



Forum

VOLUME 9, ISSUE 3

AUGUST 2005

Private DRBs, Part Two

By Len Holm

In the November issue of the *Forum* I reported on the positive input received at the Annual Meeting about the applicability of using DRBs on privately financed construction projects. An informal survey was taken of the 83 participants and 100% of the respondents felt that DRBs could be applied to the private market.

Thirteen members reported in this survey that they already had relevant DRB experiences on privately funded projects. My next step towards this research, which is being conducted in conjunction with the University of Washington's Department of Construction Management, was to get background on those completed projects, specifically from the project stakeholders. I received the following results:

- 2 projects were actually publicly financed
- 1 owner would not allow the project information to be used
- 1 project was not a true DRB
- 3 DRB members did not respond to the second inquiry

Detailed responses were received from DRB practitioners on six truly privately financed projects, with the owner, architect, and general contractors contributing information on four of those. Because the sampling was so

small, a statistical analysis could not be prepared. However, the results of disputes per project (average of 1) and disputes litigated (0) are the same as reflected in the current DRB Database of almost 1200 projects. If any of you have additional experiences on privately funded projects, your input would still be appreciated. Case histories were then prepared in a format similar to that used in the new *DRBF Practices and Procedures* manual. A summary of these six case histories follows on page 16.

The next phase of this research will involve interviews with owners, architects, and general contractors whose primary focus is the private arena. The summary information shown, along with an overview of the DRB process, statistics from the latest DRB Database and results of prior surveys conducted by others will be shared to find out:

- Is outside knowledge of the DRB process primarily limited to the public arena?
- Does the private market feel they do not need DRBs?
- What modifications could be made to the process to make it appeal more to private participants?
- What can the DRBF do to promote the DRB process to other private participants?

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A summary of the six case histories can be found on page 16.

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President's Page

It is astonishing to realize that this is my last letter as DRBF president. This year at the helm has flown by! I am grateful to have worked with some of the finest dispute resolution practitioners in meeting the challenges of our expanding membership and influence throughout the world. I am also humbled by what I have learned about the process and the dynamics of such a diverse professional organization.

One of the biggest challenges I struggled with this year was reconciling the need for an executive director to take the helm in providing full time development efforts and the challenge to fund this new position. I am impressed with the successes Larry Delmore has achieved in a short period of time, and I know that he is fully capable of bringing the DRBF to the next level. I am cautiously optimistic that we will indeed find the needed funds to keep him on board. It is a challenge that every member of our Board of Directors is ever mindful of, as we strive to protect the DRBF's financial health and provide for its continued growth.

This year also saw advances in several developmental areas. Last fall I indicated we would see significant changes in our education and training procedures. We experienced a hiccup mid-year with a change in committee chair, but efforts are now full steam ahead under the leadership of Kerry Lawrence. You can expect impressive results as he and his team move forward in the coming year to roll out new training materials and expanded workshop topics.

One of the more enjoyable aspects of my tenure was participating in the International Conference in Dubai. The dynamics of this meeting took a huge leap this year, with attendance rivaling that of the U.S.-based Annual Meeting. The conference attendees represented a wide range of dispute resolution practitioners working under different legal and cultural modes, but all with their eye on the "prize" of reducing litigation through successful DRB/DAB application.

Part of my role at the meeting was as an instructor, a presenter of DRB principles to those new to the process. But I feel as if I was actually a student, learning from my colleagues who are working the front lines of dispute resolution on a global basis. The demographics of our membership show that the typical DRBF member is U.S. based. However, the fastest growing segment of our membership is from outside the U.S. Each year the demographics of our membership are shifting significantly. It is our challenge, then, to make sure we are aggressively expanding our services to meet these changing needs as they arise. To fail to do so risks losing those new members to someone willing to provide these services.

I urge you all to make the decision today to join us October 8-9 in Denver for the DRBF Annual Meeting and Conference. This year's agenda offers some new programs and working sessions, in addition to networking opportunities and the chance to participate in guiding the future of the Foundation. We will also welcome new Board members and incoming president Harold (Hal) McKittrick. During his tenure on the Board and as chair of the Best Practice Guidelines committee, Hal has demonstrated a true commitment to the principles of the Dispute Resolution Board Foundation and to the teamwork that is required to move forward.

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The *Forum* is published quarterly by the Dispute Resolution Board Foundation (DRBF). Any opinions expressed are those of the authors and do not necessarily represent the opinions of the DRBF.

The *Forum* welcomes articles on all aspects of Dispute Resolution Boards, and members are encouraged to submit articles or topics to the DRBF, attn: Editor.

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International

During July the International Committee is holding its fourth virtual meeting at which it is hoped that matters relating to the application for funding by various Country Representatives will be discussed. For those readers not familiar with the availability of funds may I briefly explain that limited seed funding is available from the DRBF for establishing new chapters or for holding initial meetings in order to establish new chapters or to spread the DRB word around. Help is also available in the form of cash, speakers and meeting materials. To obtain more details please contact either your Country Representative, myself or Steve Fox.

Flushed with the success of the Dubai meeting, plans are well on the way for the next International event in Budapest in May next year. As reported in the last edition of the *Forum*, many countries were represented in Dubai and the event was attended by as many delegates as attend the Annual Conference in homeland USA. However I look forward to meeting you in Denver in a few weeks time.

The IC is looking for ways to improve its contact and dialogue with grass roots members and Country Representatives. It is also looking for support for new chapters and for increasing the cover of existing chapters. If you have any ideas or know of any one who may be interested to receive further details then please get in touch. I also request that Country Representatives make contact with your regional IC member and discuss ways of improving the communication and level of assistance and support which we provide.

We are also looking for information relating to existing or planned Dispute Boards. One of the strengths of the DRBF is its capacity to collate data. We have already extensive data in place – however the information is only as good as the entries made. I would urge you to please download the necessary

data forms from the web site and send in the information to keep the data schedule up to date. If you don't have time or can't do this then please just give the details to me or Steve Fox and we will file the entry for you.

