



# Forum

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## To Admit or Not to Admit DRB Recommendations: That is the Question

By Kurt Dettman

In considering the drafting of DRB specifications, one of the topics that often comes up is whether DRB findings and recommendations should be admissible in legal proceedings that could follow the DRB process. This article will explore some of the pros and cons of admissibility vs. inadmissibility of DRB findings and recommendations in later legal proceedings.

### The DRB Hearing Process and Recommendations

Most DRB specifications provide that the DRB will implement a relatively informal hearing process on any claims that it is asked to consider. The hearing process typically includes exchanging of position papers (with back-up) and holding a hearing where the parties present their respective positions. By design, the hearing does not have the trappings of an arbitration or litigation process such as keeping of a formal record, swearing of witnesses, marking of exhibits, and the like. Most notably, DRB specifications discourage the use of or participation by legal counsel; instead, claims are typically presented by the people who are actually building the project.

After the informal hearing process, the DRB issues detailed findings and recommendations (which I will refer to collectively as “Recommendations” in this article) on the issues in dispute. The Recommendations usually focus on the circumstances and events on the project from a construction and engineering standpoint, with more emphasis on the technical specifications and plans than on the front end legal terms and conditions. Although “legal” issues may be raised, they often are not determinative of the outcome recommended by the DRB. (After all, most DRB members are selected for their technical expertise, not for their ability to wend their way through a thicket of legal issues).

If the DRB’s Recommendations are not accepted by the parties, the claim usually moves on to a legal proceed-

ing, most often arbitration or litigation. Here, the lawyers take over and the proceedings switch to more of a legal track. Although there will still be appropriate respect paid to the events and circumstances of the project from a construction management and engineering standpoint, the legal proceedings are couched in terms of contractual rights, responsibilities and remedies, and the front end terms and conditions often become the focus of attention and emphasis. One party or the other (or perhaps both) may want to use (often selectively) parts of the DRB Recommendations to argue that the arbitrator or court should adopt the DRB’s Recommendations (or parts of them). This squarely confronts the issue of whether or not a party should be able to introduce into evidence, and whether an arbitrator or court should give persuasive or preclusive effect to the DRB Recommendations.

### The Arguments for Admissibility

Those who favor admissibility advance the following arguments:

1. DRB Recommendations are usually non-binding. Thus, there is nothing other than persuasive authority that prevents a party from rejecting the DRB Recommendations. If, however, the party had to “live with” the Recommendations in a later legal proceeding, it will require the party to think long and hard about rejecting it, since an arbitrator or court might be inclined to adopt it as is. Thus, fear of the (potentially dire) consequences in downstream legal proceedings if DRB Recommendations are adopted by an arbitrator or court will motivate the “losing” party to accept the DRB Recommendations, or use them as the basis to negotiate to settle the claim.
2. DRB Recommendations are the product of a thorough vetting of the claim by neutral objective experts in the construction field who are familiar with the events and circumstances of the project - why should the parties have to “re-try” the claim again before an arbitrator or court when the parties have already invested the time and effort to fully explore all aspects of the claim?

In effect, the DRB Recommendations could be considered a form of expert determination that the arbitrator or court should be able to rely on and not have to replicate through another round of evidence and experts presented by the parties. If the DRB Recommendations can be taken into account in the arbitration or litigation, it will have the added benefit of saving process time and money.

3. The value of the DRB process is to persuade the parties, through a thorough vetting of the parties' positions before project-knowledgeable industry experts, to resolve the claims without resorting to time-consuming, expensive arbitration or litigation. If parties are able to ignore the outcome of the DRB process, it will undermine the value of, and the parties' commitment to, using the DRB process to settle their disputes. A lack of faith in the process may suggest to one of the parties that the other does not take the process seriously or is simply using it as a bargaining chip for negotiations.

4. If there is a concern about wholesale admissibility of the DRB Recommendations, the specification can be drafted to make only the Recommendations themselves admissible, not the entire record of the DRB process. Moreover, the parties can expressly reserve the right to argue why the arbitrator or court should not rely on the DRB Recommendations in whole or in part.

### **The Arguments Against Admissibility**

Those who favor inadmissibility advance the following arguments:

1. DRB Recommendations are meant to be non-binding in order to let each party fully control its own destiny - in other words, the DRB is merely giving the parties recommendations that will help them, at the project level, decide to accept the Recommendations or negotiate some other mutually acceptable resolution. The mutual selection of neutral expert advisors and the presentation of the claim by project participants in a "get the facts out on the table" process should be adequate persuasive power to encourage the parties to accept the Recommendations or use them to negotiate a resolution. If they do not accept the Recommendations, then the parties can resort to a more "legal" proceeding with a full reservation of rights to assert claims in a new proceeding independent of the project level dispute resolution process. This is no different than mediation, where the parties usually expressly agree that their presentations and the feedback from the mediators are inadmissible and that the "clock re-starts" if they go to arbitration or litigation.

2. The DRB process is deliberately informal and does not have what lawyers consider to be "process protections" such as formal discovery of documents and witnesses, a stenographic record, fact and expert witnesses under oath,

the right to cross examine witnesses, etc. In contrast, arbitration and litigation incorporate these processes as the bedrock of the system. Moreover, the process in arbitration or litigation will be controlled and implemented by the parties' lawyers, not the parties' principals as it was in the DRB process. So, the net result of permitting DRB Recommendations to be admitted and potentially have preclusive effect is to take the outcome of an informal process without "process protections" and use it in as an offensive club or defensive shield in later arbitration or litigation.

3. If the DRB Recommendations are to be admitted and potentially have a preclusive effect in subsequent arbitration or litigation, then the natural tendency of parties (perhaps encouraged by their lawyers) will be to build into the DRB process more of the "process protections" that they would otherwise have in arbitration or litigation. The importation into the DRB process of more formal "legal" processes would then undermine the fundamental character of the DRB process as an informal, efficient project level dispute resolution process.

4. Even where parties reserve in the DRB specification the right to argue about admissibility or preclusive effect in subsequent arbitration or litigation, all the parties are doing is transferring the battle into the arbitration or litigation process. Thus, not only are the parties fighting about the claim as presented in the arbitration or litigation (which may have different or additional issues in play), but they are now also arguing about what happened (or didn't happen) before the DRB that makes the DRB Recommendations reliable (or not). Worse yet, they will be arguing about what the DRB did (or did not do) in its Recommendations as later interpreted by the parties. And as a further complication, DRB members typically cannot be called as witnesses, so the parties can have a field day debating about how the DRB Recommendations should be interpreted or implemented without the people who actually wrote them being at the table.

### **Conclusion**

As with so many issues involving DRB practices, there is not a "right or wrong" answer here. However, drafters of DRB specifications should consider the arguments, pro and con, and make a thoughtful choice about whether the DRB Recommendations should be admissible in subsequent legal proceedings.

*Kurt Dettman is the principal of Constructive Dispute Resolutions, an ADR practice specializing in all aspects of dispute avoidance and resolution in the construction industry. He has written extensively about DRBs and conducts training on DRB practice and administration. Kurt is on the DRBF President's List and co-chairs the DRBF Transportation and Energy Committees. He can be reached at [kdettman@c-adr.com](mailto:kdettman@c-adr.com). Kurt wishes to thank Blase Reardon and Jim Groton for their valuable input on this article.*