The Rôle of the DRB in Long Term Contracts

By Pierre M. Genton*

Presently, the Dispute Review Board ("DRB") can be found in many long term projects. Its rôle can greatly vary, as can be seen when answering the three following questions:

(a) One is often obliged to ask for the assistance of a DRB. Which rôle do the parties want the DRB to play?
This question can be divided into three sub-questions:
(i) Do the parties want a relatively formal pre-arbitration system which automatically ends up in a legal procedure if one of the parties contests the opinion of the DRB? Or do they prefer a more flexible system which would allow them to:

- ask for an opinion of principle; or
- re-start negotiations on another basis?

(ii) Do the parties want a simple non-binding recommendation allowing them to renegotiate the outcome of the submitted dispute? Or, do they prefer a binding decision, compelling the losing party to immediately execute the decision without waiting for the outcome of a legal procedure?
(iii) Do the parties want in a first phase, just an opinion of principle, allowing the parties to find out for themselves the solution on the quantum and, in case they cannot come to an agreement, ask in a second phase for the assistance of the DRB? Or do the parties want an exhaustive opinion on the dispute, on the principle as well as on the quantum straight from the beginning?

(b) Is the use of a DRB worthwhile if the set-up of the DRB and the modalities depend on the free choice of both parties? Which are the principal precautions to be taken?
It is obviously difficult to convince those in favour of legal proceedings that the parties might have an interest to avoid legal proceedings. The power and the responsibilities of the managers of each party may greatly vary from one party to the other. Are their interests convergent? In cases where the parties want to amicably resolve their dispute, can a DRB be of any help to them by limiting the risks which are part of all legal proceedings and by facilitating the investigation and understanding of a complex documentation?

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In addition, the user is confronted with the following questions:

(i) At which moment should the parties plan to set up a DRB?
(ii) What kind of agreement is recommended? Are there any standard-clauses?
(iii) How can such an agreement be integrated in the contract clause for dispute resolution (arbitration or civil courts)?
(iv) Which is the appropriate system to appoint the members of a DRB and who should be nominated?
(v) Should the parties prescribe from the beginning a deadline for the DRB to render its opinion?
(vi) Does the contract have to give a deadline to the parties to state their disagreement?
(vii) Does the opinion requested from the DRB have to be binding or not binding? Is it to be a decision which might have to be executed and later be called before the tribunals or is it a final and binding decision?
(viii) Must the parties, in case of disagreement, envisage an automatic system leading to legal proceedings?
(ix) Can a member of the DRB, once his task is finished, act as an arbitrator, a witness or counsel for one party if it comes to legal proceedings?
(x) Must the parties prescribe the course of the procedure with the DRB?

(c) What is the value to be attributed to the DRB in comparison to arbitration or to other ways of amicable dispute resolution?
The notion of DRB is often connected with ADR techniques. Is it an alternative dispute resolution? Is it reconcilable with civil or arbitration proceedings?

In trying to answer part of these questions and to illustrate the respective interests of the parties concerned directly and/or indirectly by the resolution of disputes, reference will be made to a number of practical experiences of large projects in the past and present. A check-list of the most important points to be taken into account before signing an agreement on the DRB and a possible standard clause either to be included in the contract or added as an amendment to the contract will be discussed.

The DRB—wishful thinking?

One way to start analysing the rôle of dispute review boards in long-term contracts is to have a quick, even superficial look at the development of such projects without a DRB. Over the past years, the profit and risk margin included in the pricing of large international projects has often drastically decreased for the contractors (decrease of profit, increase of risks) and, more and more frequently, the losses have become severe. If, in the past, contractors were able to have a more flexible or even a more "generous" approach, it presently becomes very difficult, if not impossible, for both the contractor and the employer (even where he has the necessary power) to settle the unpredictable variations and unavoidable discrepancies of the contract by direct negotiations during the course of the project. As a consequence, the parties often found themselves tied up in endless negotiations all through the project and were finally compelled to refer a huge case to the competent court. There are several reasons to explain these changes over the years, such as the market situation and the related tough competition amongst the contractors, the size and complexity of the projects, the financing environment, the contractual framework (turnkey, design and built, BOT[1] versus BOQ[2] contracts), the uncertainties of technical, administrative and political nature, etc.