The new ICC DB rules are now published as well as new ICE DRB procedures in the UK. The World Bank has now also launched its new "harmonised" FIDIC contract which calls for Dispute Boards to be installed on all projects with a value of \$10M or more. Clearly the trend is moving forward exponentially with new boards to be used on international contracts as a norm and not just as an option in major projects. This will inevitably mean an upsurge in the use of boards and requirements for members. If you need details of any of these procedures then please look up the ICC, ICE, World Bank or FIDIC web sites – in case of problems please contact myself. The ever increased need for boards will mean the need to become familiar with the procedures and to this end various training events are planned in various parts of the world. See the DRBF and FIDIC web sites for details. If you need to set up specific familiarisation events or seminars or workshops in your area then please contact Steve Fox.

There is currently much talk of setting up an accreditation scheme for people who wish to be considered for nomination to international boards selected by nominating bodies. At this time it is only FIDIC and the ICE in the UK who offer such accreditation. However various countries throughout the world are considering the establishment of their own "in country" lists for such selection. This will involve some form of local accreditation. If you consider that your country needs some form of assistance in the establishment of such a list then please get in touch.

Gwyn Owen

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World Bank Liaison

Working with the World Bank Liaison Committee, the International Development Law Institute ("IDLO"), headquartered in Rome, Italy, is collaborating with the World Bank Institute ("WBI") to conduct a distance learning program on the successful use of Dispute Boards. The first audio/video "Dialogue" utilizing the World Bank link system has been set for December, and will involve simultaneous participation of persons in China, Thailand, Vietnam, and Washington DC in a discussion on Dispute Boards.

The aim is to get key government officials of each of the countries to participate, along with representatives from the DRBF. The Dialogue is likely to focus in part on the May 2005 World Bank "harmonized" standard bidding document, "Procurement of Works & User's Guide." Also, it is hoped to have present key staff from the World Bank missions in the three countries, as well as someone from CCPIT, our DRBF partner in China.

The next step will be to arrange a similar Distance Learning program in some of the Latin American countries, where Dispute Boards now are expected to appear in considerable numbers as a result of the "harmonization" program now requiring use of DBs on all contracts financed by IDB.

Gordon Jaynes and Armando Araujo

Education/Training

The trademark applications have been submitted for the DRBF name, the logo and the "Fostering Common Sense Resolution..." tagline under the logo.

We have initiated contact with McGraw Hill to complete the return of the copyright of the first edition of the DRB Manual to the four original authors. We have asked the four original authors to provide the Foundation with a royalty-free license to use the first edition. The purpose of this is to allow the four original authors to continue to use and publish their manuscript as they desire, .

while ensuring the Foundation has a license to reproduce some wording from the original Manual and does not violate the copyright of the original edition. We greatly appreciate the work of the original authors and will continue to recognize them for their contribution to the industry and the Foundation.

Gordon Jaynes and Gwyn Owen continue their fine efforts to integrate the work of the DRBF with other international bodies and provide outstanding programs worldwide.

Larry Delmore has been hard at work creating new training programs for the Foundation. These programs will be an integrated series, using the DRB manual as the primary source document. Review and editing is underway. Larry will present an overview of these programs at the Annual Meeting.

Kerry Lawrence □

(continued from page 2)

Lastly, I'd like to thank my administrative support team - Steve Fox and Ann McGough. Steve has done an excellent job as "ship navigator," making sure we stay on course and tending to all the administrative details. Ann continues to make the Forum a superb publication. She quickly learned to read my mind and often turned my random thoughts into structured prose. She has also taken capable charge of our web site and transformed it into a showpiece for the DRBF and an invaluable, user-friendly reference work. The DRBF is indeed fortunate to have both Steve and Ann.

Sincerely,

Bob Rubin

If you have news about DRBs, DRBF members, or an article to share, we'd like to hear about it.



Deadline for the next issue is October 1, 2005

OTHER NEWS

DRBF Signs Letter of Agreement with ADR Center of Rome, Italy

In June, DRBF President Bob Rubin signed a Letter of Agreement with ADR Center srl of Rome, Italy, for collaboration to produce an introductory seminar in the Italian language on the new ICC Rules for Dispute Boards. The ADR Center srl is an Italian company specializing in training on all means of alternative dispute resolution, and is the only such organization certified to date by the Italian Ministry of Justice. Recently it conducted a seminar in Rimini, Italy, in collaboration with JAMS, San Francisco, focused on amicable resolution of multi-party disputes. The Rimini program enjoyed heavy attendance and wide support among the Italian commercial, academic and legal communities.

Immediately after signature of the Letter of Agreement, work began on the introductory seminar began by Mr. Gilles Blanchi of the ADR Center, and Ing. Igor V. Leto, DRBF Country Representative for Italy. It is hoped the introductory seminar will be conducted in October in Rome. If it is successful, it is foreseen in the Letter of Agreement that the collaboration between ADR Center and the DRBF will continue to offer similar seminars in other Italian cities with companies active in international commerce. The initial seminar is expected to include discussion of the Italian domestic “dispute board” for the Bologna high speed rail link tunnel, and Italian experience on Dispute Boards used on overseas contracts.

Should the requisite interest appear among seminar attendees, it is hope that eventually training workshops on the ICC Rules also will be offered.

New Regional Representative Named for Southern California

The DRBF is pleased to announce that William J. Carlson has agreed to serve as the DRBF Regional Representative for the

Southern California – San Diego area. Mr. Carlson served as president of Walsh Construction Company, Atkinson Construction Company and The Clark Construction Group. Mr. Carlson and Larry Delmore will be developing regional functions to increase awareness of both the DRB process and the DRBF members in that area.

If you are interested in serving as a DRBF Regional Representative, please contact Larry Delmore at lfdelmore.drb@comcast.net.

Seminar in Beijing Being Planned with CCPIT

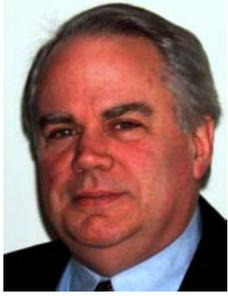


Pursuant to the Memorandum of Cooperation between the DRBF and the China Council for the Promotion of International Trade ("CCPIT"), discussions have begun on an initial joint seminar to be held in Beijing, later this year or early next year.

