail disputes and, where claims cannot be avoided, to resolve them without resort to litigation. Although perspectives differ and many promoters of the DRB method discourage attorney involvement, lawyers can play an important role on projects with DRBs.

**Counseling Clients on the Use of DRBs**

Owners and contractors frequently seek advice of counsel concerning potential forms of ADR. Lawyers familiar with the DRB process, the various model agreements, and the lessons learned from past projects can provide valuable guidance to clients in evaluating whether to use a DRB.

**Drafting Contract Documents Specifying Use of DRBs**

After deciding to use a DRB, the necessary documents must be prepared, including the Three-Party Agreement and the contract specifications. Here, counsel can advise clients on available model DRB provisions, potential modifications, and shortcomings of various forms. While some clients utilize standard form DRB agreements without consulting counsel, doing so is not without its risks. Knowledgeable lawyers can help ensure that the DRB process is clearly defined in the progression of the overall dispute resolution procedures for the project and that potential modifications to form DRB provisions are duly considered and properly incorporated.

**DRB Membership**

Lawyers can assist clients in identifying potential board members and assessing board nominees. The importance of “investigating the proposed members and rejecting those where bias or the perception of bias is detected” cannot be overstated, and lawyers can be helpful in assisting owners or contractors in performing a careful assessment. In addition, a growing number of construction counsel have been appointed to and ably served on DRBs. Some observers believe that lawyers should not act as board members because lawyer involvement can cause the process to become more formal and adversarial. Traditionally, lawyer membership is not encouraged. As stated in one DRB guide, “[a] legal background is not a disqualification provided that other essential criteria are met.” Nonetheless, qualified lawyers continue to be appointed to and successfully serve on boards.

**DRB Quarterly Meetings and Hearings**

The direct involvement of lawyers in DRB hearings has been discouraged: “In practice, attorneys seldom attend DRB sessions, although they are not usually barred from attending. For disputes that involve major points of law, attorneys do occasionally attend. There is some concern that attorneys as advocates (as opposed to advisers) tend to make the process adversarial and unnecessarily
formal."30 Ordinarily, cross-examination of those in attendance by the parties or their representatives is not permitted at a DRB hearing; however, board members frequently ask the parties questions.31 A transcript or recording is not normally prepared, but parties may request that the DRB permit a court reporter.32

Perhaps more often than is recognized, lawyers for one or both sides assist in the preparation of written submissions made to DRBs. Such involvement is especially common in large claims or a project embroiled in many high-value disputes destined for litigation. The fingerprints of counsel may be apparent from the citation and discussion of legal authorities in documents presented to a board. In certain instances, lawyer input may be valuable, especially where contract interpretation or other legal (rather than technical) issues predominate. Regardless of whether lawyers assist in formulating arguments, written submissions, or presentations at DRB hearings, clients may seek advice of counsel in evaluating whether to accept or reject the board’s recommendations. Finally, if the DRB’s evaluations are rejected, the parties often need counsel to formulate their ongoing ADR strategy, such as deciding whether to request clarification of the DRB’s recommendations.

**Litigation After DRB Recommendations**

Despite the much-touted success of DRBs in helping parties escape litigation, the courthouse cannot always be avoided. Where a dispute remains unresolved in the wake of DRB recommendations and litigation ensues, ordinarily each side will be represented by counsel. In the event the DRB findings are admissible into evidence, counsel will need to develop a strategy for blunting adverse DRB recommendations or capitalizing on favorable ones. The party seeking to defend against adverse recommendations may seek to block their admissibility, despite contract language providing for such use. A disappointed owner or contractor should not rely completely on a motion in limine. For example, counsel may utilize posthearing discovery to show that the DRB did not consider pertinent evidence and that the party that obtained the favorable DRB recommendations did not disclose such facts, documents, or testimony to the board. On the flip side, the party that gained the favorable DRB assessment naturally will seek to deflect attacks on the integrity of the process. Additionally, the party that prevailed before the DRB may seek to use its opinions as a central piece of evidence by way of a summary judgment motion, to defeat motions brought by the opposition or at trial.33

**Review of Recent Case Law and Selected DRB Issues**

A number of important issues need to be considered when drafting DRB provisions. Several such questions have been highlighted in recent cases. Owners, contractors, and their counsel should consider these issues and decisions to avoid unpleasant surprises and traps for the unwary.

**Nonbinding Recommendations That Can Become Final**

Model DRB provisions generally state that DRB recommendations do not bind the owner or the contractor.34 Importantly, however, *advisory DRB proposals can become binding through inaction*—a fact sometimes lost on those inexperienced with the process. A party must respond in writing to DRB opinions within a fixed period of time, typically fourteen days, indicating either acceptance or rejection of the recommendations.35 If the owner or contractor fails to respond to the DRB recommendations in time, they are “deemed” accepted.36

The fact that otherwise “nonbinding” DRB recommendations can become contractually binding presents two challenges. First, a party opposed to the DRB proposals must be careful to avoid a “deemed” acceptance. Good contract administration requires calendaring deadlines for responding to DRB recommendations and sending timely rejections. Second, public owners and their counsel in particular need to consider whether model DRB provisions afford sufficient time to respond to DRB recommendations. It may not be practical to obtain a governing board’s decision within the customary fourteen days, especially if that board meets monthly. Ultimately, a realistic time frame is preferable to an unrealistic one that prompts a public owner to seek repeated extensions of contractual deadlines to consider DRB recommendations—a pattern that may strain the relationship between the parties. Public agencies therefore should modify model DRB language to allow sufficient time to act meaningfully on DRB recommendations. Any such change also must recognize that the DRB process should expedite the resolution of disputes and that unwarranted delays undermine this goal.