The length of the proceedings, the direct and indirect losses (such as loss of productivity, destruction of commercial ties, loss of image, excessive time consumption of their own employees who cannot perform on other projects) have incited first the Anglo-Saxon employers and contractors accustomed to litigation to limit the "snow ball effect" of claims and to search for efficient and amicable ways to settle disputes in the course of the project. The solution of a panel of independent experts who, on a continuous and regular basis, follow the progress of the project and assist the parties in an early settlement of their dispute, was initiated in the USA on international projects in the nineties. The US term, "Dispute Review Board" was later supplemented in the United Kingdom by "Dispute Adjudication Board" (DAB).[3] Was it because the word "adjudication" implies a more binding effect than a review? In the following text no difference will be made and the term DRB will be used.

The DRB system is an amicable procedure. It does not concern only long-term contracts but also medium, or even small size projects. The DRB procedure should not be understood as an alternative to arbitration, but rather as a complement to arbitration.[4] It is, however, indisputable that the DRB is a competitive tool, limiting the number of cases forwarded to arbitration. Competent arbitrators should therefore be interested and actively participate in DRB procedures not only as counsel but also as panel members.

It is a fact that quite a number of DRBs have been implemented over the past years and most of them have been successful. This success was perhaps not always due to the parties being convinced and/or satisfied by the recommendations of the DRB, but because they felt that the DRB had assisted them to avoid long and costly legal proceedings and/or had taken over a difficult decision which they, themselves, had perhaps not the necessary competence to make.

It is also a fact that more and more financing institutions, such as the World Bank, the Asian Development Bank, do impose the DRB system, even if some governments, courts and arbitration institutions still show some reluctance and describe the DRB as an alternative to the excessively costly legal proceedings in the United States. The recent initiative of the FIDIC[5] to insert the dispute adjudication board (DAB) in the main text of their general conditions (test edition 1998) and to reduce the influence of the engineer is more than a simple

[1] The term BOT (build-operate-transfer) includes all types of alternatives such as BOOT (build-operate-own-transfer), BLOT (build-lease-operate-transfer), BOTT (build-operate-train-transfer).
[2] Bill of quantities contracts.
[3] The NEC contract and the *FIDIC Red Book* (Test Edition 1998 September 1998).
[4] "The DRB/DAB—A True Complement to Arbitration" by Pierre M. Genton (*DRB Foundation Forum* 4/98).
[5] FIDIC: Fédération internationale des ingénieurs-conseils.

indication of the importance gained by the DRB in international long-term contracts.

The various approaches of a DRB

A single definition of the rôle of a DRB would be inaccurate as there are various forms of the DRB. It is a continuous, regular and efficient method to solve problems mainly during the project implementation—"continuous" because usually the DRB follows the project from the beginning to the end, "regular" because the DRB is visiting the site at least every four months (witnessing the progress of works, discussing potential disputes, hearing claims, preparing recommendations in the course of the project), "efficient" because of the attractive ratio cost/time (in comparison with other dispute resolution systems) and its success rate. At the same time, the DRB may help to maintain a normal relationship between the parties.

