

Admissibility of Nonbinding Written Dispute Board Recommendations

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In the United States, the trend towards use of Dispute Boards currently favors informal Dispute Board proceedings, and is moving away from formal dispute hearings. It is a rare Dispute Board that even holds formal dispute hearings, because the Dispute Board members are able to create a context of cooperation and collegiality, and are able to encourage the parties to jointly arrive at solutions for unexpected events that may arise during the progress of the work.

The University of Washington, my favorite example, was an early adopter of Dispute Boards in its capital projects on its three college campuses within the State of Washington. Over the past 20 years, UW has implemented more than 60 Dispute Boards on its various capital projects, which projects had an aggregate value of over \$6 billion US. During that time, the various Dispute Boards on UW projects convened only 2 formal hearings and 4 informal hearings, for a lifetime average of one formal hearing per decade. The major distinction between “formal” and “informal” proceedings is that the outcome of a formal hearing is a written recommendation, and the outcome of an informal hearing is a verbal recommendation. The Dispute Board model utilized by the University of Washington was a proactive, involved Board, integrated into the project progress, meeting regularly with the project staff prior to any identified “disputes” arose. The prophylactic effect of Dispute Boards on projects has been noted.¹

Generally in the United States, the contract language that creates the Dispute Board provides that the determinations of the Board will be non-binding recommendations, even when the Board has held a formal hearing and renders a formal written determination. Accordingly, when a Dispute Board does render a formal written recommendation to the parties, one of the parties may reject the recommendation, and may pursue its position in a subsequent arbitration or litigation.

Under what circumstances will, or should, the Dispute Board’s recommendation be admissible in that subsequent litigation or arbitration? Surveys of users of dispute boards indicate that lawyers are more inclined to favor exclusion of the Dispute Board’s recommendation, and that non-lawyers who participate in dispute board proceedings favor admissibility.

¹ See, e.g. James P. Groton, “The Standing Neutral: A “real time” resolution procedure that also can prevent disputes”, *Alternatives to the High Cost of Litigation*, Volume 27, Issue 11 December 2009, pages 177-185

In the United States, the admissibility or exclusion of a non-binding recommendation of a dispute board will be evaluated in light of the contractual language that establishes the Dispute Board and its operations, and also in accordance with the applicable Federal (or applicable State) Rules of Evidence. In Federal courts, relevant evidence is admissible unless otherwise precluded by the Federal Rules of Evidence or by statute.² However, relevant evidence may be excluded if it is confusing or prejudicial.³

In general, the various State and Federal rules of evidence consistently provide that hearsay evidence is not admissible in a judicial proceeding.⁴ Hearsay is often described as a statement made out of court, which is repeated in court to establish the truth of the matter stated.⁵ Hearsay evidence is considered to be generally inadmissible because its credibility is inherently dubious, and because it is not subject to cross-examination during the judicial proceeding. However, there are numerous exceptions to the rule against the admission of hearsay in a judicial proceeding.

One exception that could be applicable to a non-binding determination of a Dispute Board is the “business records” exception,⁶ which provides that records created or received in the normal course of business are admissible. If the owner is a public agency, another possible exception to the rule against admission of hearsay evidence that could apply to a written recommendation of a Dispute Board is the “public records” exception.⁷ Records created in the normal conduct of business are generally understood to be more reliably credible than other forms of hearsay evidence.

Expert opinions are also generally admissible, when the use of the expert opinion will clarify a technical point⁸, and in rendering their opinions, experts are not

² Rule 402, Fed. R. Ev.

³ Rule 403, Fed. R. Ev.

⁴ Rule 802, Fed. R. Ev.

⁵ See, Rule 801, Fed. R. Ev.

⁶ Rule 803(6), Fed. R. Ev.

⁷ Rule 803(8), Fed. R. Ev.

⁸ Expert testimony is admissible when “(a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.” Rule 702 Fed. R. Ev.

limited to their personal knowledge, but may rely on information furnished by others.⁹ The contract may provide that the Board recommendation will be admissible to the same extent as an expert report. In these circumstances the recommendation would not be admitted for the purpose of establishing a dispositive determination, but as information to guide the trier of fact in the subsequent proceeding.

The determination of admissibility of evidence is within the province of the trier of fact. If the contract states whether and to what extent or for what purpose the recommendation is to be admissible, the court may choose to end its inquiry with the contract language, but the court may also choose, notwithstanding the contract language, to render its own determination as to the admissibility of the Board recommendation.

The drafter of the Dispute Board contract provisions should establish the parties' intentions with regard to the admissibility of the Board recommendations. The decision as to whether the Board recommendations should be admissible should be based upon evaluation of competing considerations. Owners who favor efficiency will want the Dispute Board determinations to be admissible, while Owners who are loathe to give up control of the matter to third parties will want to retain a second opportunity to present their position uncolored by any presumptions.

