



Forum

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Annual Meeting Breakout Sessions Spur Lively Debate “Revisions to the DRBF Manual” Breakout Session

By William Baker, Peter Douglass, William Edgerton, and P.E. Sperry

The DRBF Manual Committee addressed several key questions related to DRB practices and procedures during a breakout session at the Annual Meeting. These issues represent five of the eight controversial topics which arose during revision of the Manual. In addition, new topics were discussed which could be incorporated into future Manual updates. Due to space constraints, the discussion will be presented in the *Forum* as a two part series.

(1) When is it acceptable to solicit DRB assignments?

“Solicitation” means the practice of prospective DRB members calling the parties to seek assignments on DRB panels. One advantage is that it helps the parties identify availability. Some feel it could raise expectations of advocacy; in that if the “soliciting” member was subsequently appointed, there may be some feeling that he/she owed a duty to the appointing party. The question to be answered is: Does solicitation (in and of itself) create a perception of bias?

It was noted that DRB members should be especially careful to (a) make such solicitations only on projects where their experience matches the project needs, (b) identify potential perceived conflicts (although it was noted that such identification could be difficult in advance of the bid date), and (c) ensure availability for meetings and hearings, taking into account both the expected frequency of such meetings as well as the duration of the project. In addition, it is especially important to emphasize that, if appointed, as a DRB member you would not be an advocate for any one party, but would only consider the documents, facts, and the law in making recommendations.

Several attendees commented that the solicitation should be disclosed when making subsequent disclosures if nominated to serve. It was also noted that a response to an owner’s request for Letter of Interest (which is fairly common) might in itself be considered a “solicitation.” One attendee commented that by merely calling the parties in advance to solicit future appointments may help promote the use of the DRB process.

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President's Page

As I assume the presidency of the Dispute Resolution Board Foundation, I want to congratulate Bob Rubin on a great year and one that will be difficult for any president to duplicate. In the last year the DRBF hired Executive Director Larry Delmore, who has prepared the way for considerable expansion of the use of the DRB process. Potential users have relayed to Larry their requirement for a reliable source of trained competent neutrals, and this has led to a review of our training materials and the upgrading and updating of our workshop content by Larry and Kerry Lawrence and his Education/Training Committee. Our multi-national membership is increasing as reflected by the tremendous success of the international conference in Dubai.

Our recent initiatives such as bringing an executive director on board have arisen out of feedback and ideas we received from you, our members, at the Annual Conference. One such suggestion was to establish different strata of membership grades based on experience and training. This would fill the source needs expressed by owners as well as providing additional opportunities for our members. I chaired the committee that drafted the membership grade proposal presented at the Denver conference. We sought and received feedback that included recommending retention of the Government Employee grade and endorsing the availability of continuing education and refresher training courses for our members. There was considerable disagreement on the concept of stratification and the qualification criteria, and we are re-examining our initial ideas as a consequence. The constant concept remains to establish criteria that are meaningful, objective and easily verifiable.

We all know the success of DRBs in resolving disputes and the consequential savings in litigation costs to the construction industry. We also have learned that "one size does not fit all" and owners such as the World Bank have somewhat different specifications and procedures than the traditional U.S. models. One of the features of the Denver conference was the breakout session chaired by Gordon Jaynes on "The ICC Dispute Board Rules." The ICC has three types of Dispute Boards and also different procedures from the U.S. model but provides expanded use of the DRB process and presents yet additional opportunities for DRBF members.

These opportunities present us with the challenge of providing proper training for members. Our Education/Training Committee is focused on U.S. rules and procedures in its training courses, while training needs are rapidly growing in the multi-national arena as well. To meet these needs I have established a Multi-national Education/Training Committee. To ensure that the wheel is not reinvented, one member of the committee also serves on the existing Education/Training Committee.

We are hoping to get more local chapters activated. We recognize most members cannot attend the annual conference every year and it is important to keep in touch with your fellow members on a local basis, in a manner similar to meetings of the local chapters of ASCE and ICE. Meeting activities could range from having an informal meal and discussions periodically, to a meal and a formal presentation. We are asking for volunteers to spearhead these local organizing efforts.

Year 2006 will be the first time our entire membership will be able to vote by mail or online for officers and directors of the DRBF. Through 2005 all elections were held at the annual meeting. While proxies are permitted in our by-laws, I know of none ever utilized. Nominations also will be permitted from sources other than the nominating committee.

The efforts expended in the examination of new membership grades and continuing education are intended to make DRBF membership more meaningful to owners and their preferred choice for sourcing DRB members. When the opportunity presents itself for the use of DRBs by organizations such as the ICC we are actively engaging in the promotion of the process. Finally, we are continually seeking ways to bring the DRBF closer to you and respond to your concerns, ideas and input.

I look forward to a great year for you and the DRBF. Please keep me and all the officers and directors advised of ways in which we can improve the Foundation and expand the use of DRBs.