The Memorandum was signed at the end of 2004 with one of the two dispute organizations included within CCPIT, namely the CCPIT Conciliation Center. (The other organization is CIETAC, which is well known as China's arbitration institution.) The DRBF contact with CCPIT was managed by DRBF member Mr. Lu Chengji.

It is hoped to include in the seminar representatives from the Beijing offices of the World Bank and the Asian Development Bank. CCPIT, being the PRC member of the International Chamber of Commerce, is well-placed to stimulate attendance from those PRC companies and organizations active in international commerce and potentially interested in the new ICC Rules for Dispute Boards.

DRBF participation is expected to be from DRBF members serving on Dispute Boards, or doing other work in China, so that DRBF participation in the seminar will not be burdened with air transportation costs. □



A MESSAGE FROM THE EXECUTIVE DIRECTOR...

Do you have any thoughts on how to tap those of us who are already members of the Foundation, but seem to be the “Maytag Repairmen” when it comes to being considered for appointment to a Board?

I receive many e-mail responses to my columns in the *Forum*, for which I am very grateful.

I work for the DRBF Board of Directors on behalf of the DRBF membership.

These e-mails I receive provide a direct link between my daily efforts and those on whose behalf I toil.

In conjunction with the DRBF Board, I set a series of goals for individuals and organizations to contact to increase the DRBF membership and to spread the utilization of the DRB process.

I also respond to calls I receive from individuals and organizations to make presentations regarding the DRBF and the DRB process.

Then, I receive an e-mail that contains the line first quoted above.

It seems many of us, at times, think we are but “Maytag Repairmen.” Some days, it may seem more true than not.

We have strong CV’s that reflect decades spent at the forefront of the construction industry. We have the ability to see through posturing and can quickly focus on the real issues that need to be resolved. We know how to read a contract, discern plans and specs and how to “follow the money!”

We know we are what the owner and contractor need in order to be able to have a successful DRB.

Yet, we never seem to be called!

The DRBF Board of Directors specified when I took this job that I should not serve as a DRB panel member.

I believe that is a correct decision in that my efforts solely should be directed to increasing DRBF membership and increasing the opportunities for the membership through expanded utilization of the DRB process.

So, I cannot honestly say I know how it feels to be a “Maytag Repairman” in seeking positions as a DRB panel member.

However, like many of you, I am an arbitrator on AAA’s National Panel of Neutrals. At the beginning of last summer, I was queried as to whether I had the time to sit as a panelist on a three member arbitration panel for a large construction case in one of the New England states. I arranged my vacation time accordingly, but I was not chosen.

I felt like a Maytag Repairman!

I knew my thirty years in construction working on claims on five continents would have been sufficient to have been chosen.

I wondered what “extraordinary” CV’s those chosen may have possessed and how deficient might mine have been in comparison.

At the end of the summer, I visited some

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of my last family relatives in New London, CT and walked the granite wall above the Pequot Avenue beaches facing Groton and Fishers Island Sound. It was where I had done some of my best thinking when I was in high school and college.

And, during that walk, looking over the blue waters past New London Ledge Lighthouse and to Fisher's Island beyond, it dawned on me that this place always brought me peace and an ability to think because it not only was a beautiful place of the blending of land and sea, but because it was someplace I knew well.

Comfort always is provided by the familiar.

So, it dawned on me that, perhaps, it was not so much the fact that my CV was deficient that lay at the root of my not being chosen for that arbitration panel as it was my CV was not something that was familiar to those who were tasked with choosing the perfect arbitration panel for their construction dispute.

The familiarity of the other candidates, perhaps, was more important to those selecting the arbitrators than was the depth and breadth of their CVs.

I was reminded of that walk along the granite seawall when I received the e-mail with the "Maytag Repairman" reference quoted above.

I believe it is not so much a lack of qualifications that keep an individual from being selected to serve on a DRB panel as, perhaps, it is an apparent lack of familiarity with the individual held by those making the selection.

Here is what I am going to do to increase membership familiarity.

We will be developing state or regional DRBF chapters. In the fall, we will begin holding DRBF information sessions in various cities around the country, not only for new members and new users, but also for DRBF members. We will also begin the new DRBF training sessions. When new DRB users come on board, we will offer regional meetings and training sessions for users, existing DRBF members and interested new members.

When you hear of a potential DRB user in your area, contact me and we will jointly develop an effective approach to selling them on the benefits of DRB implementation.

When you know of other members in your area who seem to be plagued by the "Maytag Repairman Syndrome," contact me and let's discuss a joint marketing effort targeting existing and potential DRB users in your area.

Let me cite one example. I believe that the entire school construction market (elementary, secondary, colleges and universities) all could receive a distinct economic benefit from the utilization of the DRB process in some form consistent with their regulatory requirements.

I need information concerning how the money flows for these construction projects and who would be the appropriate decision makers with whom to initiate discussions. I also need to know where and when these projects are coming on line.

If you can identify these facts for your area, then together we can determine a joint effort to make the appropriate contacts.

Not only will we be able to make the DRB process more familiar, but we also will be able to make all the extraordinarily talented and qualified members that presently belong to the DRBF that much more familiar to the market that makes those decisions.

Together, I know we can solve the problem of lack of familiarity. Together, I know we can increase opportunities for all DRBF members.

The cliché tells us that all ships rise with the incoming tide. The more successful the DRBF becomes, the more success each DRBF member will enjoy. The more each member contributes to the success of the DRBF, the less chance any member again will feel like the Maytag Repairman.

Help me lead the DRBF to that level of success.

Larry Delmore, Executive Director
T: 781-400-1024 E: lfdelmore.drb@comcast.net



Spotlight on the DRBF's Brazilian Representative

**Country Rep:
Gilberto José Vaz**

Brazil is the only Latin American nation that has Portuguese as its official language. The land area is 8,547,403.5 square kilometers and its population is of approximately 180 million inhabitants. The legal system adopted in the country is the roman-germanic Civil Law.

Alternative dispute resolution is fairly recent in Brazil, due to a strong tradition to prioritize the state official jurisdiction when it comes to legal matters.