Occasionally, model DRB provisions have been modified to give the board power to make recommendations that are binding when issued. This can be accomplished at the outset by appropriate language in the DRB contractual terms. Sometimes the parties to a traditional DRB agreement subsequently amend the relevant provisions so that some or all future recommendations by the DRB automatically bind the parties. In other instances, parties have provided that DRB recommendations are binding as to disputes below a certain dollar value but remain advisory when the claim’s value exceeds the specified threshold. Parties also have agreed in advance to accept DRB recommendations as to specifically identified issues. This approach was employed on a portion of Boston’s Central

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Admissibility of DRB Recommendations

One of the key features of DRBs is the admissibility of the board’s written recommendations in later legal proceedings. Conventional wisdom holds that parties are more likely to accept adverse DRB proposals and thereby avert litigation if these recommendations reflect the considered judgment of three industry experts and may be used as evidence in any litigation. As stated in the 1991 ASCE Guide: “It is difficult to imagine either party expending the time and money to submit the recommendation of an impartial board of informed experts to a judge or jury, unless the recommendation of the technical experts is contrary to a basic legal principle.” However, the use of DRBs does not guarantee that there will be no resulting litigation; therefore, parties should consider whether to modify model DRB forms to specify that the board’s recommendations shall not be admissible.

A number of substantial lawsuits have been initiated notwithstanding the admissibility of DRB recommendations. This occurs after a complete breakdown in trust between the owner and the contractor or between one or both parties and the board. In either case, it happens more often in high-stakes disputes. In these situations, even the DRB process and admissibility of board findings may be unable to avoid the very litigation that all parties to a construction project hoped never to endure. For example, several claims arose on Boston Harbor’s Deer Island Effluent Outfall Tunnel where the parties presented issues to the board, sought reconsideration of those recommendations, and conducted subsequent legal proceedings in a manner that led the court to comment that it was “a hugely over-litigated case.” Accordingly, the possibility of lawsuits on projects with DRBs means that parties should carefully consider how the admissibility of board recommendations might impact the DRB process and the ultimate resolution of disputes.

The subsequent use of DRB recommendations in court may cause a party to view the board as a means to create evidence for litigation, rather than as a method to avoid it. This occurs more often when one party has determined that a lawsuit with large claims is inevitable. In these circumstances, the admissibility of the board’s recommendations may cause both sides to “lawyer up” the DRB process either directly or indirectly. A party that chooses to pursue litigation in the face of unfavorable DRB opinions usually attacks them as part of its litigation strategy. If the board continues to conduct hearings on other disputes during the course of such litigation, the owner’s or the contractor’s trust and confidence in the DRB and its process may wane. Because the core purpose of the DRB is to help the parties resolve disputes and avoid litigation rather than create evidence for litigation, an owner and contractor might rationally decide to specify that the board’s recommendations shall not be admissible evidence.

Standards for Removal of DRB Members

At times, an owner or contractor may lose faith in one or more DRB members or the board as a whole. In unusual circumstances, this loss of confidence may cause the owner or the contractor to believe that a change in DRB membership must occur to restore the viability of the board. Model DRB provisions, however, vary with respect to the contractual right to remove board members, the standard that must be satisfied, and the mechanism to exercise that right. Parties must understand these differences and should consider which approach to removal and replacement of DRB members is most likely to avoid collateral litigation over the composition of the board and reinforce the effectiveness of the process.

The model Three-Party Agreements in the 1989 ASCE Guide, the 1991 ASCE Guide, and the 1996 DRB Manual all provide that a party-appointed member can be removed only by the appointing party and that the third member or chairperson can be removed only with the agreement of the first two party-appointed members. In other words, the contractor has no express right to remove the appointee of the owner and the owner may not dismiss the appointee of the contractor. The model agreement in the 1989 ASCE Guide provides that the owner or the contractor can remove its appointee “for cause.” In comparison, the 1991 ASCE Guide and the 1996 DRB Manual each specifies that a party may remove its appointee “for or without cause.” Since these model Three-Party Agreements provide that the third board member may be terminated on agreement of the two party-appointed members, it appears that the third member may be terminated “without cause” (provided the other two DRB members agree). As discussed below, the difference between the “for cause” and the essentially “at will” standard has significant implications frequently unappreciated until a party seeks to remove a DRB member.