Sincerely,

THE DISPUTE RESOLUTION BOARD FOUNDATION

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ANNUAL MEETING BREAKOUT SESSION: “ICC DISPUTE BOARD RULES”

One of the sessions at the DRBF Annual Meeting and Conference was on the September 2004 International Chamber of Commerce Dispute Board Rules. These Rules were officially launched on the Friday following the DRBF Conference at a well attended session in New York City, featuring several DRBF members.

The Rules are based on drafting which was carried out by a Task Force headed by the DRBF Country Representative for Switzerland, Pierre Genton. The Task Force members included several DRBF members; indeed, by the time of the completion of the Task Force work, those members who had not been DRBF members earlier had been recruited to DRBF membership!

The ICC DB Rules are intended for use not only in the field of engineering and construction but also on any international commercial contract which is complex or calls for lengthy performance. For example, one DRBF member has reported two Information Technology contracts using the ICC DB Rules.

At the conference, the breakout session on the ICC DB Rules was run three times, twice on Saturday and once on Sunday morning. Each session was 1.5 hours in length, and began with an overview of the Rules presented by Gordon Jaynes, a member of the Task Force, and the person who prepared the initial draft of the Rules. He used a 12 slide Power Point presentation, to identify and distinguish each of the three types of DBs covered by the Rules -- Dispute Review Board, Dispute Adjudication Board, and Combined Dispute Board.

Each attendee received a complimentary set of the Rules, and these were used in the remainder of the breakout session. Following the overview presentation, attendees were divided into smaller working groups, headed on Saturday by Volker Jurowich and Marianne Ramey, and on Sunday by Volker and Bob Smith. Each working group tackled two or three hypothetical cases involving the Rules, and after study of each case, each working group selected a spokesperson who reported to the entire breakout session on the working group's analysis and conclusions regarding each hypothetical case. Many attendees expressed their interest in the Rules and their appreciation of having a true training breakout session rather than a general discussion breakout session. -Submitted By Gordon Jaynes □

In Memoriam: Hugh Cronin 1940-2005

Dispute Resolution Board Foundation member Hugh Cronin passed away on March 30, 2005 at the age of 64 from cancer of the esophagus. In addition to his success as an engineer, his was active in numerous professional organizations including the DRBF. “He was a staunch advocate of the Foundation,” said former DRBF President Jack Woolf. “He promoted some radical initiatives that, in the long run, have made us a stronger organization.”

Hugh Cronin served on the Bylaw Revision committee, and chaired the 2003 Rapid Excavation and Tunneling Session on Dispute Review Boards where he reported the results of an extensive survey that he conducted on the use of DRBs in the tunneling industry and their strengths and weaknesses as perceived by the industry. His co-chair, Pete Douglass, said “Hugh was well respected by his peers, was always willing to speak his mind (whether in vogue or not) and was consistently active in advancing the DRB process to the betterment of the industry. Hugh set an excellent example of how a DRBF member can get involved and stay involved in furthering the DRB process. He will be sadly missed by his friends and colleagues and the construction industry as a whole.”

Hugh began his career with Morrison Knudsen, and later moved on to Grow Tunnel, where he rose to vice president of the Underground Division. In 1975 he resigned and moved to California, where he organized UCCI, an engineering firm specializing in tunnel construction.

DRBF President Hal McKittrick called for a moment of silence in Hugh's memory at the 2005 Annual Meeting and Conference on October 8, 2005. □

Letters and E-mail to the DRBF

Dear DRBF,

Defects are main problems for many disputes. My colleagues and I have been unable to find any useful definition published on the subject. Therefore, we have created one which we think will be a useful tool to apply when working on a DRB. I would very much like to receive the input and feedback of my fellow DRBF members regarding this issue. It is in this way that we can continue our efforts in establishing best practice standards for the industry.

Regards,
Adam Heine, M. Sc. Eng.
heine@poczta.fm

Definition of Defect

Defect is a common word in the construction industry, playing a key role in disputes. But what does it exactly mean? We cannot rely on age-old adage: *A horse – what it is, everybody knows*. When it comes to law, the disputing parties produce various definitions, like: *Defect means non-conformity with design (or with contract)*. But this is not a good definition at all: both design and contract are made under the assumption that their execution shall comply with *good engineering practice*. But what does *good engineering practice* really mean? Sometimes more precise wording is needed. Such definition has been elaborated by SIDiR's experts, and it may be useful for many cases, when the dispute involves such definition. It is as follows:

1. **Defect** means any negative and unintended feature of a facility, resulting in difficulties with operation, use, and/or maintenance, and/or deprecating its aesthetic outlook and/or comfort of users, which might be eliminated by updated construction techniques.
2. Absence of any feature of the facility, declared by the contractor to the owner, is also a defect.
3. A negative feature of the facility may not be considered as a *defect* only when it is a result of *expressis verbis* provision of the contract (because in this case it is not *unintended*, as per paragraph 1 above).
4. Possible cause of a defect, e.g. faulty design, material, or execution of the work, does not have substantial importance in establishing the existence of a defect, nor does the contribution of third parties, such as a subcontractors and/or designer.
5. Prime responsibility for defects in the executed work is always born by the contractor, even when the work strictly followed design or used materials supplied by the owner.
6. If the contractor notifies the employer about any mistakes or omissions in the employer's drawings and/or shortcomings of materials, and/or other circumstances which may be a cause of defects, and the employer nevertheless upholds his decision to execute the works notwithstanding such circumstances, then the contractor shall not be hold responsible for the effects thereof, because unfavourable features cannot be claimed unintended, as required by paragraph 1 above.
7. Contractor's penal liability for breaking construction law, and/or for jeopardising the safety, health or third parties rights, is not exempted by any employer's order as per paragraph 6 above.
8. If the contractor suffers cost of defects elimination or is in any way charged for their consequences, then he may claim the cost from the guilty party, therein the suppliers of materials and/or the plants, as well as the designers. However, the result of such claims cannot be a condition of the employer's claim satisfaction.
9. The submission of a claim after the end of the defects notification period shall be considered as a basis for rejection of such claim only when the appearance of the defect

Forum Editor: Ann McGough

Editorial and subscription address:
Dispute Resolution Board Foundation,
6100 Southcenter Blvd.,
Suite 115, Seattle, WA
98188-2441
Phone: 206-248-6156
Fax: 206-248-6453
Toll free (US only)
888-523-5208
E-mail: home@drb.org
Web site: www.drb.org

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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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Dispute Resolution
Board Foundation

To All Members..... HELP!

Owners create DRBs. To have more DRBs we must convince owners that DRBs are necessary and worthwhile. A major part of selling DRBs to owners is to show them how DRBs are used by other owners, on what type of construction and what size projects.

The Foundation does NOT have complete data on DRBs in our Database. Members have not and are not reporting needed information to the Foundation. The Database does not include any data on many completed DRB jobs, many present jobs are not listed, and the data is not up to date on many jobs that are listed. We need your help.

Wondering if the DRBs you've served on are included and up to date? Simply sort the database (Appendix 1A "DRB Database") to go straight to the project.

Instructions for sorting are in Appendix 1A in "Introduction to the DRB Foundation Database."

To promote the use of DRBs the Foundation must have accurate and complete data. Our primary source for data is YOU, our members.

The data must be provided to the Foundation by each member who is on a DRB. There is no problem if all members of the Board report the data, but if no one provides it our Database is incomplete.

Please report data on one of the forms in Appendix 1A of the Manual, found on the DRBF website at www.drb.org. It's easy to do, shouldn't take more than an hour of your time a year, and is critical to successfully promoting the DRB process.

<p>TIP: At the first DRB meeting, assign one member to be responsible for reporting and updating project data to the DRBF.</p>

If you find missing DRBs, on which you didn't serve and don't have data, or if you have any other questions please call John Nichols at 415-945-1316 or Steve Fox at 206-248-6156.

(continued from page 4)

was not notified to the contractor within the period. Even if it was not notified, the claim shall not be rejected if the defect was of a latent nature, or when the defect once notified and repaired, reappeared within the extended defects notification period. Nor should the claim be rejected when within the defects notification period the contractor assured the employer that the defect did not exist.

10. It cannot be effective if the contractor, during the execution of work or defect notification period, has assured the employer that the defect does not exist.
11. Absence of or defective technical documentation: as-build drawings, maintenance and operation manuals, and/or non-submission of the operation codes and/or programmes required for use of the plant without additional payment to the supplier, makes itself a defect even when the basic works and/or plant are faultless.
12. Nevertheless, non-submission of the programmes and/or codes as required by the paragraph 11 above may not be claimed as a defect if the contract clearly exempts submission of these materials from contractor's obligations.

Note: Please send your comments regarding the "Definition of Defect" to:

Adam Heine
Heine-Konsulting
Maszynowa 5A/11
02-392 Warsaw
POLAND
Fax: 48-22-823-6572 E-mail: heine@poczta.fm



A MESSAGE FROM THE EXECUTIVE DIRECTOR...

I returned two days ago from spending six days in Denver for the DRBF Annual Meeting.

Jim Donaldson and I spent two days providing training in the Administration & Practice and Advanced & Chaining courses which had been completely rewritten to bring them up to date.

The DRBF Board of Directors meeting on Friday was followed on Saturday and Sunday by the Annual Meeting.

The combination of the seating of both Hal McKittrick as the new president and three new directors with the coming together of over 60 dedicated DRBF members at the Annual Meeting is an exciting and energizing time. Those attending also included many representatives of countries other than the United States, individuals who expended a great deal of time and money to attend this meeting because they believe in the DRB process and have a great desire to come together with other construction professionals who share a dedication to the DRB principles.

