# Dispute Resolution: Is Civil Litigation Part of the Solution or Part of the Problem?

*The Hon John Doyle AC*[1]

I had a number of discussions with Ian Nosworthy about the subject matter of my speech today. He put forward two propositions for me to consider.

The first is that the courts should discourage parties to civil litigation from litigating until after they have explored settlement, using one form or another of ADR. I use ADR here to embrace all the options, without listing them. The discouragement should take the form of cost penalties, and possibly other disincentives. The courts might go so far as to impose a mandatory requirement that the parties first explore settlement using ADR.

The other proposition is that the courts should change their approach to civil litigation. The paradigm of civil litigation is a system of litigation founded on general rules that provide a single method for dealing with all cases. Our method is the common law adversarial method, using pleadings to identify the issues, and with a standard suite of pre-trial processes intended to enable each party to understand the other party's case, and to collect relevant information. There is some variation from court to court. The process in the Magistrates Court, for obvious reasons, is intended to be simpler and cheaper than the process in the Supreme Court. The proposition is that the procedure in civil litigation should be tailored to the particular dispute before the court.

Underlying the two propositions that I have put before you is the idea that ADR is the senior partner, and civil litigation before the courts is the junior partner, to be consulted only if the senior partner cannot do the job.

Also underlying the propositions is the view that civil litigation is failing to meet its intended purposes, and needs fundamental reform. That begs the question of what are the purposes or

1 The Hon John Doyle AC is the Chief Justice of the Supreme Court of South Australia. He was admitted to the degree of Bachelor of Laws from the University of Adelaide in 1966 and to the degree of Bachelor of Civil Law from Oxford University in 1969. He was the 1967 Rhodes Scholar for South Australia. He was admitted as a barrister and solicitor of the South Australian Supreme Court in 1970. He was a partner in an Adelaide firm of solicitors from 1970 to 1977. From 1977 until 1986 he practised at the Bar in Adelaide. His work at the Bar involved most branches of the law with a substantial involvement in appellate work. He was appointed a Queen's Counsel in 1981. In 1986 he was appointed Solicitor-General of the State of South Australia. He was appointed Chief Justice of South Australia in May 1995.
A Companion of the Order of Australia was conferred on June 2002.
He was awarded Doctor of Laws honoris causa from the Flinders University of South Australia in December 2002.
For a number of years he was a part-time lecturer and examiner in the Faculty of Law at the University of Adelaide.
From 1972 until 1979 he was a member of the Council of the Law Society of South Australia. His Honour was a member of the Legal Services Commission of South Australia from its establishment in 1978 until 1986, and at the time of his appointment as Solicitor-General he was Chairman of the Commission. He was President of the Bar Association of South Australia from October 1993 until his appointment as Chief Justice and had previously served a term as President of that Association from June 1989 until November 1990.
His Honour was appointed Chairman of the Council of the National Judicial College of Australia in 2002, and continues to hold that position.

functions of civil litigation. Unless we first identify them we cannot say whether or not civil litigation is serving those purposes.

Our discussion led me to think yet again about civil litigation as I know it. I intend to discuss the propositions that Ian Nosworthy put to me, and the underlying ideas that I have identified. I also intend to give you my views about civil litigation as a process.

Civil litigation has been a major part of my professional life for about 37 years. For much of that time, judges, lawyers and others have said that our method of civil litigation needs reform.

The process is said to be too expensive, too slow and too inflexible.

There has been enquiry after enquiry, report after report. Most of them are now forgotten. I suspect that you could fill a room with reports on civil litigation in Australia alone, let alone if we include other common law countries.

Despite all this activity, and despite many changes in the legal environment, in the litigation environment, and in court procedures, the same problems remain. As the well known saying goes, the more things change, the more they stay the same.

I agree that civil litigation is expensive. The average person cannot afford to get involved in substantial litigation. Even a fairly well off person could not afford this.