The DRBF’s model DRB provisions, the DRB Guide

Artery/Tunnel Project. Before modifying the traditional DRB procedure to authorize binding recommendations, some fundamental issues should be considered. A shift from the noncoercive mediation model of dispute resolution to a more adversarial and adjudicative model has significant structural and procedural implications. The conventional DRB model does not require that any board member have legal training. If DRB recommendations are to be automatically binding, parties may not be willing to have technical experts untutored in the law make decisions that could be legally flawed or otherwise unacceptable. Similarly, DRBs ordinarily do not allow parties to directly examine witnesses, let alone to cross-examine representatives of the other party (and lawyers seldom make presentations at DRB hearings). A party that agrees in advance to be bound by the decision of a hearing body may expect these and other due process protections that are absent from the normal DRB procedure. Thus, a compulsory process that yields binding determinations creates a different dynamic causing participants to alter their behavior and expectations. Counsel therefore should strongly discourage clients from uncritically modifying model DRB provisions to make DRB recommendations binding when issued.

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Specifications of the AAA, and the ICC rules differ in a number of important respects when it comes to removal of board members. First, under the DRBF model provisions, a DRB member may be removed only by agreement of both the owner and the contractor.48 Second, under the AAA and the ICC rules, a party may challenge or seek removal of any of the three board members; agreement of the two party appointees is not required to remove the third board member.49 The basis for the objection or removal of a DRB member under the AAA model is “for cause,” which is the same standard applied by the 1989 ASCE Guide for removal of a party-appointed member.50 The AAA specification does not define or provide any examples of what constitutes “cause.” The decision on any such objection is made by AAA: “The AAA shall determine whether the Board member should be disqualified and shall inform the Owner and Contractor of its decision, which shall be conclusive.”51 The ICC’s rules similarly provide that the ICC shall decide challenges to continued service of any board member but also require that any challenges be made “within 15 days of learning of the facts upon which the challenge is based.”52 The chances of litigation over the composition of the board are greatly reduced if an administrative body, such as the AAA or ICC, determines challenges to DRB members. Also, disqualification efforts are resolved much faster under such a system. Nonetheless, not all users of DRBs may be willing to cede authority over the removal of a board member; those using the AAA Guide Specifications or the ICC rules should appreciate the role played by those organizations.

The first published DRB decision in the United States, MTA v. SKK, highlights how parties can become embroiled in litigation concerning the composition of a board.53 In that case, the provisions for removing a board member followed the 1989 ASCE Guide (allowing the owner and contractor to remove their respective appointee “for cause”).54 When the owner sought to dismiss its appointee for cause, the contractor objected, and the owner’s appointee refused to step down.55 Because the parties could not resolve this dispute over continued service by the owner’s appointee, the matter proceeded to trial. The trial court determined that the owner had adequate cause to remove its appointee and the court of appeal affirmed.56 Although the trial court found that six separate incidents warranted removal of the owner’s appointee, the court of appeal discussed the details of only one (prejudgment of a dispute and improper ex parte communication) and held that any one of the infractions provide sufficient cause for removal.57 The court of appeal concluded that “loss of confidence in [the owner’s appointee], if objectively verifiable by reference to facts material to the [owner], would be sufficient ‘cause’ for . . . termination.”58

In view of MTA v. SKK, an argument can be made that the owner and the contractor each should be free to remove any of the board members “for or without cause.”59 The success of the DRB hinges upon the parties’ mutual confidence and trust in the board. As stated in the 1996 DRB Manual: “If, at any time, it becomes apparent that either member has lost faith in a member of the board, that member should step aside. Regardless of the merits of the occasion, the credibility of the DRB concept should never be sacrificed to individual feelings.”60 In many respects, as noted by the court in MTA v. SKK, “[t]he DRB members are facilitators or mediators, not adjudicators or arbitrators.”61 With that principle in mind, removal “for or without cause” provides a sound approach to ensure the continued effectiveness of a board that has lost the confidence of the owner or the contractor. Certainly, a situation where a party litigates its right to remove a DRB member does little to reinforce confidence in that board, especially if the other two members follow normal human instincts and come to the support of their challenged colleague.

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A cogent argument in favor of a “for cause” standard also can be made for removal of board members because it reinforces their independence. Requiring actual misconduct helps ensure that each time the DRB issues recommendations on a claim, the loser does not replace board members. Of course, striking board members comes with a steep price to the DRB process itself. One of the reasons for the success of DRBs and one of its unique features is the board’s historical knowledge of the project—insight and background that are lost when DRB members are replaced. Owners, contractors, and their counsel should understand that different model DRB provisions apply varying standards for removal of board members and those differences may influence the success of the DRB.