This past week I renewed old acquaintances and made great new ones with people who share a dedication to the DRBF concept and have offered their time to help me help the DRBF extend its utilization into new markets and obtain new users.

The continued success of the DRB process and the DRBF is dependent upon the expansion of DRB users. I expend a tremendous amount of time and energy toward that end on behalf of the DRBF. As I stated during the Annual Meeting's Breakout Sessions that I chaired, if I can impose upon each member to spend between one half hour to one hour per

month to determine what is going on in construction within a 50 mile radius of your house or office, and send that information to me, the success of the DRBF and the opportunities for its members will increase exponentially.

Likewise, if I can impose upon the membership to send me the listings of DRB users who are looking for new DRB candidates, or any postings for same of which you become aware, then I will share this information to the DRBF membership.

These are small tasks each of us can assume, yet the benefits to the membership will be huge.

The health of the DRBF is dependent upon the contributions of its membership to make the DRBF and the DRB process grow. Can I count on you to provide me with the information needed to help the DRBF membership?

I write this column sitting on a train heading to New York.

Tomorrow afternoon, I am privileged to be one of the speakers presenting at the United States Council for International Business' conference, "The U.S. Launch of the ICC Dispute Board Rules: Using Dispute Boards Under ICC's Unique Format."

Joining me on the dais Friday will be the DRBF's Bob Rubin, Gordon Jaynes and Bob Smith. This "launch" of the ICC's Dispute Board Rules should be cause for great celebration within the DRBF.

Whether it is called a dispute resolution board (DRB), dispute board (DB) or dispute adjudication board (DAB),

FOUNDERS OF THE DISPUTE RESOLUTION BOARD FOUNDATION

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the fact that the basic concept of DRBs now is receiving international acclaim and utilization reflects the worldwide business community's recognition that the essence of the DRB process is one that is good for business.

As you all know, the DRB process offers owners and contractors the opportunity to regain control of the dispute resolution model. This same essential benefit carries over to dispute board rules.

While the DRBF has concentrated solely on the construction industry, we always have to keep an eye on tomorrow, before tomorrow becomes yesterday. The cliché tells us that if we concentrate on preserving the status quo, we definitely will fall behind.

The DRBF always has stood in the forefront of dispute resolution in the construction industry, at times a singular voice tolling the benefits of a process that others were so very quick to disparage.

The efforts of those who developed the DRBF have paid great dividends, with widespread domestic and growing international success. Now, the DRB process takes a logical growth path and moves beyond construction into the international business community. Likewise, the largest growth in DRBF membership comes from outside the US shores.

The world is taking note of the successful potential of the DRB process.

If it is to retain its birthright to the DRB process throughout the world, the DRBF must retain its world place. To further that end, the DRBF must support the efforts of those in-country leaders of the DRB process through the supply of DRBF marketing materials and, where applicable, self-funded DRBF training, while they, in turn, make the DRBF aware of potential DRB user opportunities.

Together, we can preserve the place of the DRBF as the first choice for dispute resolution worldwide.

As a result of the increased awareness of the successful potential of the DRB process, I

have been asked to speak at the following venues:

Nov. 10-11, 2005 **ABA CLE** Henderson, NV
Dec. 9-10, 2005 **Construction Superconference**, San Francisco

March 29-April 1, 2006 **Construction Specifications Institute (CSI)**, Las Vegas

April 5-8, 2006 **ABA Dispute Resolution**, Atlanta (also exhibiting)

I plan on attending the following conferences:

Jan. 26, 2006 **Joint Mid-Winter Construction Meeting**, NYC

April 12-16 **ABA Forum on the Construction Industry**, San Diego (also exhibiting)

I plan on making time available for several days prior to these conferences in order to meet with potential DRB users and/or members in the area. To that end, please contact me if you live in the area of these conferences and believe that you know of:

- a. potential DRB users;
- b. potential DRB members; or
- c. potential candidates for whom the DRBF could provide a training session that week.

In the same vein, from now through May, I plan to hold regional meetings of DRBF members, potential members and potential DRB users. Please contact me if you are interested in helping set up these meetings.

Finally, I am in the process of obtaining approval for the DRBF training courses for Continuing Legal Education (CLE) and Continuing Education Units (CEU). Based upon the availability of CLE and CEU credits, the DRBF will be able to offer its training to those searching for legal and professional education courses. Unlike other CLE and CEU providers, however, the DRBF courses also will offer the opportunity to qualify for future dispute resolution services.

Together, we can ensure the DRBF is the first recourse for dispute resolution worldwide.