The process is rather slow. The courts used to leave it to parties to control the pace of litigation. Now, in most courts, the court controls the pace, and there are less stale cases washing around in the system. But even so the process is rather slow. But I emphasise that this is usually because of the manner in which the parties conduct the litigation. If parties want to come to trial quickly, the courts can usually accommodate them.

Our procedures are somewhat inflexible. While things have changed, I can read a report of a case from 1907, and indeed from 1807, and understand the process which has been used. And while a lawyer from each of those years would be surprised by some of the things we do today, that lawyer would also recognise the procedure that we are following. There has been some innovation, and we are more flexible than in the past, but the fundamentals have not changed.

The lack of change does not, of itself, prove that the system is defective. The system might have remained as it is because it is a good system.

A cautionary point I make is that cost, slowness and the limited change or innovation are not new. Sometimes people talk as if this is a recent problem. My impression, although I cannot prove it, is that in 1907 and in 1807 people could be found who would make the same criticisms of the civil justice system. Remember Charles Dickens!

The thing that troubles me most is this. Trial judges from all around Australia, in my experience, often make three points about the cases that they hear. First, that when the case came to trial, it was not really ready, and the pleadings were unhelpful. Second, that a fair bit of the pre-trial proceeding proved, ultimately, to be of no great value to the resolution of the case. Third, that at trial too much time was spent on peripheral matters.

This troubles me because the cost of using the system and its relative slowness have usually been justified on the basis that they are an inevitable by-product of a system intended to produce a fair and right result at trial. But if the points that trial judges make are right, a good deal of the pre-trial activity, and so of the cost incurred and time spent, has been to little effect. This is a real cause for concern.

This is how I came to the title that I have chosen for this speech. Have we got to a point at which we should acknowledge that the defects in the system of civil litigation are such that it is part of the problem of dispute resolution, rather than part of the solution. An alternative title, perhaps punchier, would be "Is Ian Nosworthy right?".

I start at the beginning. What are the purposes of our system of civil litigation? Key features are that it is based on law, and once it is engaged the plaintiff can compel the other party to the case to come to the court, and to submit to the court's adjudication.

The system is there because the State must provide a system for settling disputes between its citizens. It must be a system that includes power to compel the parties to come before it, and compel them to abide by its decision. Without that we would have a kind of civil anarchy.

Resort to that system should be a last resort, because people should try to settle their disputes without going to law.

But any person must be entitled to resort to the system of civil justice, if that person wishes to do so. Access to a system of civil justice is a right, not a privilege. So we need to justify an approach that prevents a person from going to court, or penalises them if they do so without first resorting to ADR.

There are categories of civil litigation as to which it can be said that it would be a rational choice to resort first to ADR, and that the interests of justice would also be better served if that happened. By "interests of justice", I mean that a fair and just result will be achieved.

But we also have to acknowledge that there are categories of civil litigation in which there is no objection to a party resorting to the court without first resorting to ADR. There is no reason why a debt collector should not go straight to the Magistrates Court to chase the debtor. There are other kinds of civil litigation as to which one can say that there is no reason why the parties should not go immediately to the court, with its ready made system, rather than look around for a suitable form of ADR.

So my starting point is that there are categories of civil litigation in relation to which one could justify discouraging or preventing use of the court as a first resort, and categories of civil litigation in relation to which one could not justify doing that.

There are other considerations that complicate the picture.

Civil litigation has uses and purposes that mean that putting obstacles between people and the courts requires great care.

Litigation is public. It can be used, and is used, quite properly as a means of exposing a situation to the public gaze. This applies to claims between individuals, and claims against the Government and its agencies. Litigation offers the prospect of an enforceable outcome. Litigation offers a process that involves compulsion, and while it is slow it can finally bring a recalcitrant party to heel, or, as a last resort, punish recalcitrance by deciding against the party. Litigation can be used to develop the law. Litigation is the means by which the common law in particular is adjusted to contemporary circumstances.