The importance for the parties is to select the suitable DRB system. The following three categories of DRB may be considered:

A. The DRB as a pre-arbitration and deciding panel. The decision of the DRB is binding until it is overturned by a court decision and has to be implemented without delay. Usually the dissatisfied party has to notify its disagreement within a defined period and, in some cases, is even compelled to start arbitration proceedings within a prescribed time. This type of DRB cannot be considered a friendly way to settle disputes, but still remains an amicable settlement as compared to legal proceedings.
B. The DRB as a formal advisory panel: the recommendation of the DRB is not binding, but is a support to the parties in their decision making process. It can even be considered a kind of "scarecrow" if future arbitration proceedings are envisaged. In case a party is dissatisfied with the recommendation, it is compelled to notify the other party within an agreed period that it refuses to comply with the recommendation. It is then up to the dissatisfied party to decide if and when the case should be referred to legal proceedings.
C. The DRB as a flexible and formal advisory panel: the parties have a preliminary opportunity to refer a potential dispute to the DRB and to seek general advice on matters of principle. The demanding party will submit a short presentation questionnaire of the case (1–2 pages) and the DRB will discuss the matter with the parties during the visit on the site. The DRB will not issue a written note and will not be bound by any oral statement made during these discussions. In a second step, the same DRB process as indicated under item B will take place and the recommendation issued by the DRB remains non-binding.

Usually it is advisable to start by requiring from the DRB a recommendation on matters of principle only, leaving the assessment of the quantum to the parties. The parties are often better equipped for carrying out the calculation (computer facilities), they can perform faster and at lower costs, and they are given the opportunity to re-discuss and renegotiate this step. If substantial differences subsist on the assessment of the quantum, the most diligent party may either request a punctual assistance or a written recommendation from the DRB in accordance with the contract.

The set-up of a DRB mechanism

It would be presumptuous to work out rigid guidelines without taking into account the nature of the project and the form of contract. However, the following basic questions may cross the mind of potential users of a DRB.

When should a DRB procedure be set up?

The most convenient time for deciding to have a DRB procedure is, without any doubt, before the contract signature. Such a procedure may already be included in the tender documents or prescribed by the financing authorities. The parties should consider this issue as an important part in the negotiation of the contract. It is of utmost importance that the DRB is appointed at the contract signature and mentioned *expressis verbis* in the contract so that the DRB is immediately operational to sort out the first differences.

Most of the DRBs, however, have been introduced in the course of the works. It is not easy for the parties already in dispute to agree, at this stage, on amendments to the contract. The experience shows that it is a long, tedious and costly process. It is also difficult for the appointed DRB panel to catch up on what happened in the previous years, to deal with old, usually complex disputes and at the same time with potential disputes.

Even if the most efficient way is to have the DRB straight from the stall of a long-term project, in line with the progress of the works and with the difficulties met by the parties, the DRB can also greatly assist if appointed at a later stage.

What kind of DRB system should be selected?

The type of DRB to be selected depends on various factors such as the mentality of the parties, the estimated willingness, competence and possibilities of the parties to accept compromises, and even on the selected DRB panel. If the representative of one of the parties is clearly considered unable or unwilling to accept, any recommendation from a DRB panel which does not serve his interest, system A with its "pre-arbitration and deciding panel" would be advisable. This type of DRB is actually used on the Tagus Bridge project in Portugal.

However, in most cases, depending on the factors mentioned above, the DRB system C with a "flexible and formal advisory panel" is likely to be the most convenient and most satisfactory system for the parties. The opportunity to have preliminary discussions with the DRB and to get some guidance can greatly assist the parties in solving their differences and in maintaining a good relationship. In case the contract still has the engineer ruling in accordance with article 67 of the FIDIC contract, the DRB system C may also assist the engineer when he has to issue his formal engineer's decision. System C is presently used in China on the Xiaolangdi multipurpose project.

The DRB system B "formal advisory panel" can be understood as a compromise between system A and C. Such a system is actually in force on the Lesotho Highland Development Project for the dam and the tunnels.

What kind of agreements should be considered?

Basically two possibilities exist: Either the DRB process is already envisaged at the contract signature and is integrated in the clause related to the resolution of disputes, or the parties decide later on to have a DRB and the contract needs to be amended.