Apart from a few early statutes, mainly related to commercial law, the legal treatment regarding the subject can be traced back to the early twentieth century, when both the Civil Code from 1916 and the Civil Procedure Code from 1939 introduced the arbitration regime and roughly sketched its preliminary dispositions. However, the nature of these dispositions could not consolidate the arbitration as an effective dispute resolution system, for problems used to occur even before the beginning of the proceedings, as arbitration clauses were not deemed binding by the judges. The courts would only stipulate the payment of damages to the other party, instead of enforcing the execution of such an agreement.

In 1996, a Federal Law (n° 9.307) regarding arbitration was finally edited, and it considerably increased the incidence ambit of the institute. Later on, the New York Convention (ratified by the Brazilian Congress only in 2002) joined the Federal Law as another specific regulation upon the subject.

Throughout the years, the decisions professed in arbitration procedures have undergone several questionings concerning the extent of their enforcement and their prerogative to exclude judicial

re-appreciation, which presented crucial problems of constitutionality, since the 5th Article, XXXV, of the Brazilian Constitution states that no threat or lesion of rights will be kept away from the Judiciary. In 2001, the Supreme Court of Brazil was asked to declare the validity of these matters and ruled that, as long as the debate remained restricted to patrimonial rights that could be disposed of without any particular impediment, the parties could safely agree to submit themselves to arbitration, for its award would be thereafter protected from any sort of judicial intervention. That represented a great accomplishment in terms of the consolidation of arbitration and implied a substantial increase of the proceedings.

Another important discussion contemplates contracts that involve the Public Administration. These contracts – hereby qualified as “administrative contracts” – are regulated by the Federal Law n° 8.666/93 and, for their public nature, must always fulfill specific purposes, such as complete submission to the dictates of the law. Therefore, in order to be rendered an object of arbitration, they depend upon explicit legal authorization. Regarding the subject, article 42, paragraph five, of the Federal Law 8.666/93, admits the rules and procedures of international financial organizations and the conditions fixated within international agreements or treaties, provided the authorization from the National Congress, can integrate the contract. Thus, if such rules and conditions comprised the adoption of an arbitration clause or other dispute resolution mechanism, they would then be considered effective.

The administrative contracts must also follow another specific purpose, that is, the protection of public interest, which brings about the controversy of the disposability of public patrimony. According to the Supreme Court ruling (2001), it is only possible for the parties to agree on the arbitration

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if the debate remains restricted to patrimonial rights that can be disposed of without any particular impediment. However, there are some authors who believe it is impossible for any administrative contract to ever meet such a requirement, since, according to the Constitution, the public interest cannot be disposed of or negotiated by either one of the parties. Others, on the other hand, based on the distinction between goals and means to achieve the public interest, believe that in all administrative contracts there will always be patrimonial rights that could be disposed of. Anyhow, the matter has yet to be settled by the Superior Courts.

Despite being, by far, the most used alternative dispute resolution method in Brazil, arbitration has not yet been fully diffused around the country. Still, there has been a progress in arbitration procedures as more and more companies adhere to it, something that has also helped to launch the Dispute Resolution Board (DRB) as a new system to resolve contests. The DRB has stepped up to public attention since it was recently included as a clause for the first time in three administrative contracts, signed with the purpose of expanding the subway system in the city of São Paulo (the Board was effectively composed after the signing of the contract, but no matter has yet been submitted to its appreciation). And though this can be considered a breakthrough in terms of repercussion and propagation of the new system, it also pinpoints several doubts that come along with it.

The implementation of the DRB clause in such contracts was done according to the World Bank's Procurement of Works, which mandates the use of binding recommendations in order to assure foreign bidders that their rights to recovery under the contract will be protected. Thus, the parties must promptly give effect to the recommendation of the Board, unless and until the same shall be revised in an arbitral award.

Another disposition (also in conformance to the provisions from the World Bank) included in these contracts prescribes that if neither party gave written notice of objection within 14 days of receipt, the recommenda-

tion would become final and binding. Such "binding in the interim" disposition, however, is quite controversial, given that the Brazilian Law, as previously appointed, only recognizes as final and binding the decisions pronounced by either the Judiciary or the Arbitral Courts, and yet restricted, in the latter, to patrimonial rights that can be disposed of without any particular impediment.

Said restriction, in its turn, is closely related to the issue of contracts that involve the public administration, which require, in order to be rendered an object of alternative dispute resolution, the fulfillment of the two mentioned conditions: explicit legal authorization and disposability of patrimonial rights.

All these considerations are relevant to the validity of the World Bank's DRB procedure's adoption, which, despite the acquiescence from the parties involved, can still be impugned by the Court of Accounts and the Public Ministry. The Brazilian Constitution has granted the latter the role of surveyor of law, and it therefore has both the legitimacy and competence to judicially argue the inapplicability of a contractual clause.

In view of such matters, there has been some apprehension towards the execution of the World Bank's DRB clause in the contracts mentioned above. It is feared that a judicial interpellation might compromise the belief in the institute, and prevent its future adoption among other contracts. It would be better if the DRB recommendations in the subway system contracts were non-binding, as recommended by the DRBF.

Note: Gilberto José Vaz has a degree in Law and in Civil Engineering, and post-graduated in Economics. Mr. Vaz is a certified mediator by Fundación Libra (Buenos Aires, Argentina) and has completed DRBF Chair training. He has worked in the infrastructure segment for the past thirty years, and has extensive experience in administrative and legal litigation. Mr. Vaz is currently the principal of two companies: Gilberto José Vaz Associated Engineers and Gilberto José Vaz Lawyers, with corporate offices in Belo Horizonte – MG and a branch office in Brasília – DF. You may contact him by e-mail at gilberto@gilbertovazassociados.com.br □

DRBF Board Meeting

Summary Minutes

**By Peter M. Douglass,
Secretary/Treasurer**

JUNE 10, 2005 MEETING

A DRBF Board of Directors meeting was held by conference call on June 10, 2005 with 13 directors and officers participating, as well as several invited guests. The following is a brief summary of the discussions and actions taken at the meeting.

Executive Director's Report

Larry Delmore provided a brief summary of his current activities. In June, he is spending the bulk of his time working on new training materials. He expects to have an extensive discussion with Jim Donaldson to ensure a seamless transition in 2006.

Larry indicated he needs assistance from the Board of Directors on his education initiative working with colleges and universities.