Potential “Carve Outs” from the DRB’s Jurisdiction

As a general proposition, model DRB provisions broadly direct the board “to assist in the resolution of disputes, claims and other controversies” between the owner and the contractor without any specific limitations on the subject matters.62 The 1996 DRB Guide gives the board jurisdiction to address any “Dispute,” defined to be “[a] claim, change order request, or other controversy that remains unresolved following good faith negotiations between authorized representatives of the Owner and Contractor.”63 These model agreements do not specify any limitations on the type of disputes between the owner and contractor that may be submitted to the DRB. Such broad authority may come as a surprise to public owners that may believe some claims are inappropriate for DRB consideration. For this reason, public owners in particular need to decide whether specific controversies should be outside the purview of the board and, if so, whether such exclusions should be enumerated in the speci-
The types of issues or elements of the contract that the public owner may not want the DRB to address will vary with the owner, the project’s size, or the kind of work. As alluded to by the DRBF’s model specifications, an owner may wish to specifically exclude claims concerning Owner Controlled Insurance Policies or disputes under Project Labor Agreements. Public owners should consider whether a termination for default should be within the jurisdiction of the DRB. Likewise, shutting down the job due to safety concerns or directing replacement of contractor personnel may not be controversies an owner wishes to have submitted to a board. Thought should be given to whether establish privity of contract or otherwise overcome the usual privity requirement. In each of these circumstances, owners frequently assert claims back against the prime contractor or subcontractor. If DRB provisions do not clearly indicate whether some or all of these actions must be submitted to the board before litigating, expensive and time-consuming uncertainty arises and the effectiveness of the DRB process can be frustrated. Thus, to fully help the parties avoid litigation, it is important to understand how a board may function with respect to a source of claims as potentially significant as subcontractors.

The existing model DRB provisions and available practice guides focus on disputes between owners and contractors and, with the exception of the DRBF’s model provisions, do not specifically address subcontractor claims. Still, if the contractor sponsors the subcontractor’s claim and “passes it through” to the owner, DRBs established under the model agreements can address such disputes. Subcontractor “pass-through” claims really are in the nature of disputes between the owner and the prime contractor for the purposes of the traditional DRB process. However, conventional DRBs do not address disputes between the prime contractor and the subcontractor or three-way disputes that also involve the owner. The traditional DRB rightfully should be reluctant to review disagreements under a subcontract. If a DRB addresses a “pass-through” claim, the board ordinarily leaves it to the prime contractor and the subcontractor to sort out the effect of its recommendations. Because most DRB members are not lawyers, confusion may abound if boards are called upon to separate out liability under the subcontract from liability under the prime contract. Unfortunately, model DRB agreements do not expressly address the situation where the subcontractor objects to the submission of its “pass-through” claim to the DRB and directly pursues litigation against the prime contractor and/or owner.

Although the traditional DRB was not structured to address disputes purely between a prime contractor and a subcontractor, some owners and contractors have modified model provisions to broaden the scope of issues to be heard by boards in the hope of establishing a one-stop, all-purpose dispute resolution forum. In some instances, owners and contractors now expressly require that subcontractor claims be submitted to the DRB before the subcontractor may commence litigation. To accomplish this, DRB provisions have been incorporated into subcontracts and purchase orders. Altering the process in this fashion injects unpredictability. Two cases addressing whether a subcontractor can be compelled to submit its claim to a board under these circumstances have yielded diametrically opposed conclusions. A recent California decision held that the DRB process is “presumptively biased and unenforceable as a condition precedent to [a] subcontractor pursuing litigation” where “the interests of the general contractor and the owner are adverse to those of the subcontractor.” In an earlier opinion, the Southern District of New York held that a subcontractor was obligated to submit its

Limiting the issues to be addressed by an ADR mechanism creates difficulties of its own.

certain types of statutory claims (e.g., direct actions by the public owner under a state false claims act, disputes over prevailing wage issues, and audits) should be expressly withheld from the DRB’s jurisdiction.

Limiting the issues to be addressed by an ADR mechanism creates difficulties of its own. For example, arbitration agreements that provide one party the right to decide whether to arbitrate or litigate have been challenged on a variety of grounds, including unconscionability. How much courts will apply such concepts to agreements creating DRBs remains to be seen, although at least one decision has applied the doctrine of unconscionability to hold that a subcontractor could not be compelled to submit claims to a board before commencing litigation. Restricting DRB jurisdiction invites disputes over the exact borders of such authority and the proper forum for deciding any jurisdictional controversies. In all events, public owners should be mindful of the broad range of claims covered by the most common model DRB agreements and critically assess whether to carve out certain types of claims and disputes.

Subcontractor Claims and the DRB Process

The DRB process as it applies to subcontractor claims requires special attention for several reasons. Many disputes between owners and contractors on large public works projects involve so-called subcontractor pass-through claims. Indeed, where an owner substantially holds up a works project, that then almost always files an indemnification action against the owner. In some cases, subcontractors do not wait for the prime contractor to bring the owner into the litigation; they file direct claims against the owner designed to
claim against the prime contractor to the DRB before proceeding with litigation and stayed a lawsuit filed by a subcontractor pending submission of the dispute to the board.\textsuperscript{72} These cases have implications for all parties thinking about expanding the DRB jurisdiction to address disputes between a prime contractor and subcontractor. Familiarity with these decisions is a must for construction lawyers.