For these and other reasons we have to be careful about creating obstacles to resort to civil litigation. Even when experience tells us that the case is in a category such that the first resort should be to ADR, in the interests of economy and justice, there may be reasons why a party should be permitted to go to the court as the first choice. The reasons may be unrelated to the question of the

best method of resolving a dispute of the kind in question.

To say this is not to say that the courts cannot discourage resort to the court as a first option, or penalise those who do so. But, it leads to the conclusion, in my opinion, that there are only certain categories of litigation where this can be done, and even in those categories the obstacles to resort to civil litigation as first choice need to respect and to reflect the wider purposes served by our system of civil justice.

So we can reject the idea that initial resort to ADR should be a general rule, but accept the idea that there may be categories of litigation in which, with appropriate qualifications, this can be the general rule. But even if we narrow the proposal down in that way, there are some other practical considerations to take into account.

First, access to the courts is not free. Those who go to the court must pay court fees unless they can, on an individual basis, establish that they are impecunious. The court fees are substantial. The cost of legal representation is very substantial, and legal aid is, by and large, restricted to people of limited means.

Bearing that in mind, why do we need to create impediments that will encourage litigants to resort to ADR? Are incentives to resort to ADR really needed in the relevant categories of litigation? I emphasise, that I am now addressing those particular categories of litigation as to which it can be said that first resort to ADR is sensible and just.

If civil litigation is slow and costly compared with ADR, I would have thought that is a significant disincentive. My limited understanding of economics tells me that a basic principle is that in an open market rational participants will make rational choices. One might think that the deficiencies of the civil justice system, and the merits of ADR, should be allowed to operate in the market place, and that we should allow parties to make their choice.

If the problem is that potential litigants are not sufficiently aware of the availability and of the value of ADR, should the courts use their powers to turn parties towards ADR? If the problem is lack of knowledge, surely the answer must be to educate the legal profession, who will be involved in most cases, and who are best placed to tell the clients what it is in their interests to do. There is also scope for public education. Punishing the litigant for not resorting to ADR does not seem to be the answer to the problem of education.

We have to bear in mind that people are entitled to make a choice between ADR and the courts. If we are going to deprive them of that choice, or discourage choice of the courts as the first resort, we need to have a very clear justification for doing so, and it must be one that relates to the justification.

I acknowledge that some people will choose to go to court for purely tactical reasons. Some of those reasons will be unworthy ones. A person might resort to court with a view to intimidating an opponent, with a view to deep pocketing the opponent, or with a view to attracting publicity that will pressure the opponent to capitulate. But that is not the usual thing, and it is difficult to establish that that is the reason for resorting to the courts.

So that leaves me giving a heavily qualified assent to the proposition that the courts should impose obstacles or penalties on those who first resort to the courts.

I turn to the second proposition. Why not drop the "one size fits all" approach to litigation? Why not assess each case at an early stage and decide how best that case can be handled, drawing on

a wide range of dispute resolution methods, including ADR, and taking a much more flexible approach to civil procedure if the case is to proceed through the court?

The first answer is that we do not have the resources to take this approach in all courts. The Magistrates Court handles a volume of civil litigation that would make it impossible to make an early assessment of each case, with a view to determining how best it should be handled.

It might be possible to do this in the District Court and the Supreme Court. We do not have enough judges to do it. But our Masters, who handle most of the pre-trial work anyhow, possibly could do this. I suspect that we would need to increase the number of Masters. However, I recognise that if this approach meant that more cases settle, and that more cases settle early in the process, there will be a saving to the State and to the parties that might justify the additional judicial resources.

But there are some issues that this proposal must address.

In South Australia, and I believe throughout Australia, at all levels about 90 per cent of all civil claims settle without going to trial. Settlements occur at all stages along the way to trial. Most informed observers believe that many cases could and should settle sooner than they do. There is a fair bit of judicial effort directed not so much to encouraging settlement, because we know that is likely to happen with most cases anyhow, but to encouraging early settlement.

If 90 per cent of all civil cases will settle, how much should the State invest in encouraging and cajoling the parties to settle sooner? I acknowledge that the effort might also be directed towards encouraging them to settle in a way that will give greater satisfaction.