He will be participating in a kickoff with Connecticut DOT on their new DRB program. The first step will be looking at who is available to serve on their Dispute Resolution Boards.

In NY, he's made contact with someone at the MTA (subway system). They have a significant construction program, and want an expanded pool of qualified board members within a days drive. Larry is talking with them about putting together a program, and encouraging them to join the Foundation and take advantage of our training programs. He is also coordinating with the Moles to identify people who might be good local DRB candidates.

Larry was asked for an update on the meetings being scheduled with DRBF regional reps and law firms in those

regions. The two meetings that were in the works got sidelined by a court case and a vacation. Larry indicated that because of vacation schedules, we won't see much activity on that effort this summer, but can expect activity in September and October.

Treasurer's Report

Pete Douglass stated that we are slightly better off than the last report. The Foundation has collected another \$5,000 in one-time contributions for a total of \$29,000.

The Board analyzed the budget figures with particular emphasis on expenses related to the executive director position and projected expenses through the remainder of the year and in 2006. Although detailed budget forecasts have not been completed for 2006, the Board discussed the significant savings that could be realized by using the ED and local DRBF volunteers as instructors. Additional revenue is expected to come from added membership (dues revenue) and workshops. The bottom line of the Treasurer's report is that we are closer to having a course forward in reaching the funds necessary to fund the ED position for another year.

Grades of Membership

Hal McKittrick reminded the group that in Chicago the Board approved two parts of the proposed plan – to have a tiered approach, and to base it primarily on qualifications. Discussions went into the details of identifying the qualifications, and the Board decided his committee should present the proposal in Denver and get feedback from the membership. The entire program should be ready to be finalized in early 2006.

BOD Nominations

The Nominations Committee consists of Larry Delmore (ex-officio), Bill Baker and Jack Woolf. Jack reported on the positions that are/may be coming available. In summary, three positions need replacement, with the possibility of four depending on what Armando Araujo decides following his upcoming retirement from the World Bank.

Jack urged fellow Board members to submit any nominations if they haven't already. Peter Chapman expressed the concern that we ensure we have appropriate non-U.S. representation on the Board. Most of the candidates are U.S. based at this time. Peter urged the group to not lose sight of the fact that the Foundation is growing faster around the world than within the U.S. The question was raised whether the Board of Directors members' percentages should reflect the membership percentages. It was stated that these are the percentages that we are striving to maintain. As of May 31, the DRBF has 576 total members, 161 are non-US (30%), with the UK and Australia holding the two largest percentages. Therefore, the current 11 member BOD should have three to four non-US members. Currently we have four BOD members who operate almost exclusively in the international arena.

The issue was raised that the Board must also be mindful of the need for diversification on the Board (ethnicity and gender), which was strongly echoed by several attendees. The challenge is that there are so many candidates and so few positions to satisfy the diversity issues and need for international representation.

Al Mathews Award

For this process, the president forms a committee and the committee selects someone. President Bob Rubin asked that the Board consider their recommendations and forward them on to him. He also asked that members notify him if there are any recommendations for a

special award.

Peter Chapman noted that last year we set a new trend of having an international and a domestic award, and expressed his hope that will continue. It was also mentioned that more than one award can be given, as was the case last year.

Manual

The vote on whether Section 3 access should be limited to DRBF members only was tabled for the next BOD meeting, scheduled for August 12.

Joe Sperry reported revisions were made to Section 1 Chapter 2, adding the "Best Practice Guidelines" and a page with new statistics. Board members are encouraged to read these revisions carefully and provide feedback to the Manual Committee.

Forum and Website

Ann McGough reported that there are two ads in the upcoming issue of the *Forum*. If the advertising program does continue, we need to consider a different size because the business card dimensions don't fit well with the newsletter layout.

Ann also reported that progress had been made regarding copyright issues for the library section of the website, and she will proceed as advised by the IP lawyer. If permission can be obtained, she will post the recent article by Rubin and McMillan in the main section of the site, not just the members-only area.

A question was raised regarding a desire to limit the size of resumes currently on the website. Steve Fox confirmed that the original limit was 500 words, but there were complaints so it was expanded. It was suggested that one typed page is the maximum that should be allowed. There is a basic boilerplate in place, but the space for experience and training needs to be reduced. The Website Committee will provide a recommendation on how to go about curbing the size of the online resumes.

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Education & Training

Kerry Lawrence gave a report on the process underway with the intellectual property issues. An attorney has been retained, and trademark applications for the name, logo and slogan are being submitted. He is now addressing copyrighting other materials – the manual, website, etc.

Kerry said he is working with Larry Delmore on new training plans, and they are looking to add a “master’s program” to take it to the next level.

Dubai, FIDIC, ICC

President Bob Rubin noted that the Dubai conference was fabulous, and a full report is in the May issue of the *Forum*. He reported that he and Gordon Jaynes have met with Peter Boswell, executive director at FIDIC, to come up with a training arrangement between the two organizations.

Annual Meeting & Conference

Ray Henn reported that the Friday field trip plans are in place, and he is working with Tom Howell at Kiewit. The spouses’ walking tour with the Historical Society will be leaving from Union Station. Steve Long, vice president with David Stevens and Associates will talk about construction and DRB activity in the region.

There was discussion about inviting local owners and engineers who may be new to the process to participate in the conference in some way. After various options were explored, it was decided that Larry Delmore and Ray Henn will contact Hugh Rice in Denver and work together on identifying a list of key owners and engineers. They would be invited to participate in the entire conference, including the social events.

Chapters & Regional Representatives

John Nichols requested that the BOD members help him identify regional reps. New England is a weak spot and we particularly need support here and in the Rocky Mountains.

To clarify, these are not the more fraternal “chapters.” These regional reps are people who cover 3-7 states and are the primary contact between the membership within that region and the Foundation. These reps would address regional specific issues that are not appropriate for the *Forum* because they are too localized. We have six states with no members, and 14 with only one or two members. John believes we could improve those numbers if we had a regional rep available to beat the drums a little. John estimated the position would require approximately 10 hours per month.