In \textit{Schuluster Tunnels}, the prime contract called for the creation of a DRB.\textsuperscript{73} The prime contractor executed a purchase order that incorporated the DRB provisions of the prime contract and specifically required that any subcontractor “pass-through” claim must be submitted to the board before initiating litigation.\textsuperscript{74} At the prime contractor’s request, the city made certain design changes, which caused the subcontractor’s cost of performance to increase. As part of obtaining approval of the design change, however, the prime contractor agreed that the change would “have no cost impact” to the city.\textsuperscript{75} The subcontractor subsequently presented a $2.5 million claim to the prime contractor, invoked the “pass-through provisions” in the purchase order, and requested that the prime contractor submit it to the owner.\textsuperscript{76} When the city rejected the claim, the subcontractor prepared to submit it to the DRB.\textsuperscript{77} In an insightful move that strengthened its later litigation position, the subcontractor requested that the city and the prime contractor permit it to appoint an additional member to the DRB.\textsuperscript{78} After its request was denied, the subcontractor refused to proceed with the DRB, as demanded by the city and the prime contractor, and the subcontractor then filed its lawsuit.\textsuperscript{79} In the ensuing litigation, the subcontractor obtained a total monetary award against the contractor and its sureties of $3,031,171, plus an award of $1.6 million in attorneys’ fees.\textsuperscript{80}

On appeal, the prime contractor argued that the subcontractor’s failure to bring its claim to the DRB before commencing litigation barred any recovery because submission to the board was a contractually mandated condition precedent.\textsuperscript{81} Applying a two-part test for unconscionability, the court concluded that, in the circumstances presented, the requirement that subcontractor claims be submitted to the DRB was unenforceable. First, the court found the purchase order was a contract of adhesion presented to the subcontractor “on a take-it-or-leave-it basis.”\textsuperscript{82} Although the subcontractor “bid on the purchase order, it had no meaningful opportunity or ability to negotiate the other provisions of its purchase order with [the prime contractor] or the provisions of the Prime Contract.”\textsuperscript{83} The court’s opinion did not cite any evidence or otherwise explain this conclusion.

Second, the court explained more extensively the basis for its conclusion that the DRB process as applied to the subcontractor’s claims was “so harsh and one-sided that it ‘shock[s] the conscience.’”\textsuperscript{84} The court concluded that “the DRB is presumptively aligned with [the prime contractor] and City and presumptively biased in their favor, excusing [subcontractor] from any obligation to comply with the DRB process before filing suit.”\textsuperscript{85} The court focused on the fact that “the DRB members were appointed and compensated” by the prime contractor and the city, “parties adverse to [subcontractor] because it was in the interests of both City and [prime contractor] that [subcontractor’s] claim be denied.”\textsuperscript{86} From the court’s perspective, the denial of the subcontractor’s request to appoint an additional member to the DRB for purposes of hearing its claim reinforced this conclusion.\textsuperscript{87} The contractual requirement that DRB members must be neutral did not change the court’s view that “pragmatically it is recognized that the two party-appointed members as a matter of appearance are considered biased in favor of the party who appointed them.”\textsuperscript{88} “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.”\textsuperscript{89}

The court also rejected the suggestion that the DRB provision could not be unconscionable because the board’s recommendations were not binding. As the court noted, DRB conclusions were “not without precedential effect and evidentiary influence because the Prime Contract provides for its admissibility into evidence in any later dispute resolution or legal proceeding.”\textsuperscript{90} The court also stated that the subcontractor should not be required “to pursue a charade characterized as meaningful ADR” and that notions of “presumptive bias” should apply in evaluating conditions precedent to litigation like the DRB process.\textsuperscript{91} In the court’s opinion, all of this was underscored by other indicia of a process “biased” against the subcontractor, including periodic project meetings with the board that do not include the subcontractor and the ability to change rules concerning the DRB process without input from the subcontractor.\textsuperscript{92} “From the [subcontractor’s] perspective, this overall process creates the potential that the DRB proceedings would have been nothing more than an opportunity for [the prime 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.”\textsuperscript{93}

In contrast to \textit{Schuluster Tunnels}, a completely different result was reached in \textit{BAE Automated Systems, Inc. v. Morse Diesel Int’l, Inc.}, albeit without consideration of the doctrine of unconscionability.\textsuperscript{94} The prime contract provided that all disputes must be submitted to the DRB prior to commencing litigation.\textsuperscript{95} The subcontract expressly incorporated the DRB process and required that the subcontractor “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.”\textsuperscript{96} The subcontractor filed a complaint against the prime contractor for “increased costs incurred as a result of [the prime contrac-
The BAE court easily held that the matter should be stayed pending submission of the subcontractor’s claim to the DRB. Initially, the court found that the subcontract expressly required submission of the subcontractor’s claim to the DRB before commencing litigation. The court rejected the argument that only subcontractor claims that are “attributable to the [owner’s] conduct,” as opposed to claims related to conduct of the prime contractor, must be submitted to the board:

[T]he Subcontract unambiguously incorporates the dispute resolution procedure set forth in . . . the Prime Contract and clearly requires [subcontractor] to “pursue and exhaust” that procedure prior to commencing any other action for claims “arising out of its performance of the Work herein.” Nothing in this language limits the dispute resolution procedure to those claims attributable to [owner’s] conduct. Although . . . the Subcontract requires [subcontractor] to submit its claims to [prime contractor] who in turn must “pass on” [subcontractor’s] claims to [owner], this provision merely provides the mechanism for invoking the dispute resolution procedure—it does not define its scope.

The court also rejected the subcontractor’s argument that the DRB process only applied “to claims which arise while the work is in progress.” Even though the subcontractor’s claims were not “raised” until after substantial completion, the disputes “by their very nature, arise from its work on the project” and therefore must be submitted to the DRB. Finally, the court ruled that there had been no waiver of the prime contractor’s “right to invoke” the DRB process since the subcontractor had never requested that the prime contractor “pass on its claims” to the DRB.