Second, many experienced lawyers tell us that intensive case management, aimed at encouraging early settlement or, failing that, a prompt trial, is counter productive. They tell us that this imposes costs on the parties, not just on the system, and that they consider the effort imposed on them by intensive case management, and the cost, to be unwarranted. It is difficult for the court to pick the cases in which intensive case management will be worthwhile, and those in which it is not. So in a nutshell we are often told that "front end loading" by early and intensive case management is not wanted and is not productive.

Third, we must be realistic about the situation with which we are dealing, especially in the higher courts. The parties are usually represented by a legal practitioner. The legal practitioner does, or should, know the client's case. The legal practitioner should know that the courts are willing and able, to a significant degree, to modify their processes, and to expedite them, when that is what the parties want.

To what extent should the court be telling the parties or inviting them to consider ADR, or to consider moulding the court processes to the particular case? Our system is based on a substantial degree of party autonomy, and on the role of a skilled legal profession. The profession seem to me to be the key players in this respect.

One view is that if the parties have come to court, the judiciary should get on with it and hear the case.

But the fact that we continue to talk about this issue indicates that there is a problem there. It does appear to be the case that insufficient consideration is being given, in many cases, to adjusting the court procedures to the needs of the particular case.

We should look more closely at why this is so. The proposition that in every case the court should undertake an early assessment of the case, and develop a tailor made procedure, assumes that court control and management is the best way of solving the problem. If it is, then in relation to certain categories of litigation (and I would again impose that limitation) the proposition may be sound. But we first need to be sure that there is not a better and simpler solution.

I agree that our system of civil litigation, at least in the higher courts, has become too expensive, is too slow, and could and should be used in a more flexible manner.

But I have explained, I hope, why the two propositions with which I began cannot be adopted across the board, why the use of obstacles to resort to the courts requires great care, and why the development of court supervised tailor made procedures for each case requires further justification, even if limited to certain categories of litigation.

It is depressing that despite the many enquiries and reports on civil litigation, we have been circling the same problems for the last 30 years. As far as I am aware no-one has yet come up with a solution that has persuaded all of the main players.

The Victorian Law Reform Commission is currently undertaking a Civil Justice Review. At a recent conference I heard an interesting paper by Dr Peter Cashman, the Commissioner heading the Review, dealing with the cost of access to courts.

He refers to the well known Woolf reforms of civil litigation in England. He refers to a number of studies that concluded that these reforms had not succeeded in reducing costs, although they may have achieved other benefits.

He refers to a paper by Professors Peysner and Seneviratne, and an observation that 'in the business world there is virtually an iron law that of the three objectives of improving the business by increasing the speed of delivery, reducing the cost of production, and improving the quality of service, it is possible to improve two out of the three, but rarely all three'. Perhaps we are caught by this iron law, although I am not sure that we can claim that we have achieved substantial improvements even in two of the three.

In South Australia, as in much of Australia, we embraced intensive case management, aiming to increase speed of disposition, reduce cost and improve the overall quality of justice. More recently there has been a re-think, and we have adopted a less intensive form of case management, responding to criticisms from the profession.

We have had virtually no success in reducing costs as far as I can tell. We are moving cases through the system a little faster. But there is still a lot of unproductive activity. And judges still find it difficult to steer a path between strict insistence on procedural rules, and permitting departures from them in the interests of justice. This remains a significant problem.

So, where does this leave us?

We need to remind ourselves of that well known saying by the American journalist H L Mencken. He said:

'There is always a well known solution to every human problem – neat, plausible and wrong.'

My view is that our focus on change has been too much on the courts. We might not have paid sufficient attention to the part played by the legal profession, by the parties themselves, and by other environmental factors. We need to think again about how we encourage change by all participants. We need to focus on particular categories of litigation and litigants.

I do not pretend to have the solution, let alone one that is neat, plausible and right.