A. Considerations supporting admissibility

1. It is what it is. Three individuals, selected for their relevant training and experience in similar matters, have determined the merits of the matter.
2. It is inefficient, expensive and wasteful of resources to re-litigate matters already considered by a competent, neutral and informed evaluators.
3. The expertise and training of the Dispute Board members, as well as their personal involvement and familiarity with the conditions of the project renders them more qualified to evaluate the matter than a jurist or even an arbitration panel of construction specialists.
4. The qualifications and the knowledge accrued by the Dispute Board members could justify classifying their recommendations as a form of expert opinions, which may, under the rules of evidence, be presented to a judge, jury or arbitration panel to explain technical considerations.

⁹ "An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed." Rule 703, Fed. R. Ev.

5. The underlying project documents and professional analyses that were presented to the Dispute Board, and which formed the basis of the Dispute Board's recommendations, were all admissible records.
6. The DRBF Manual recommends that the recommendations be admissible as a best practice.¹⁰ The manual was compiled and peer reviewed by experienced dispute board panelists who participated in hundreds of projects having dispute boards.
7. The admission of a Dispute Board determination into evidence is not dispositive of the issue (otherwise the Board's determination would be binding); it merely informs the ultimate decision of the judge or arbitrator.
8. Courts have granted binding decisions of Dispute Boards the same deference as arbitration awards, subject to review only if arbitrary, capricious, or lacking a rational basis.¹¹

On the other hand, particularly for those who are skeptical of the Dispute Board process, there are competing reasons to exclude consideration of the Dispute Board determination from a subsequent proceeding.

B. Considerations supporting exclusion.

1. The quasi-judicial decision of the Dispute Board was rendered without benefit of safeguards for due process. No procedural rules are in place, no rules of evidence prevent the introduction of incompetent information, no cross-examination allowed a party to expose the flaws in the information introduced by the other side. Witnesses do not swear to the truth, and documentary evidence is unauthenticated. No lawyers were present to monitor, to object to, to challenge or to rebut incompetent evidence.
2. The Dispute Board proceeding can be considered a form of mediation; the results of mediation proceedings are, by statute, deemed confidential, and non-admissible.
3. Alternatively, the Dispute Board proceeding can be considered analogous to a non-binding arbitration; the results of non-binding arbitrations are typically inadmissible, and are used solely to establish entitlement to recovery of attorneys' fees and costs.

¹⁰ Section 2.8.3 Subsequent Dispute Resolution Activity, User Guide, *DRBF Practices and Procedures*, revised January 2007, www.drb.org/manual_access.htm

¹¹ See, eg., *Excel Group, Inc. v New York City Tr. Auth.*, 28 A.D.3d 708, 814 N.Y.S.2d 220 (N.Y.A.D. 2 Dept. 2006); *Massachusetts Highway Dept. v. Perini Corp.*, 79 Mass. App. Ct. 430, 947 N.E.2d 62 (Mass. App. Ct. 2011).

4. Alternatively, the Dispute Board proceedings could be considered analogous to settlement negotiations, or the Dispute Board determinations may contain references to settlement negotiations. Offers to compromise or settle a matter are not admissible.¹²
5. The essential purpose of classifying the Dispute Board's decision as "non-binding" rather than "binding" is to give the parties a second bite at the apple. That second bite will present information in a different light than was shown to the Dispute Board. Proceedings in court and in arbitrations are choreographed, and information is filtered, by advocates on both sides. Certain information that is inconsistent with a party's position may be omitted; other information that was initially ignored may be brought into focus by cross-examination. Admitting the decision of the Dispute Board to the judge or arbitrator could irreparably prejudice the outcome, and could prevent the dissatisfied party from receiving fair and impartial consideration of its claims.¹³

When the contract is silent as to the admissibility of the Dispute Board's determination, then the judge or arbitrator will be compelled to weigh these considerations unaided by any information about the parties' intentions. The intentions of the parties with regard to admissibility should be resolved by the parties prior to the commencement of the project, and the contract should clearly reflect the extent to which the Board's non-binding recommendations will be subsequently admissible. Not every issue needs to be addressed in an identical manner. The contract may specify that some Board decisions (often, decisions below a monetary threshold) are binding, while other decisions are non-binding. Similarly, the contract may specify that some decisions are admissible, while others are not.

¹² Rule 408, Fed. R. Ev.

¹³ See, e.g., *El Dorado Irrigation Dist. v. Traylor Bros., Inc.*, Not Reported in F.Supp.2d, 2007 WL 1113547 (U.S.D.C. E.D. Cal. 2007) where the decision of the dispute board was used as evidence of liability. See also this judicial commentary on a lawsuit challenging a non-binding Dispute Board determination: "One need only look to the fact that the contract in issue contains provisions for a Disputes Review Board made up of three experts in the kind of construction at issue who themselves have taken months to resolve some of these very same issues, only to be asked to reconsider their initial conclusions and then, because their determinations are not binding, to have the issues raised again in this litigation. 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 the decisions of their contractually assembled team of experts." *Kiewit-Atkinson-Kenny v. Massachusetts Water Resources Authority*, Not Reported in N.E.2d, 2002 WL 31187691 (Mass. Super. 2002).

The parties' expectations with regard to the admissibility of the Dispute Board's recommendations may well color their attitude towards the Dispute Board process, and may impact their willingness to accept the recommendations that result from the process.