The BAE and the Schulster Tunnels cases reached different results on projects with very similar DRB provisions. The Schulster Tunnels case involved “a subcontractor whose interests are antithetical to those of the general contractor and the owner.” In many (if not most) cases, the subcontractor’s and general or prime contractor’s interests are not “antithetical,” and they often cooperate in the prosecution of claims. A subcontractor may not oppose submission of its claim to the DRB and it may be part of a larger claim being pursued by the general contractor. The general contractor and subcontractor often execute liquidation agreements obligating the general contractor to process the subcontractor’s claim through contractually specified claim processes, such as the DRB process. Thus, a subcontractor frequently will not object to submission of a claim to a DRB.

The hard situation is the problem that arose in Schulster Tunnels. None of the existing model DRB agreements directly address the issues raised there and the court’s decision serves as a warning that simply modifying standard DRB provisions and incorporating them into the subcontract may not suffice. While some may dismiss Schulster Tunnels as an anomaly, several strategies exist for avoiding the outcome in that case where the conventional DRB process is modified and extended to cover subcontractor disputes.

First, the DRB process could be amended to eliminate or minimize any suggestion that the DRB is “presumptively biased” against subcontractors. The contractor’s nominee to the DRB could be made on behalf of the contractor and all subcontractors, with subcontractors given notice of and an opportunity to object to the contractor’s appointee, the owner’s appointee, and the proposed chairman. This might blunt the concern expressed in Schulster Tunnels about the subcontractor not having a voice in the selection of DRB members. But not all subcontractors may be known at the time of the creation of the DRB. The subcontractor also could specify that the prime contractor must present the subcontractor’s claim to the board as a condition precedent to the subcontractor initiating litigation, the prime contractor must request a hearing within a specified time period of a demand by the subcontractor, and the DRB recommendations will not be admissible in litigation between the prime contractor and the subcontractor. Some may view this as taking the teeth out of the DRB process; however, a high percentage of subcontractor claims likely would be resolved without litigation. These sorts of changes to the DRB process may minimize the risk that a court would characterize it as unconscionable and therefore unenforceable as to subcontractor claims.

If the owner and the contractor intend the DRB process to apply to subcontractor claims, other steps can be taken to protect the process from a successful challenge. Prime contractors may want to specify in liquidation agreements that subcontractors must submit claims to the DRB, review and approve the membership of the DRB, and have no unsatisfied objection to the members of the board or the process. Even though it did not carry the day in Schulster Tunnels, prime contracts and subcontracts should clearly require submission of subcontractor claims to the DRB. This avoids an argument that such claims are beyond the scope of the board’s jurisdiction.

Conclusion

The expanding use of DRBs on major construction projects requires that construction lawyers become more familiar with the DRB process, standard DRB agreements, and the varied roles lawyers may play in the DRB process. As available DRB model agreements continue to proliferate, owners, contractors, and their lawyers must become aware of the peculiarities of each of the exemplars and select an appropriate form. Key issues should be considered when customizing DRB provisions, including the admissibility of the board’s recommendations, the standard for removal of its members, and the time frame for rejecting DRB recommendations. As illustrated by Schulster Tunnels, special attention must be given to whether subcontractor claims fit within the DRB procedures, and, if so, how that is to be accomplished. Addressing such issues at the outset will help ensure that the
The DRB process fulfills its purpose of helping the owner and the contractor resolve disputes and avoid litigation.

Endnotes


5. Conventional DRBs, as that phrase is used, are based on the model developed by the American Society of Civil Engineers. See, e.g., technical committee on contracting practices of the underground technology research council, American Society of Civil Engineers, avoiding and resolving disputes in underground construction B8–B20 (1989) [hereinafter 1989 ASCE Guide]; technical committee on contracting practices of the underground technology research council, American Society of Civil Engineers, avoiding and resolving disputes during construction 45–60 (1991) [hereinafter 1991 ASCE Guide]; Robert M. Maytas et al., construction dispute review board manual 121–40 (1996) [hereinafter 1996 DRB Manual]. The more common variants of the conventional DRB are described in the 1996 DRB Manual. Id. at 34–35.

6. See, e.g., Schulster Tunnels, 111 Cal. App. 4th at 1338 (“The DRB process constitutes a form of [ADR]” that “resembles the arbitration process with several significant differences”).

7. See, e.g., MTA, 59 Cal. App. 4th at 683 (“The DRB members are facilitators or mediators, not adjudicators or arbitrators.”); Massachusetts Highway Dep’t, 2001 Mass. Super. LEXIS 412, at *17 (“The [DRB] disputes resolution procedures, whether binding or not, are a form of contractually accepted arbitration and must be treated by the Court as such.”).

8. See, e.g., Schulster Tunnels, 111 Cal. App. 4th at 1338 (“The DRB process resembles the arbitration process with several significant differences.”).

9. The DRB process is not meant to supplant other pre-DRB steps in the dispute resolution process. See 1991 ASCE Guide, supra note 5, at 5; 1996 DRB Manual, supra note 5, at 36–37. However, the contract provisions creating the DRB should clearly indicate whether other steps in the dispute resolution ladder must be exhaust- ed or reach an impasse before the DRB may conduct a hearing.