If the parties agree during the tender negotiations to rely on ADR (Alternative Dispute Resolution) techniques and especially to have a DRB procedure, it might be appropriate, for long-term projects, to integrate straight from the beginning a dispute resolution clause in three stages, *i.e.* DRB, mediation and arbitration.[6] Taking into account the comments presented in this article and experience acquired in the field, the following clause could be suggested:

> "In the event of a dispute arising between the parties in connection with the contract or the execution of the works, the parties agree, prior to any arbitration proceedings, to refer the case at first to a dispute review board consisting of three experts. Such reference shall be made in accordance with the conditions set up in appendix XX. The written recommendation of the DRB shall become final and binding upon both parties, unless a notice of dissatisfaction has been given by either party within 30 days after receiving such recommendation.
>
> In the event of one party disagreeing with the recommendation issued by the DRB under the terms of the preceding clause, such dissatisfied party may decide, prior to any arbitration proceedings, to refer in a second stage the dispute to a mediation procedure. This mediation procedure will be conducted by two independent mediators. Such reference shall be made in accordance with the conditions set up in appendix YY. The written recommendation of the mediators shall become final and binding upon the parties, unless a notice of dissatisfaction has been given by either party within 30 days after receiving such recommendation.
>
> In the event that either the procedures have failed and that the parties have complied with the notification deadlines as set up in the previous two paragraphs, all disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules."

Concerning the standard contracts, the FIDIC first introduced the concept of the dispute adjudication board in late 1996 as an alternative to the role of the engineer (*Supplement to the fourth edition of the Conditions of contract—Red Book*—article 67). This first and innovative attempt to modify the rôle of the engineer and "... to replace him as the 'decision maker' by a dispute adjudication board ... " has recently been confirmed by article 20 of the test edition of the Red Book issued in September 1998. The intention and initiative of the FIDIC to modify the previous contractual framework employer/contractor/engineer should be welcomed. The suggested new model clause is still under examination and should be used with some reservation: Several corrections and amendments are to be expected before the issue of these conditions in the first half of 1999. The suggested and provisional adjudication agreement with the DRB member and the procedural rules are attached to this test edition.

[6] "Soft and Hard Arbitration" by Pierre M. Genton and Francois Vermeille (*International Business Law* 2/98).

Up to now, in most cases, the parties decided or were compelled in the course of the project to implement a DRB procedure. Two agreements were signed: one between the parties in form of an amendment to the main contract between the employer and the contractor, (integration of the DRB system in the dispute resolution clause, procedural aspects, schedule, appointment of board, principles of compensation, etc.) and one between the parties and each DRB member (procedural aspects, obligations of the parties and of the DRB members, terms of compensation and so on).

When should a referral be made to the DRB?

If the DRB system is already included in the provisions of the contract, the parties should make use of it. Beforehand, it is advised that the parties should exhaust the subject by way of comprehensive direct negotiations. Notwithstanding the positive impact of a discussion with the DRB on potential disputes (if the contract allows for it), a formal referral to the DRB panel is an important contractual step and should be considered as the end of the direct negotiation between the parties, even if opportunities for a settlement by negotiation may still arise after the DRB's recommendation has been delivered.

Experience shows, however, that contractors usually wait much too long when a difference or a dispute arises. They consider the use of a third party such as the DRB a sign of their personal inefficiency to solve the case. In some cases, project managers may even want to protect themselves from the higher management.

How should the DRB panel be appointed?

The method of appointment of a DRB panel is in most cases similar to the method used for most "ad hoc" arbitration: Each party nominates one member and these two members nominate the third member, usually the chairman. However, the DRB members should remain free to decide among themselves who should take over the chairmanship. It is an advantage that the already appointed DRB members have the opportunity to select the third member, as they will work together for several years. Some consideration should also be given to the fact that, for the nomination of the chairman, the nominated DRB member should have the opportunity to seek the approval from the party having appointed him.

In case of a disagreement or failure by the DRB members or the parties either to appoint, or to replace a DRB member, it is useful for the contract or agreement to allow a neutral organisation to appoint the missing DRB member(s).