Larry Delmore, Executive Director

T: 781-400-1024

E: lfdelmore.drb@comcast.net □



Spotlight on the DRBF's Poland Representative

Country Rep: Adam Heine

I am the co-founder and past president of SIDiR, the Polish National Member Association of FIDIC. The organization dates back to 1914, but the current model was established in 1991 by a group of engineers, each of whom worked abroad in free market countries where they had the opportunity to learn about FIDIC and its Conditions of Contract.

At that time such experience and knowledge was extremely rare in Poland, which for half a century was almost completely cut off from the world markets and ruled by the principles of an all-national economy. In such conditions the market elements, such as contracts, competitive bidding, consulting engineers, and arbitration, were replaced by State rules, State distribution of jobs, State resolution of disputes, and other elements of a so-called *planned economy*. As a result, the engineer's knowledge of actual construction industry organization in the world of free markets was confined to the few foreign trade practitioners and still fewer staff of technical universities. A better understanding was found among the lawyers and the economists, where foreign trade was taught and studied, and aroused vivid interest as the only chance to a better life.

The revival of the engineering consultancy and its only representation – SIDiR – was tolerated by authorities, but never highly appreciated or supported. It developed slowly and almost by the own means of its few members. It faced strong competition from the international consulting engineering firms, who readily employed Polish individual consulting engineers, but reluctantly joined or supported the organization.

Having a good national ant-like tradition of reconstruction of our nest, we set about with the job of publishing bilingual copies of FIDIC's Red Book in 1992, and at the same time promoting the World Bank's Standard

Bidding Conditions 1991. Besides the publication of translated documents, SIDiR arranged a series of conferences presenting the model documents of FIDIC, including Tender Documents 1982, to many hundreds of people in the trade: State officials, employers, contractors, designers and supervisors of works. In this way basic knowledge of FIDIC and SIDiR was conveyed, and we continue our efforts ever since, on an increasing scale. This is our base of development, because many of our listeners were glad to learn about the existence of FIDIC representation in Poland and some were even eager to join us. Through great effort, we reached the point that, when joining the European Union in 2004, people in the construction trade no more asked "*what is it?*" when hearing the word "FIDIC." But still they do not know enough about DRBs.

The co-operation of SIDiR with FIDIC and the World Bank first brought DRBs to Poland, through Minor Works 1991 of the Bank. But we have the proverb *first fruits are often worm-eaten*, and the ground for the DRB was not properly prepared. The whole idea of applicability of civil law contracts in construction was brand-new for employers at large: they applied a DRB only because it was a Bank condition to get credit, badly needed at that time. So employers nominated anybody, sometimes even a prominent expert in construction, but equally often somebody neither trained in civil law nor familiar with construction contracts. Usually, the nomination ended with misfire, with few disputes being submitted and still less resolved. But the idea survived, and when it reappeared in 1995 Standard Bidding Documents of the World Bank, and soon afterwards with FIDIC's Orange Book and Standard Tender Documents of the European Bank of Reconstruction and Development, we undertook it as a challenge for our association.

Our first step was to train our own members in weak areas, i. e. civil law. Fortunately,

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Austria
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**Australia and
New Zealand**
Ronald A. Finlay

Bahamas
Colin Arthur Marshall

Brazil
Gilberto José Vaz

Canada
Robert W. McLean

Columbia
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Italy
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Toshihiko Omoto

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Dr. Lic. Herfried Wöess

Pakistan
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Poland
Adam K. Heine

Southern Africa
Andrew L. Griffiths

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United Arab Emirates
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United Kingdom
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Vietnam
Richard L. Francisco

Soviet-trained revolutionary, forming State authorities in Poland in the late 1940s, knew even less about the Polish legal system, including Civil Code, Civil Proceedings Code and so on, because these did not exist in pre-revolutionary Russia, so they were never enlisted as a part of *bourgeois relics* to be destroyed. In this way the laws survived, and even maintained their pre-war binding power. We have even found brilliant lawyers, some of them prominent members of ICC or Faculty of Law, eager to arrange seminars and lectures for members of our association. We reached abroad and arranged lectures by Tony Norris and Peter Campbell, prominent FIDIC specialists in contracts and adjudication. At the peak moment 16 of our members are on the FIDIC list of Experts & Adjudicators, a number second only to the UK. We also joined the DRBF as early as 1996. Just after appearance of the FIDIC 1999 CoC we arranged a seminar in Warsaw led by three members of the FIDIC Committee of Assessment Panel for Adjudicators. We participated in numerous DRBF events, including the 1998 Chicago, 1999 London, and 2001 Las Vegas Annual Meetings and the 2003 and 2005 Paris and 2004 Berlin International Conferences.