14. 1996 DRB Manual, supra note 5, at 121; see also id. at xxii–xxiii, 2.


16. Id.

17. See id. (Contents); id. § 2, chs. 10 (Guide Specification), 11 (Three-Party Agreement).

18. Id. § 2, ch. 10, at 1; ch. 11, at 1.

19. Id. § 2, ch. 10, at 3 (Guide Specification ¶ 4.4.A) (DRB members to be jointly selected); id. ch. 11, at 5 (Three-Party Agreement ¶ X.A) (DRB member “may be terminated only by agreement of both the OWNER and the CONTRACTOR”).


23. See id. art. 4 (Dispute Review Boards).

24. Id. art. 5 (Dispute Adjudication Boards).

25. Id. art. 6 (Combined Dispute Boards).


27. 1996 DRB Manual, supra note 5, at 47.

28. Id.

29. 1991 ASCE Guide, supra note 5, at 6; see Mass. Highway Dep’t v. Perini Corp., Nos. 00-4096 BLS, 01-906 BLS, 01-1796 BLS, 01-3925 BLS, 01-4452 BLS, 00-5700 BLS, 2002 Mass. Super. LEXIS 110, at *15 (Super. Ct. of Mass., at Suffolk, Mar. 20, 2002) (“What is called for in DRB membership are construction industry experts, not lawyers, judges or professional arbitrators. Substantive knowledge and experience in construction projects of the kind involved, not deep learning in the law, is mandated.”).


31. Id. at 58. DRB members do not administer oaths and presentations by parties are not made under penalty or perjury. Id.

32. Id. Although a DRB has discretion to permit a court reporter to transcribe a hearing, parties can modify model DRB provisions to provide the owner and the contractor with the express right to have DRB hearings transcribed.

defendant public entity’s motion for summary judgment based in part on DRB recommendations, which reflected conclusions reached “in a manner that makes sense to this Court”). The court in this case expressed some frustration with what it viewed as a “hugely over-litigated case” where the parties refused to accept recommendations of a DRB comprised of three experts in the kind of construction at issue. Id. at *33–*34. “Here a single judge—not a panel of experts in the subject of tunnel construction—is asked to resolve the issues because the parties themselves refuse to accept decisions of their contractually assembled team of experts.” Id.


36. See, e.g., 1996 DRB MANUAL, supra note 5, at 132 (DRB Guide Specification § 1.04(I)) (“The failure of either party to respond within the specified period shall be deemed an acceptance of the Board’s recommendations.”); AAA Guide Specifications, supra note 20, § 1.04(I)(1) (same); cf. ICC DRB Rules, supra note 22, art. 4(3) (“if no Party has sent a written notice to the other Party and the DRB expressing its dissatisfaction with a Recommendation within 30 days of receiving it, the Recommendation shall become binding on the Parties.”); id. art. 5(3) (same regarding “Decision” by Dispute Adjudication Board).

37. See Mass. Highway Dep’t v. Perini Corp., Nos. 00-4096 BLS, 01-906 BLS, 01-1796 BLS, 01-3925 BLS, 01-4452 BLS, 00-5700 BLS, 2002 Mass. Super. LEXIS 110, at *3–*5 (Super. Ct. of Mass., at Suffolk, Mar. 20, 2002) (the original DRB agreement provided for nonbinding recommendations and a subsequent DRB agreement provided for binding recommendations as to specifically identified disputes).

38. See, e.g., 1996 DRB MANUAL, supra note 5, at 40, 57.

39. A hybrid DRB where the same panel issues binding recommendations as to certain issues and nonbinding recommendations as to other issues presents additional challenges. The task of “shifting gears” between nonbinding and binding proceedings is a challenge for even the most well-trained potential DRB members. Constituting separate DRBs, one to issue binding recommendations and one to issue nonbinding recommendations, may be another option but introduces additional costs.

40. 1991 ASCE GUIDE, supra note 5, at 7.

41. The AAA Guide Specifications have brackets that allow the parties the option to indicate whether DRB recommendations will or will not be admissible in evidence. See AAA Guide Specifications, supra note 20, § 1.04(K) (“If the Board’s recommendation does not resolve the dispute, the written recommendation, including any minority report, will [not] be admissible as evidence [to the extent permitted by law] in any subsequent resolution proceeding or forum.”) (brackets in original).


44. 1989 ASCE GUIDE, supra note 5, at B-19 (Three Party Agreement ¶ IX); 1991 ASCE GUIDE, supra note 5, at 59 (Three Party Agreement ¶ IX); 1996 DRB MANUAL, supra note 5, at 138 (Three Party Agreement ¶ IX).


46. 1991 ASCE GUIDE, supra note 5, at 59 (Three Party Agreement ¶ IX); 1996 DRB MANUAL, supra note 5, at 138 (Three Party Agreement ¶ IX).


48. Practices and Procedures, supra note 15, § 2, ch. 11, at 5 (Three-Party Agreement ¶ X.A). Notably, the DRBF model specification provides that the preferred method for selection of each of the three members is by mutual agreement of the owner and the contractor rather than having each party nominate one member and the two members selecting the third member. Id. ch. 10, at 3 (Guide Specification ¶ 4(A)-(B)).