I accept that there is a problem. But the problem is only in relation to certain categories of litigation.

And the solution of the problem is not obvious. If a solution is to be attempted, I believe that it must begin by getting the courts, the profession and the regular litigants together. That is easier said than done. And then it requires a sensible identification of the categories of litigation in which there is a problem that can be fixed.

I think that we will achieve change only if we can produce a fundamental shift in attitudes on the part of the legal profession and on behalf of the regular litigators in the relevant field. The courts, believe it or not, will follow. The problem is to get the parties wanting change.

I doubt whether we can do much at all about lawyers' fees. We can exercise some influence over the legal input into litigation, and so into the legal costs, but only limited influence. Litigation will never be cheap.

It is worthwhile trying to identify those categories of litigation as to which early review and tailor made approaches will be attractive to the players. That really is the issue. Unless we do that, nothing will change. And I mean here players on the record, and those off or behind the record, such as insurers, litigation funders, relevant industry groups and the like.

I would not start with the ambitious and global agenda of improving speed, cost and quality. I would identify specific categories of litigation and specific aspects of that litigation where something might be achieved, if the main players can be persuaded to support it.

In all this we have to acknowledge the importance of party autonomy. If the parties do not want the benefit of improved procedures, there is no point trying to thrust them on them.

So there it is. I am having it both ways. Civil litigation is part of the solution, but also part of the problem.

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# The Benefits of Dispute Resolution Boards for Issue Management of Medium to Large Construction Projects

*Graeme Peck*[1] *and Peer Dalland*[2]

## I. Introduction

The scope, scale, duration and complexity of construction projects makes fertile ground for uncertainty and conflicts between parties. Differences of opinion between the contract parties frequently arise on both technical and legal issues. If not quickly resolved, these can lead to expensive and drawn out disputes over a complex mix of legal, technical and factual issues. These problems are magnified with scale of project, but are not limited to "large" projects.

Robert Hunt provided a general overview of the concept of Dispute Resolution Boards ("DRBs") in this journal in 2004.[3] Mention was made of the adoption of the concept by FIDIC and the World Bank, and various examples given of its use on some major infrastructure projects within the USA and internationally.

The concept has regularly been demonstrated to substantially reduce the level of disputation and greatly assist in achieving contract closure at or very shortly after construction completion. These benefits have led to a rapid expansion of its use over the past 10 to 15 years.

Quite apart from FIDIC and **all** multilateral development banks (of which the World Bank is the best known), the ICE, ICC and EU have all now embraced the concept. The international DRBF is presently represented in 28 countries around the world, and the concept is no longer just a 'major project' tool. DRBs[4] are now in common use on numerous contracts in the less than $US30m range.

This paper reviews the development history of DRBs and the key factors which have led to its success.

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1 Graeme Peck was for a number of years a Director of a successful construction company. He commenced his own consultancy in 1984. He was a founding principal of Evans & Peck in 1985 and Managing Director and/or Chairman from then until his retirement from the practice in 2001. He remains active as a Consulting Construction Engineer across a wide range of major projects, is a Grade 1 Arbitrator & currently President, Dispute Resolution Board Australasia. He has been a member of 3 DRBs.

2 Peer Dalland is a Consulting Civil Engineer and Adjudicator. He is a member of the FIDIC panel of accredited Adjudicators and a member of the NSW subgroup of the Dispute Resolution Board Australasia.

3 Robert Hunt, Dispute Resolution Boards, (2004), 23(2), *The Arbitrator & Mediator*, 13-22

4 The terms Dispute Board or Dispute Resolution Board are generic and include the Dispute Review Board (DRB) – USA origin, providing nonbinding recommendations; the Dispute Adjudication Board (DAB) a FIDIC model based on the US model, but which provides an interim binding decision; and the Combined Dispute Board (CDB) which is a hybrid of DRBs and DABs created under a scheme introduced by the ICC in 2002. For convenience of reference, the term 'DRB' used in this paper encompasses all the above variants