It is necessary to explain the staff of SIDiR and its members are active professionals, serving mostly as engineers, resident engineers, supervisors and other real jobs, but also as the contract and tenders facilitators and lecturers on countless seminars related to FIDIC contracts, always including the dispute resolution clause, but since 1995 also addressing the DRB/DAB. This was a natural channel to attract the employers' attention to our list of adjudicators. Clearly, we did not have a monopoly (moreover such monopoly would be illegal), so we cannot exclude the nomination of others. But we have encountered much greater hindrance elsewhere. Most employers have permanent legal advisors to whom they submit any draft of the contract conditions – and quite often these advisors simply strike off all provisions related to the DRB/ DAB and arbitrage, leaving all disputes to the State courts. There one must distinguish *legal advice* from the *advice of the lawyer*. It would be legal advice if it

pointed to the law, making something mandatory or prohibited. But it is not the case: our law leaves the dispute resolution clauses to the decision of the parties. The lawyers, mostly educated in the time of *planned economy*, either do not know anything about arbitration (and the DRB/DAB looks exotic and alien), or worse – they prefer long multi-stage litigation in State courts. We have to defend our points of view, and once we win, twice we lose. *C'est la vie*.

The SIDiR approach is to: (a) promote FIDIC model contracts, (b) promote World Bank Standard Bidding Documents (c) use these to teach our own members about modern trends in resolution of disputes, especially civil court proceedings, arbitration, and Alternative Dispute Resolution (ADR), the last including DRB/DAB/CDB theory and practice; (d) train employers and contractors about the subject, and (e) use European Federation of Consulting Engineers (EFCA) and CEFTA forums to gain support from the EU.

It must be clear that arbitration clauses are a **must** for the DRB/DAB. The contract, subject to State courts only, shall not have any use for the DRB/DAB. Arbitration clauses were natural in the USA, and so it was for decades in all FIDIC model forms, but it is not equally natural in Europe. Legal systems providing for arbitration, including the New York Convention (on mutual recognition of the arbitration awards) form a cornerstone for the DRB. Most of the EU countries fulfill such conditions at least as principle. This may look to be a paradox, but while DRB/DABs are invented as a remedy against abuse of arbitration, nevertheless they cannot be useful where there is no arbitration at all.

By the end of the 20th century, knowledge of FIDIC in the European Union was sufficient to make FIDIC model forms of contract mandatory for EU-financed projects, and in this way the DRB/DAB has been granted a strong foothold in the Polish economic system. Moreover, it is also true for other European countries who receive EU funds and other international bank financing. In Poland, SIDiR's bilingual publication of FIDIC

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DRBF Board Meeting

Summary Minutes

AUGUST 12, 2005 MEETING

A DRBF Board of Directors meeting was held by conference call on August 12, 2005 with 12 Board members and several invited guests participating.

Finance/Budget

Projections are still that we will have roughly \$60,000 in our reserves at the end of 2005. Based on Joe Sperry's analysis of memberships, new members in June and July were estimated at 40, whereas we actually gained only 28 (70% of the Sperry estimate). Using 70% of the projection for August and September we should reach 624 members by year end (off from the 680 assumed in our 2005 budget). This is still up from last year and isn't bad considering we raised dues significantly this year.

Education & Training

Kerry Lawrence gave an update on the materials Larry Delmore is preparing for the workshops. Larry D. has been approached about putting on two workshops for CDOT, and he requested Board permission to do those using the new workshop program. Massachusetts and NYC transit are also in talks, so there could be as many as six new training sessions this year. CDOT is looking at the 3rd week of September, and the other two would likely be after the Annual Meeting.

The question was raised about the possibility of performing a dry run of the new training program prior to the September workshops, as the Board was expecting to see Larry do this in Denver for the first time. After lengthy discussion, it was agreed that a dry run would be scheduled to occur during Larry's trip to Seattle in late August, and Jim Donaldson would assist him with the CDOT workshops. It was further decided that Larry and Jim should do the training in Denver as a

model for other trainers to follow. It was noted the new training materials will be submitted for copyright registration and duly marked on the cover.

A suggestion was made to bring the new training program to Caltrans, who has recently elected to perform their own training workshops in lieu of the DRBF training. Caltrans responded favorably to the DRBF's offer to sit in on their in-house training and Jack Fellar noted that he and Bill Baker are planning to do so. This is also a good opportunity to go back to CALTRANS with our new training program to see if they want to consider re-instituting formal DRBF training. Jim Donaldson will review the new training materials and tell Jack exactly what the differences are so Jack can follow up with Caltrans accordingly.

Several DRBF members have expressed an interest in being trainers. It was agreed that Larry Delmore send out an email with a brief summary of the new training and stating potential co-trainers must attend the Denver workshops to be considered as co-trainers in the immediate future. The Education Committee is responsible for selecting potential co-trainers to ensure they have sufficient DRB training and experience.

Executive Director

Larry Delmore reported that he has been approached to have the DRBF co-sponsor a construction claims conference a year from now. He needs introductions from Board members to insurance and surety companies who might participate in the event. It would be a marquee event with revenue for the DRBF (split with the co-sponsors). Larry will draft a summary of the opportunity and what he needs which will be distributed to all Board members.