Jim Donaldson, northwest regional rep, reported that the 2nd Annual Northwest Conference held recently was very successful. There was good attendance and the event was followed up with training. Four new members joined as a result. It is a good model for other regional reps to follow and the details are being shared with both John Nichols and International Committee Chair Gwyn Owen.

RETC

There will be a couple of meetings in conjunction with the RETC meeting– the DRBF Revised Manual Committee, and the DRBF Testing and Evaluation Committee will both meet Sunday, June 26 from 8am to noon. If anyone wants to participate, please notify Joe Sperry.

Other Business

A suggestion has been made that two face to face BOD meetings per year, in addition to the one at the Annual Meeting, are needed to fully air the multitude of DRBF activities currently under consideration. This subject will be on the August agenda.

Meeting ended at 1:45. The next BOD meeting is scheduled for August 12, 2005 at 12 noon EST.□

Board of Directors Meeting Schedule

The DRBF board of directors has scheduled meetings for the following dates:

**August 12
September 9
October 7**

If you have something you would like the board to discuss or consider, please notify Bob Rubin or one of the directors.

Dubai Workshop Includes Analysis of 3 Principal DB Systems Used Worldwide

By Hamish MacDonald

Immediately following the 2005 DRBF International Conference in Dubai, a two day workshop was held in the conference venue, the Fairmont Hotel, on 9 & 10 May. There were 26 attendees, including several who were not DRBF members and thus had not attended the conference. Attendees had traveled from Europe, Africa, the Far East and Australia to attend the workshop. Local attendees included representatives of the Dubai airport authority and the developers of the well known Palm Islands and The World developments. The workshop had a panel of six DRBF members, all in attendance both days, under the capable chairmanship of Gordon Jaynes.

The workshop began with an in-depth study of the three principal DB systems: the World Bank, presented by President Bob Rubin; FIDIC's DAB, presented by current International Committee Chair Gwyn Owen; and, the ICC Rules, presented by member Christopher Koch, who was a prominent member of the ICC Task Force on Dispute Boards. Each presentation was followed by questions and discussions. Copies of the texts of the three systems were included in the large workshop manual.

The other three panelists participated in the discussions which followed each presentation: Dick Appuhn, an experienced civil engineer and geologist based in Rome; Cyril Chern, a very active DB member, engineer, and barrister, based in London; and Marianne Ramey, a civil engineer based in Virginia but very active in Europe and Asia, specialising in delay analysis. Marianne also made a special presentation on how to prepare and present to DBs

effective analyses of delays, their causes and their impacts.

Attending as a guest and observer was Dr. Peter Boswell, General Manager of FIDIC, a co-sponsor of the workshop along with the ICC. Peter briefed attendees on FIDIC and its activities and reported on the latest status of the "harmonization" efforts of FIDIC and the principal multilateral development agencies to agree a uniform set of Conditions of Contract, including DB provisions, for use on projects for which they provide financing. Indeed, during the second day of the workshop, Peter announced that he had just received word that the World Bank had posted that day on its website its new Standard Bidding Document, now entitled "Procurement of Works & User's Guide." This requires that all contracts enjoying finance from the World Bank will have either a one person or a three person DB, irrespective of the financial size of the contract.

During the second day of the workshop, attendees divided into four groups, working in separate parts of the workshop room, developing analyses and conclusions on each of several hypothetical cases of disputes, all drawn from real (but anonymous) projects. The six members of the workshop panel sat with and assisted each of the four groups. For each hypothetical case, each group selected a spokesperson who reported to all attendees on the group's reasoning and conclusions with respect to the hypothetical case. Membership of each group was altered between each of the hypothetical cases, to stimulate for each attendee maximum exposure to other attendees and full participation in the study and discussion of the

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2005 WORKSHOP CALENDAR

October 5 - 2005 Administration and Practice Workshop
October 6 - 2005 Advanced/Chairing Workshop
Location: Denver, Colorado

November 8 - 2005 Administration and Practice Workshop
November 9 - 2005 Advanced/Chairing Workshop
November 10 - 2005 Update Workshop
Location: Orlando, Florida

Attendees should take the Administration and Practice workshop prior to the Advanced/Chairing workshop. Registration fee includes lunch and workshop materials. Each participant will receive a Certificate of Completion from the Dispute Resolution Board Foundation.

To register for a workshop or learn more about the new programs, contact the Dispute Resolution Board Foundation by phone at 206-248-6156 or e-mail home@drb.org.

For the latest additions to the training schedule, visit www.drb.org.

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hypothetical cases.

Despite the many attractions of Dubai (and the magnificent view of the city and its coastline from the huge windows of the workshop area of the Fairmont Hotel), attendance both days was faithful and interaction among the panel and the attendees continual throughout -- and even after! -- the two full days.

At the end of the workshop each attendee was given an evaluation form to complete anonymously, and the panel was delighted to learn later that their contributions had received high ratings indeed. Especially promising was the fact that every attendee was of the view that if a similar workshop were held in the participant's country, the participant would urge all colleagues in the country to attend.

Hamish MacDonald can be reached at macdonad@emirates.net.ae. □

Details of DRBF/USCIB Partnership to be Presented at Annual Meeting

The DRBF Board of Directors has approved a "break-out" session for the Denver 2005 Annual Conference on the topic of the September 2004 International Chamber of Commerce Rules for Dispute Boards. As already indicated, the DRBF is working with the International Chamber of Commerce (ICC) on the launch of a US seminar on the ICC Rules, which will be held in New York City in the Friday following the Denver Conference (14 October 2005). President Bob Rubin is working with the New York City headquarters of the US member organization in the ICC, the US Council for International Business (USCIB). It is hoped that a permanent working relationship will be established between USCIB and the DRBF, and that similar seminars will be held in other US cities whose companies are active in international business. If demand develops, it is foreseen that the same working relationship could expand to include training workshops on the use of the ICC Rules.

It is hoped that the ICC Rules will be used not only in the engineering and construction industry but also in other industries as well, whenever long-term or complex projects are undertaken. Already the Rules have been adopted in some significant information technology contracts.