The DRB members are generally appointed for an initial two year period. This period is fixed and cannot be reduced by the parties. The agreement is usually re-conducted by both parties on a year by year basis. The DRB members are clearly independent from all parties and will act impartially. It may be useful to consider whether the contract should prescribe that the nationality of the DRB members must be different from the nationalities of the parties. Concerning the competence and the background of the DRB members to be selected, a balance should be required of international expertise and experience in engineering, contract management, legal aspects, and dispute resolution. Therefore, it is advisable that not only engineers with contractual/legal experiences should be considered potential DRB members, but also lawyers with experience and interest in engineering projects. The ideal composition of a DRB for a long-term contract seems to be two engineers and one lawyer. The arbitration panel could be made of two lawyers and one engineer.

Some procedural aspects of a DRB

Should a deadline be fixed to the DRB for rendering a recommendation?

The FIDIC conditions of contract stipulate a fixed period for the DRB to render its recommendation (84 days after having received the reference). Both the parties and the DRB should bear in mind that the time required for making a decision and preparing a motivated report depends on the complexity of the issue. A case dealing with time-related charges or delays will require more time than a case related to issues of principle such as price escalation or currency fluctuation. If a standard period has to be included in the contract or in the agreement as a guideline for the DRB to render a decision or a recommendation, the parties and the DRB should nevertheless remain flexible and be ready, on a case by case basis, to adjust the time necessary to prepare such a recommendation.

Should a deadline be given to the parties to reject a DRB recommendation?

In order that a recommendation issued by the DRB may efficiently assist the parties in clarifying their respective intention and in solving the matter of dispute, it is compulsory to prescribe to the parties a limited deadline to reject the recommendation. The dissatisfied party should be compelled to notify the other party in writing of its refusal to abide by the recommendation of the DRB. If it fails to issue such a notice of dissatisfaction, the recommendation becomes final and binding. A period of about one month seems adequate. The FIDIC recommends 28 days.

Binding decision or non-binding recommendation?

This is a very delicate issue, as it dictates the efficiency of the DRB system.

A non-binding recommendation may assist the parties in solving their dispute but may also be considered only an advice. The losing party, following the view that the DRB was not competent or fails to understand the matter at stake, may have a passive attitude and decide to wait and see. This might be a deadlock for the winning party or an opening for legal proceedings. The DRB recommendation will certainly have some importance in legal proceedings but may not assist the winning party which might for instance, be short in cash.

A binding decision by the DRB is a very tough approach for a dispute resolution. The DRB has the power to immediately enforce the decision and the parties have no opportunity to appeal against such a decision. The losing party has no more means to react and still has to live with the DRB for years. Such a system, while effective, does not give any protection to the parties and is risky. It may even be questionable in regard to public order.

A semi-binding recommendation seems to be an appropriate system in terms of efficiency of the DRB. The DRB is requested to issue a decision which has to be implemented without delay but which also leaves the opportunity to all parties to challenge it before a court. However, such a challenge does not have a suspending effect.

At the present time, most DRBs are requested to issue non-binding recommendations. In order to limit the financial and financing impacts when a dispute is not solved in the course of the project, it may be preferable both for employers and contractors of long-term projects to consider the third solution, which is the semi-binding recommendation. Such a decision is difficult to make and shows the importance of selecting the appropriate DRB members. Such a semi-binding solution has been selected for instance on the Tagus Bridge and the Channel Tunnel projects.

Automatic start of legal proceedings?

In some contracts, the parties have agreed that, if one party objects to implementing a recommendation of the DRB, legal proceedings will start automatically. Not only is a deadline given to the parties to reject a DRB recommendation, but the dissatisfied party is compelled to submit its request for arbitration within a period limited in the contract. (On the Tagus Bridge, this period is 20 days after the date of receipt of the recommendation).

Such a clause may look efficient but should be rejected on the ground that it destroys the basic principle of amicable settlement of a dispute: as soon as the claimant refers a dispute to the DRB, the files should be ready for a request for arbitration. In such a case, the DRB system can be considered the first step of legal proceedings. Furthermore, difficult legal issues may arise if several disputes are referred to the DRB in the course of the project. For each of the disputes a request for arbitration would have to be filed and this would lead to endless proceedings, to a hardened relationship between the parties and to a slower progress of the works. Therefore, the parties should avoid prescribing a deadline for launching legal proceedings.