In Maryland and Virginia, some members have contacted him about a regional chapter and regional training. He's working with the Regional Representative committee, and expressed his desire to improve the active leadership of this group.

Larry also gave a summary of the training materials in development. He is using the DRBF Manual and a fictional project with a series of problems to help bring the subject matter to life – not just black and white, but “into the grey” and then back “into the light.”

International Committee

Gwyn Owen expressed concern at the lack of participation by International Committee members, despite his efforts to establish terms and responsibilities for them. He questioned what the Board wants from the committee, how they should function, and whether we even need an international committee at this time.

A brief overview of the origins of the committee and progress over the past two years was given by Gordon Jaynes (first International Committee chair) and Peter Chapman (former chair). Gordon reviewed the establishment of the country representatives program, and the need for them despite the fact that some are dormant. Peter mentioned that he expanded the effort by starting the Annual International meetings, and by giving them a term of reference by which they should move forward.

Gwyn mentioned that the country reps are indeed the foot soldiers around the work. He created a committee with 5 or 6 members who each have responsibility for a handful of countries in hopes of dispersing the workload. The question is whether we are ready for the committee level or should we just leave it at the country reps reporting to one person (the chair), and dissolve the committee. A fuller discussion of this will be addressed at the Denver meeting.

Nominations

A report was submitted by Jack Woolf

and distributed to all Board members. Larry Delmore stated the candidates under consideration have expressed the time and commitment to serving on the Board fully. Peter Douglass has held both secretary and treasurer positions for the past 9 years, with voting privileges and a spot on the executive committee. The future plan is to divide those positions into two, and the question has been raised as to whether these should be appointments or elected positions. Pete suggested that it should be a multi-year appointment of someone who has DRBF experience and has a good working relationship with Steve Fox.

Manual

The issue of restricting accessibility of Section 3 to members only was tabled for the Denver meeting. Joe Sperry offered some things to consider in preparation: Sections 1, 2 and 4 should remain available to everyone; the question only affects Section 3. He stated that the Foundation won't fail if we give Section 3 away, as some seemed to express at the Chicago BOD meeting. He stated that while some membership may be gained by offering it to members only, there is no way to know how many would be captured this way.

SEPTEMBER 9, 2005 MEETING

A DRBF Board of Directors meeting was held by conference call on September 9, 2005 with 14 Board members participating and several invited guests.

Finance/Budget

The finances appear to be slightly ahead of last month's projection. This can be attributed primarily to the new training workshop planned in Connecticut later this month. Membership figures are currently on track with last month's projection of 624 members by year end.

The draft budget for 2006 is under review, and will be distributed to the Board prior to the next BOD meeting before the Annual Meeting. The 2006 budget has a lot of emphasis on workshops, which are anticipated to be a significant revenue source for the Foundation.

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Education & Training

Larry Delmore is proceeding with programs he has scheduled on the east coast. With regard to volunteer trainers, the committee's recommendation is to have Larry Delmore and Jim Donaldson train some additional trainers, and in 2006 schedule a "train the trainer" session (3 sessions in different parts of the U.S.). Pete Douglass, Bill Baker and Dan Meyer have volunteered, in addition to Jim Donaldson. There will be no charge for the "train the trainer" session, but expenses would not be covered by the DRBF. However, travel expenses would be covered for volunteers actually co-training on workshop sessions. The committee is planning to limit the number of people who participate for co-training purposes in a regular workshop session to one or two people, because they don't want it to detract from the main purpose of training the paying attendees.

Discussion turned to the qualifications for volunteer trainers. The point was made that trainers must have a certain presentation style in addition to a strong knowledge base. It was mentioned that the hope is to have a combination of owner and contractor background trainers making the presentation (Larry Delmore comes from the owner perspective). It was also expressed that the co-trainer should have experience with the owner whose jobs we are training for (Caltrans, for example, wants someone who understands their organization and contracts). In determining the most important trainer criteria, it was agreed that being able to train effectively is more important than the co-trainer's background.

It was agreed Larry Delmore has authority to "comp in" owners considering the process, and report to the Board after the fact, with a limit of two per workshop. The first will be Mary Jo Champion of AAA, who has asked to audit the Connecticut workshop session. (Note: The September workshop was deferred to a future date.)

Executive Director

Larry has been asked to be on the state of Connecticut's Construction Industry

Advisory Committee. One of the objectives of this committee is to develop a procedure for incorporation of subcontractors into the DRB process. Larry stated he envisions that such a procedure would facilitate a DRB to rule on merit only for subcontractor claims before the dispute is passed to the owner. Hopefully, inclusion in the DRB process would forestall the common current practice of the general contractor withholding funds from the subs after award. There was concern raised about the Foundation getting involved in making recommendations on claims certifications. It was agreed that once a more detailed proposal is brought to the Board, they can decide if it is appropriate to endorse it and if such language should be added to the Manual.