To assure that DRBF members have the background to assist in the future seminars in the US and to serve on Dispute Boards established under the ICC Rules, the DRBF Board decided to have the 1.5 hour "break-out" session on those Rules at the Denver Conference. DRBF members wishing to get a head start can read the Rules (and download them free of charge) at www.iccwbo.org. Click on the bar "Codes, Rules and Model Contracts" in the left column of the home page. The Rules are particularly interesting in that they provide for a choice of type of Dispute Board -- its form of "DRB," its form of the FIDIC-style "DAB," and a new and unique "CDB," or "Combined Dispute Board."

DRBF members played a leading role in the creation of the ICC Rules. DRBF Country Representative for Switzerland, Pierre Genton, chaired the ICC Task Force for Dispute Boards (which prepared the Rules), and was the driving force behind the creation of the Task Force. Most of the Task Force members were DRBF members, or became DRBF members as a result of the "missionary" activities of those Task Force members who already were members! Special thanks are extended to Gordon Jaynes, Christopher Koch, Igor Leto, Toshihiko Omoto, Robert Smith, Nael Bunni and Jean-Claude Goldsmith who all actively participated in the preparation of the ICC Dispute Board Rules. Thanks also go to Armando Arajo, Peter Chapman and Jack Woolf for their contributions.

**See page 20 for more information about
The U.S. Launch of the ICC Dispute Board Rules:
Using Dispute Boards Under ICC's Unique Rules.**

If you are in contact with similar stakeholders, and would like to include their input to this final survey, please send me a note (holmcon@aol.com) and I will forward you a copy of the blank questionnaire. The results of this last phase of this research project will be published in a future issue of the *Forum* and maybe presented for a focus group discussion at the Annual Meeting in Colorado. □

CASE HISTORIES SUMMARY

Case Histories of Privately Funded Construction Projects Which had Dispute Resolution Boards

PROJECTS:	6	
TIME PERIOD:	1986-2004	
PROVISIONS:	Written into the specifications:	5 projects
	Recommendation of owner's representative:	1 project
PROCUREMENT:	Negotiated:	3 projects
	Competitively Bid:	3 projects
DRB EXPERIENCE:	Owners or Reps:	1
	A & Es:	1
	General Contractors:	1
	DRB Members:	6
RESPONSES:	Owners or Reps:	4
	A & Es:	4
	General Contractors:	2
	DRB Members:	6
	Total:	16
PROCESS:	Responses were split as to whether the DRBs functioned as formal or informal. This may be due to the inexperience of the responding participants.	
	Five Boards were comprised of three DRB members, and only one with one member.	
	The A & E firm participated in the DRB process on half of the projects.	
	In only one exception, Case History 5, which had a large claim, there were not any other variations made to the DRB process because these were privately funded projects.	
RECORD:	Disputes Heard:	5 total, average of 1 per project
	Disputes Litigated:	0
Dispute Value(s):	Indeterminate	
COSTS:	Total Construction Value:	\$215m total, average of \$36m per project
	DRB Cost:	\$185k on the 5 projects reported
		Average of \$37k per project, or 0.01% average per project
	Board Cost Paid by:	Owner - GC split: 5 projects
		100% by owner: 1 project
REMARKS:	With only one exception, all of the respondents felt their projects were successful and the DRB process contributed to that success. Even those participants whose projects did not have any disputes felt that the presence of the Board caused the parties to communicate effectively and negotiate solutions at the project level.	
FUTURE:	All respondents indicated that the DRB process is a success, applies to the privately funded construction projects, and they will recommend its use on future work.	

WELCOME TO NEW DRBF MEMBERS

MEMBER ADDITIONS MAY THROUGH JULY 2005

Daniel Alcon
Knowles Middle East
Dubai, UAE

Barrett R. Atkins, P.E.
Wills Point, TX USA

Robert E. Badgley
Berkeley, CA USA

Anthony Baylis
Cambridge, UK

Paul Berry
Seattle, WA USA

Richard A. Brown
Port of Seattle AV/PMG
SeaTac, WA USA

Syed Asif Ali Burney
Lahore, PAKISTAN

Edward Corbett
Corbett & Co.
Teddington, Middx UK

Ing. Tommaso Dammacco
Italferr Spa
Rome, ITALY

Rocco A. DePrimo
Florida DOT
N. Miami Beach, FL USA

Robert Dun, P.E.
ASCG Inc.
Anchorage, AK USA

Philip E. George
Stimpel-Wiebelhaus Assoc.
Redding, CA USA

Nigel M. Grout
G. F. Civils Ltd.
Bedford, UK

Amin K. Habboub
Nakheel Procurement and Con-
tracts Dept.
Dubai, UAE

Dr. Ludger Hasenauer
Hochtief Construction AG
Essen, GERMANY

Andrew Hewitt
Abu Dhabi, UAE

Richard Johnson
Prospect Harbor, ME USA

Bernard S. Kamine
Kamine Ungerer LLP
Los Angeles, CA USA

Frank J. Leech II
Abu Dhabi, UAE

Tsepo T. Letsunyane
Ministry of Works & Transport
Gaborone, BOTSWANA

Vu Chi Long
Ministry of Finance
Ha Noi, VIETNAM

John T. MacDermott
Jacobs Associates
Hilton Head Island, SC USA

Joseph C. Malpasuto, Esq.
Joseph C. Malpasuto P.C.
Northridge, CA USA

Peter Howard May
May Associates
Uttoketer, Staffs UK

Edwin W. McLaughlin
Tidewater Skanska
Virginia Beach, VA USA

Norman Mururu
Mururu & Associates
Nairobi, KENYA

Nigel Aitken Cameron Nilen
Nilen Civil Eng. Services
Witkoppen, SOUTH AFRICA

Ajit B. Pawar
Pune, Maharashtra, INDIA

Felix A. Peguero
Miramar, FL USA

George J. Pierson
Peckar & Abramson
River Edge, NJ USA

David W. Race
Wye, Kent UK

Niall Reynolds
TACA International
Phoenix, AZ USA

Rohan Shorland
Athens, GREECE

Geoffrey Smith
PS Consulting
Bourdonne, FRANCE

Ing. Alexandra Stan
Romania National Co. of
Motorways & National Roads
Bucharest, ROMANIA

David Thomas Q.C.
Keating Chambers
London, UK

Simon J.A. Tolson
Fenwick Elliott LLP
London, ENGLAND

Roger Trett
Trett Consulting
Bishop's Stortford, UK

Rungao Zheng
Conciliation Centre CCPIT/
CCOIC
Beijing, PRC



9th Annual Meeting and Conference

October 7-9, 2005

Denver, Colorado

The DRBF Annual Meeting and Conference is open to anyone using or interested in furthering the use of the Dispute Resolution Board process. The event will offer educational meetings as well as interactive sessions designed to expand and guide the future of the DRB process and the Foundation's activities.