Should the DRB report be prevented from being submitted in legal proceedings?

A DRB recommendation worked out by an impartial and independent panel of experts can be considered as an expert witness report. The tribunal will become aware of the DRB involvement and it would be keen to know the content and the justification of the disputed recommendation. The tribunal remains, however, totally free to consider or disregard the recommendations of the DRB.

There are no objective reasons why a DRB recommendation should be prevented from being submitted to the tribunal. It is not certain that a specific restriction included in the contract would be legally acceptable; in any case it would be contra-productive and may even increase the cost of the proceedings.

Should the DRB member be prevented from acting in legal proceedings?

One party may be keen to appoint a former DRB member as an arbitrator, counsel, consultant or witness, because this member already knows the case and is appreciated by the party. Furthermore the DRB member may have been on site and could testify as an "expert witness in real time".

Any former DRB member who has already expressed himself on a case should not act as an arbitrator, counsel or consultant appointed by one party. He has already given his opinion as an independent person and may not have a fully unbiased approach to the problem by defending his recommendation.

Concerning the testimony of a former DRB member, opinions may differ. Taking into account that a DRB member has been a quasi "witness in time", it might be of interest to the tribunal to hear such a witness. The DRB member, in his testimony or affidavit, should limit his statements to facts and should not deal with assessments.

The DRB referral and recommendations

It is important that all parties concerned, including the DRB, know in advance on what basis the DRB will issue its recommendation. A five-phase procedure is usually recommended and can be included in the agreement with the DRB.

(a) Notice requesting a DRB recommendation

If one party is either dissatisfied with the response of the other party to his claims, or with the engineer's decision (in FIDIC contracts), the claimant is invited to send an advanced notice to the other party, with copy to the DRB, of its intention to request a DRB recommendation or decision on a specific subject. The purpose of such a notice is to give the defendant the opportunity to mobilise the necessary resources and to inform the DRB of such a referral (timing, programme of hearing, organisation).

(b) Position paper

The claimant should prepare a concise position paper, not only explaining his point of view but also responding to the arguments developed by the other party (and the engineer) in the course of the negotiation. The relevant contract documents, the correspondence, the request for an engineer's decision and the engineer's decision (if relevant) should be attached to the position paper. The defendant is then called to prepare a concise paper representing his position with the relevant enclosures, which should be submitted within a prescribed time (for instance 30 days after receiving the claimant's position paper).

The DRB's preparation starts with the reading of the documents. Depending upon the complexity of the case, the DRB will meet before the hearing in order to organise the hearing, exchange preliminary views, prepare a preliminary list of questions and additional documents and make the necessary arrangements for the preparation of the recommendations.

(c) The hearing

A hearing will be held on site, preferably 30 days after having received the position paper of the defendant. It should last not more than 10 days. The hearing basically consists in a three step process. A presentation of the case by each party, a discussion with the DRB asking for some clarifications and/or questions (a written questionnaire may be handed over to the parties), and finally the answers by each party. The engineer, as the case may be, will participate in the debates. A concise written summary of the presentations is expected to be submitted at the end of the presentation. The responses to the questions are supported, if possible, by a written document.

Taking into account that the DRB procedure is an amicable way of settlement and depending on the nature of the relationship between the parties, the DRB may be willing to conduct the hearing in an informal way, and even start discussions already during the presentation of each party.

(d) The deliberation

The DRB will start the deliberation on site after closing the hearing. Immediate reactions are collected and a first outline of the recommendation is drawn. As the case may be, an immediate drafting of the final recommendation is possible in some cases. However, as the cases submitted to the DRB are usually large and complex, the DRB needs some time of reflection and should not be pressed by time. The final deliberation will take place after the DRB has written its preliminary report in the home office.