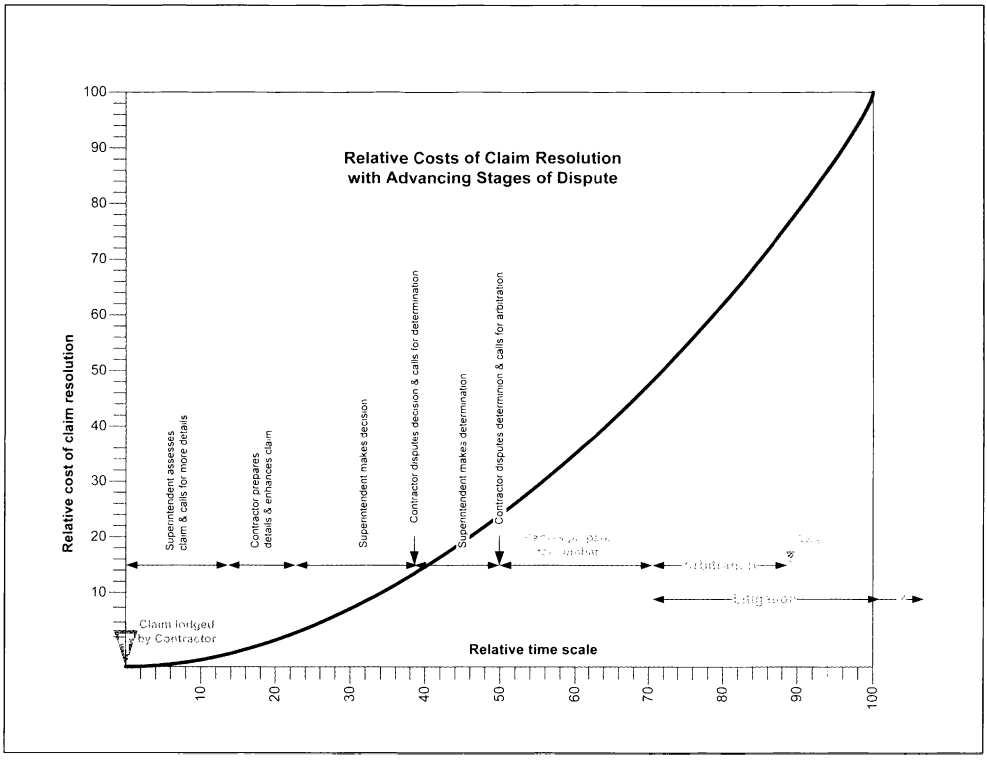
# 2. Alternative Dispute Resolution Processes and DRBs

## *2.1 Commercial Benefits of early issue resolution.*

Figure 1 is a diagrammatic representation of the relative cost of claim resolution between first notification by the normal contract administrative processes at site level and final resolution by one or other of the two usual 'processes of finality' (being arbitration or litigation) incorporated in most contracts if such becomes necessary.

It is self evident from Figure 1 that avoidance of the formal processes of achieving finality should be an extremely desirable commercial objective.

While Adjudication (under the respective Security of Payment legislation in Australian States and Territories) has also become a regular feature of construction contract disputes, it does not lead to a final and binding outcome and dissatisfied parties are then obliged to resort to the dispute resolution mechanism in the Contract to achieve a final and binding outcome.



## *2.2 Conventional ADR processes*

The term ADR embraces various processes for resolving construction disputes, such as Mediation, Conciliation, Expert Determination, Mini-trials and Negotiation. The term is also used to embrace Arbitration, although those who have been involved with that process will be well aware that significant arbitration proceedings can approach the complexity of a full scale court case.

DRBs are also frequently described as an ADR process.

A 1998 survey summarised the experience of practitioners in the field of 'dispute avoidance and resolution' with the various processes then in use.[5] At that time, only 8% of respondents had any direct experience with DRBs. 28% of respondents admitted to "familiarity with DRBs" as compared to 80 to 90% of respondents who were familiar with Arbitration, Mediation and Expert Determination.