49. AAA Guide Specifications, supra note 20, § 1.02(F); ICC DRB Rules, supra note 22, art. 8(4).

50. AAA Guide Specifications, supra note 20, § 1.02(F); ICC DRB Rules, supra note 22, art. 8(4); 1989 ASCE GUIDE, supra note 5, at B-19 (Three Party Agreement ¶ IX).

51. AAA Guide Specifications, supra note 20, § 1.02(F).

52. ICC DRB Rules, supra note 22, art. 8(4). The ICC Rules contemplate challenges “on the basis of an alleged lack of independence or otherwise.” Id. This suggests a “for cause” standard, but it is unclear whether subjective loss of confidence in a DRB member alone fits within the “or otherwise” language.

53. Los Angeles County Metro. Transp. Auth. (MTA) v. Shea-Kiewit-Kenny (SKK), 59 Cal. App. 4th 676 (1997). The authors were both involved in this case, Mr. McMillan as counsel for MTA and Mr. Rubin as a testifying expert on behalf of the owner.

54. Id. at 679; 1989 ASCE GUIDE, supra note 5, at B–19 (Three Party Agreement ¶ IX).


56. Id. at 687.


58. MTA, 59 Cal. App. 4th at 684.


60. 1996 DRB MANUAL, supra note 5, at 41; see also 1991 ASCE GUIDE, supra note 5, at 14–15 (“If, at any time, the Board believes that the process might work better with other Board members, it should offer to step aside. This necessity would arise if the Board senses that either the owner or the contractor has lost trust in their impartiality or judgment.”).


62. See, e.g., 1991 ASCE GUIDE, supra note 5, at 45 (Model DRB Specifications § 1) (“A Disputes Review Board will be established to assist in the resolution of disputes, claims and other controversies arising out of the work of this project.”); id. at 54 (Three Party Agreement ¶ 1(DR) (“is to assist in the resolution of disputes, claims and other controversies between the OWNER and the CONTRACTOR”).

63. See 1996 DRB GUIDE, supra note 5, at 123 (Model Specification §§ 1.01.A.3, 1.01.B.1–.2); id. at 133–34 (Three Party Agreement ¶¶ II.B, III.A, IV.C.1). The language in the AAA model specifications and Three Party Agreement is virtually identical to the 1996 DRB GUIDE on these points. See AAA Guide Specifications, supra note 20, §§ 1.01.A.4, 1.01.B.1–.2; AAA Three Party Agreement, supra note 20, ¶¶ II.B, III.A, IV.C.1; see
also Practices and Procedures, supra note 15, § 2, ch. 10, at 1 (Guide Specification ¶ 2) (“Except as explicitly otherwise provided, all disputes . . . between the OWNER and CONTRACTOR may be referred to the DRB.”).


67. See, e.g., Mass. Highway Dep’t v. Perini Corp., Nos. 00-4096 BLS, 01-906 BLS, 01-1796 BLS, 01-3925 BLS, 01-4452 BLS, 00-5700 BLS, 2002 Mass. Super. LEXIS 110, at *29–*32 (Super. Ct. of Mass., at Suffolk, Mar. 20, 2002) (court deems to but agrees with decision of binding DRB concerning its jurisdiction and whether “certification” of claim by contractor was a condition precedent to consideration of dispute by DRB).

68. Unlike other model DRB provisions, the DRBF’s model specification expressly provides that subcontractor claims, “including pass-through claims by a lower tier subcontractor or supplier, against the CONTRACTOR which are actionable by the CONTRACTOR against the OWNER” may be heard by the DRB. See Practice and Procedure, supra note 15, § 2, ch. 10, at 5 (Model Specification ¶ 6.D.2.d). The DRBF’s commentary states that subcontractor pass-through claims “may be heard by the DRB” but “[d]isputes by a subcontractor or supplier with the contractor, or both the owner and the contractor, cannot be considered by the DRB.” Id. at 2.

69. Where the subcontractor claim is presented in the DRB on a “pass-through” basis, several uncertainties arise. For example, in the event of subsequent litigation concerning the claim, is the DRB recommendation admissible where the subcontractor is a party to the lawsuit? May the subcontractor take the lead at the DRB hearing in presenting its claim? Issues like these can and should be addressed by the parties in advance of a DRB hearing.

70. Compare Sehulster Tunnels/Pre-Con v. Traylor Bros. Inc./Obayashi Corp., 111 Cal. App. 4th 1328, 1340 (2003) (subcontractor excused from submitting claim to DRB before commencing litigation because DRB process held to be unenforceable) with BAE Automated Sys., Inc. v. Morse Diesel Int’l, Inc., No. 01 Civ. 0217 (SAS), 2001 U.S. Dist. LEXIS 6682, at *1 (S.D.N.Y. May 21, 2001). Under the prime contract, the prime contractor “was to provide professional construction management and inspection services in connection with the Project.” Id. at *3.


73. Sehulster Tunnels, 111 Cal. App. 4th at 1333.
74. Id. at 1337.
75. Id. at 1333.
76. Id. at 1334.