Conference Highlights

Friday October 7, 2005

Site tour of the T-Rex Project, a Colorado Department of Transportation design-build project rebuilding 17 miles of I-25 and installing 19 miles of new light rail track along with 13 new stations and 3 parking garages.

Saturday/Sunday October 8-9, 2005 Meeting and Conference

Overview of construction in the Rocky Mountain region and the status of DRBs in that area.

Guest speaker Tom Howell of Kiewit Construction.

Breakout sessions on the accomplishments and challenges of the new executive director, Larry Delmore; revisions to the *DRBF Practices and Procedures Manual*; and ICC Dispute Board Rules—a new frontier for DB appointments and for DRBF training.

Saturday night will feature a reception, dinner, and presentation of the Al Mathews Award.

Workshops

The DRBF will be offering the 2005 Administration and Practice Workshop on October 5 and the 2005 Advanced/Chairing Workshop on October 6. These are intensive one-day skill development sessions for those who are serving on or wanting to serve on Dispute Resolution Boards. These workshops are also excellent for owners or contractors who want to implement a DRB program. Contact the DRBF office for additional details.

Registration and Reservations

Registration fees for members are \$220 in advance or \$250 after September 16, 2005. Non-member fees are \$250 in advance and \$280 after September 16, 2005. To register, fax, e-mail or mail a registration form which can be obtained from the DRBF office or downloaded at www.drbf.org.

Registration is required for the optional T-Rex project tour, and space is limited. Sign up today to insure your space.

The Annual Conference will be held at the Embassy Suites in downtown Denver. Room reservations may be made by calling 800-733-3366 toll free in the US, or 303-297-8888. Be sure to request the DRB Foundation group rate of \$119.00 per night when you make your reservation.

PROGRAM AGENDA

Friday 7th October

8:30am – 12:30pm

T-Rex Project jobsite tour. This design-build project covers the rebuild of 17 miles of I-25 and installing 19 miles of new Light Rail Track (including 13 new stations and 3 parking garages) thru south Denver. The project is 90% complete.

2:00 – 4:00pm

Committee meetings

5:00 – 9:00pm

Board of Directors meeting

Saturday 8th October

7:15 – 8:00am

Breakfast

8:00 – 8:15am

Welcome and DRBF business

8:15 – 9:15am

Membership Grades – Hal McKittrick & colleagues

9:15 – 10:15am

Education and Training – Kerry Lawrence & colleagues

10:00am – 12noon

Walking tour of Historic Denver for accompanying guests, hosted by the Colorado Historical Society. Cost is \$5 per person.

10:15 – 10:45am

Coffee

10:45 – 11:15am

Construction overview in the Rocky Mountain region – Steve Long, David Evans & Assoc.

11:15 – 12:00noon

Guest speaker – Tom Howell, Kiewit Construction

12:00noon – 1:15pm

Lunch

1:15 – 3:00pm

Breakout Session 1

Executive Director - Accomplishments, Challenges, Discussion - Larry Delmore

Larry Delmore has just completed a new DRBF training program that includes five distinct training sessions: (1) "Brush-up" (2) "Administration and Practice" (3) "Intermediate" (4) "Advanced/Chairing" and (5) "Masters." These courses will retain the collective wisdom of the DRBF and all of its training programs and will be innovative, up-to-date and interactive. The breakout sessions will provide an overview of each course, the business plan for their implementation and a request to the DRBF membership for DRB stories that can be used as real-life examples in the training sessions. Larry will also review accomplishments from the past year and goals for 2006.

Revisions to the DRBF Manual – Joe Sperry & committee

When is it acceptable to solicit DRB assignments? How proactive should DRBs be? Under what circumstances should an advisory opinion be suggested to the parties? How should minority opinions be presented? What conflicts of interest should be disclosed? Solicit new ideas for DRBs to prevent issues from becoming disputes, and feedback on the Manual.

The ICC Dispute Board Rules: A New Frontier for DB Appointments and for DRBF Training of Potential Users – Gordon Jaynes & colleagues

What is the ICC and why has it involved itself in Rules for Dispute Boards? Why should I care about the ICC Rules? For what kinds of contracts are the Rules intended to be used? Why are there 3 "flavors" of Dispute Boards in these Rules? What are the differences between the 3 "flavors"? How are the ICC Rules different from typical DRB procedures in the USA? What are the DRBF plans regarding the ICC Rules?

3:00 – 3:30pm

Coffee

3:30 – 5:15pm

Breakout Session 2

6:45pm

Cocktails, Dinner, the Al Mathews Award Presentation, and Remarks from Larry Delmore

Sunday 9th October

7:15 – 8:00am

Breakfast

8:00 – 8:45am

Treasurer, Committee Reports & other business continued

8:45 – 10:30am

Breakout Session 3

10:30 – 11:00am

Coffee

11:00 – 12:00noon

Summations of Breakout Sessions and Close Conference



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Seattle, WA 98188-2441

FOUNDATION FORUM

The U.S. Launch of the ICC Dispute Board Rules: Using Dispute Boards Under ICC's Unique Rules

Friday October 14, 2005 1:30 p.m. - 6:15 p.m.

The Century Association, 7 West 43rd Street, New York, NY, USA

This program is intended to provide U.S. users with a detailed briefing of the ICC Dispute Board process, providing real-life examples about the use, function and benefits of DBs.

The program is designed for lawyers, corporate counsel, arbitrators, mediators, academics, ADR experts and users, and business persons who wish to learn more about this growing form of dispute resolution.

The early bird rate of \$95 is valid until September 1st; after that the USCIB or DRBF member fee is \$105, and the non-member fee is \$125. For a complete agenda and registration form, contact the Kare Yang at (212) 703-5044 or visit the USCIB website at www.uscib.org.

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