(e) The reporting

Some contracts require the DRB to formulate its recommendations on site, the intention of the parties being to finalise the matter as quickly as possible. This is an unrealistic approach (wishful thinking), as the cases brought to the DRB are in general complex cases with a lot of money involved. Usually, a huge amount of paper is exchanged. Therefore, in order to make a serious recommendation or decision with the support of adequate contract and technical references, the DRB is compelled to write its final report in the home office. In practice, a DRB report can be issued within 1–2 months after the end of the hearing.

DRB versus arbitration or other ADR techniques

It is a custom to include the DRB in the alternative dispute resolution techniques and to compare DRB with arbitration. The DRB should be understood as a complement to arbitration. It should be required to issue either a non-binding recommendation or a decision against which it can be appealed in legal proceedings. If the DRB has to issue a binding decision, it may be seen only in competition with arbitration.

In the course of the project, the parties, in direct negotiations, may feel compelled to reject a compromise when considering the amounts to be paid. The recommendation issued by the DRB as a third party can be an escape route for the management to protect an appropriate relationship between employer and contractor, as well as a warning for both parties against any legal proceedings.

Compared to the other ADR techniques, such as mediation, mini-trial, MED-ALOA and soon, the DRB system has the great advantage to follow the project step by step, to be available to the parties at any moment from an early stage of the dispute. The parties should therefore take into consideration the following:

- The effectiveness of the DRB system: the advisory rôle can be required at an early stage already. The parties often overestimate their ability to solve a dispute in a negotiation process. Sometimes the responsible manager may need to justify his own case and his behaviour in front of the senior management.
- The rôle of assistance of the DRB: the DRB can be requested first to act like an advisory board discussing some principles of a potential dispute. In case of a referral, the DRB may be asked to issue just a recommendation on principles, leaving the parties to define the "quantum" and to

settle the core of the dispute. This is different from the more formal approach, where the DRB is in the position of a pre-arbitration tribunal as the penultimate means of solving a dispute.

The referral to a DRB near the end, or even after project completion, may not always be the most appropriate way of solving disputes. Why not use the agreed DRB system at an early stage, why spend money on an inactive DRB? If the project has been developed without the use of a DRB system and the disputes arises at the end of a project, it may be preferable to use the mediation process.

In case of long-term projects with large and complex claims related, for instance, to delays, acceleration of the works or loss of productivity, the parties may wish, before referring the case to long and costly arbitration proceedings, to have an additional opinion and/or be sure that all opportunities for an amicable settlement have been exhausted. It is therefore possible to introduce in the contract, instead of a two-step procedure such as DRB and arbitration, a three-step procedure which includes a DRB, mediation and finally, if necessary, arbitration. The other so-called ADR techniques are no longer alternatives to the DRB system but rather complementary systems.

Summary and conclusions

The use of the DRB concept means that the parties should have the intention to act in good faith and be ready for compromises. This is not always the case, but more and more organisations should be able to see their own interests in following the recommendations of the World Bank, the Asian Development Bank and the FIDIC.

The concept of the DRB is a very appropriate means of solving disputes in long term contracts. It is not time consuming, remains flexible (if used adequately), is efficient in solving disputes at an early stage, protects the commercial ties and the image of the parties and is cost effective if compared to arbitration. The success rate of the DRB all around the world is impressive.

The DRB concept is a flexible approach which entirely fits in with ADR techniques and with other legal proceedings. It has been developed for large long-term contracts, but can also find its application for smaller contracts. The idea of a mini-DRB with a single panel member is another alternative for small and local projects.

Finally, a DRB should never be looked at as an alternative to arbitration. It is true that the DRB is a procedure which limits the number of disputes referred to legal proceedings. Every efficient and fair lawyer looking at the legitimate interests of his client will try to limit costly and lengthy legal proceedings. The DRB should become a convincing tool not only for his client, but also for his own activities. Lawyers should be ready to work on DRB panels together with engineers and economists.