The authors' experience over recent years suggests that the majority of the Australian construction industry participants continue to be unaware of the international development of DRBs.

## *2.3 'Dispute Avoidance' benefits of Conventional ADR processes?*

Over recent years there has been a growth industry in conferences and seminars associated with the various ADR processes with the stated objective of '*avoiding or preventing disputes*' in construction contracts.

Unfortunately, most of the conventional ADR processes in common usage in Australia and elsewhere are **reactive** processes – i.e. they are initiated after the dispute event has to a greater or lesser extent become a fact of life. Thus at best they will be activated somewhere around point 6 or 7 on the Figure 1 representation. They focus on minimising expensive dispute resolution procedures, but do little or nothing to assist with the management of **dispute avoidance**.

In reality, many of the ADR processes run in parallel with the commencement of the formal processes of Arbitration and/or Litigation. They may well avoid the extremes associated with the tail of Figure 1, but they can only 'avoid disputes' if **during** the progress of the contract work, they can influence the performance of the contracting parties and thereby avert issues that could, if left, result in disputes.

By comparison, the forum of DRBs emphasises the maintenance of project relationships while resolving disputes in a timely and equitable manner. Thus while DRBs are frequently classed as another form of ADR, they actually contain a fundamental difference. The focus of a DRB from the project outset is on **avoiding disputes**, not merely resolving them at a lower cost than the processes of finality.

5 Peter M Trainer, 'Dispute avoidance and resolution in the Australian construction industry- part 1' (1998) 17 (1), *The Arbitrator & Mediator*, 32-57.

# 3. The DRB Concept

## *3.1 Issue Resolution at the Workface*

Many people with long experience in construction projects strongly believe that resolution of differences at the workplace level is the most desirable objective for sensible commercial relations and least cost dispute management. One only has to consider Figure 1 above to see the commercial reality of that fact.

The concept of a project specific dispute management group external to the project management teams of both contract parties has grown from this belief.

## *3.2 DRB Origins and Growth*

The history of the development and growth of DRBs has been summarised by a number of authors. Three useful references are included in the footnote below.[6, 7, 8] The precise set out following draws upon information contained in the referenced documents and numerous other publications covering the same topic.

The DRB concept originated in the USA. The earliest reported use was on Boundary Dam in Washington in the 1960's. The process worked well and was used as an example for later developments which are summarised following:

- **1972:** study initiated by the US National Committee on Tunnelling Technology into improved contracting practices., which led to the 1974 report – '*Better Contracting for Underground Construction*'.
- **1975:** establishment of a DRB for the Eisenhower Tunnel in Colorado based on the 1974 study recommendations.
  - 'The Eisenhower' example was followed throughout the USA. Regular USA usage grew through the 1980's.
- **1980:** the World Bank used a DRB on the El Cajon Dam and Hydropower scheme in Honduras. The project involved an Italian contractor, a Swiss 'Engineer' and an inexperienced Owner, and was perceived by the Bank as '*potentially difficult*'. The El Cajon DRB was successful.

  International growth really stemmed from the acceptance of the concept by the World Bank.
- **1990**: the World Bank published *Procurement of Works* which comprised a modified FIDIC contract with provisions for DRBs to publish non-binding recommendations.
- **1995/1996:** FIDIC itself introduced a new version of the Design-Build Contract which incorporated as an option Dispute Adjudication Boards or DABs. If the DAB option was used, the Engineer was removed as the first-tier dispute decider. The DAB concept followed the original DRB concept except that the DAB decisions were interim-binding.

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6 *Construction Dispute Review Board Manual*; McGraw Hill, 1996

7 Peter H Chapman, 'Dispute Boards on major Infrastructure Projects' (2006), *DRBA/ACEA Seminar, Brisbane Nov 2006*;

8 Nicholas Gould, 'Establishing dispute boards; Selecting, nominating and appointing dispute board members' (2006), *DRBF 6th Annual International Conference, Budapest, May 2006*