Larry recently was in contact with a Bechtel executive regarding a large contract in New Orleans. He also is scheduling meetings in Washington, DC and hopes to have Hal McKittrick join him for those. Additional meetings are in the works regarding capital campaigns at several universities.

Larry Delmore said that Kerry Lawrence is on a bond council for Harborview Medical Center, located in Seattle. When the public approved a \$390 million bond issue to upgrade and expand the facility, the bond agreement required unanimous agreement by all three entities involved (King County, Harborview Board of Trustees, and the University of Washington) for the expansion and improvements. The three entities decided to put in place a "Management DRB (MDRB)" to provide recommendations in the event they were unable to reach unanimous agreement between themselves, and Kerry is serving on the MDRB. Larry noted that he is intrigued by this new concept of having a DRB just for the bonding issues of the project. He hopes to promote the idea to appropriate audiences and will put together a brochure about it.

Website Committee

Ann McGough stated that some technical-clean up had occurred with the member resume database, and the committee is now prepared to notify the membership that the "DRB Training and DRB Experience" and

Board of Directors Meeting Schedule

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

**November 11
December 15
January 13**

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

the “Brief Resume” sections will be restricted to a maximum of 100 words each. The Board agreed this was sufficient space.

The committee requested 15 minutes of the next BOD meeting to present analysis of website user statistics its affects on development of the site. The Board expressed support of and interest in the analysis.

Other business:

International Conference - Peter Chapman stated he has sent a draft program to the Austrian representative who is the local point person for the meeting in Budapest. She has not been in contact for several weeks, but Peter hopes to renew conversations with her soon.

Olympic Games Initiative – Peter Chapman participated in a meeting about establishing DRBs for the Olympic Games in London in 2012 – and all future Olympic Games. He requested Board permission to link the DRBF name with the effort and was given unanimous approval. Jack Woolf mentioned that anything that can expedite the review process is going to be crucial to a successful DRB process. Peter stated he believes the government will only provide support for the concept, and not get involved in the procedural details. Beijing has not been receptive to the idea thus far, but things look good for London. The London Olympics dispute resolution process would follow the DAB model with binding recommendations (in accordance with the law in the U.K.).

OCTOBER 7, 2005 MEETING

A DRBF Board of Directors meeting was held in Denver, Colorado on October 7, 2005 with 14 Board members participating and several guests present by invitation.

Finance/Budget

Pete Douglass gave a brief overview of the 2006 budget draft that had been distributed to the Board. One workshop has been dropped so revenue and expenses in 2005 dropped accordingly, resulting in the net draw and remaining funds in reserve at the end of 2005 being approximately the same

as reported in September. The Board previously established a minimum cushion to be kept in reserves, leaving roughly \$43,000 available from reserves in 2006.

Some highlights were addressed in the revised draft 2006 budget. In the revenue section, there will be no contributions, as those were a one-time occurrence in 2005. In 2005 we extended an offer of a \$100 credit on 2006 dues to those members who brought in one or more new DRBF members in 2005 and this will have a relatively minor impact on the dues revenues in 2006. Most importantly, the 2006 draft budget includes a projection of 20 workshops (~2 per month) with 20 participants assumed in each workshop. The workshop budget projections are the single greatest net increase in 2006 net revenues relative to 2005. Therefore, they are the key to the DRBF continuing to be able to fund the Executive Director position in 2006. By June 2006 we will have to make a decision on whether those workshop projections are realistic, based on our experience to that point.

Education & Training

Kerry Lawrence began with a report on the two days of training held prior to the Board meeting. These workshops were administered by Larry Delmore and Jim Donaldson utilizing the new training materials. There were many positive comments about the sessions from participants.

There was discussion following the workshops about potential changes. It was suggested that the User Program be offered as a separate 4-6 hour course so that it could be completed in one day, including limited travel. It was also suggested that the DRB member training and chair training (complete with a testing component) be offered as a separate workshop, and that an advanced program for experienced chairs be offered. Another suggestion is to offer half of the DRB member and half of the chair workshops as a refresher course at a lower cost.

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Larry Delmore indicated that although he will focus on administering the training workshops in the coming year, ultimately he expects to move away from workshop responsibilities due to the time commitment required. Also, he confirmed that with the completion of the training manuals, the DRBF can now offer continuing education credits. It was noted that a sexual harassment component should be added to the ethics section of the training manual. The proposed changes to the training workshops passed unanimously.

BOD Candidates/Appointed Positions

Jack Woolf announced the slate of candidates with Pete Douglass as president-elect, and incoming Board members Romano Allione, Marianne Ramey and Bob Smith. Jim Donaldson will take over as treasurer, and Bill Baker will serve as secretary, with assistance from Ann McGough. Previously, the role of secretary and treasurer was combined under appointment of one individual to “serve indefinitely, until a replacement is appointed.” The Board was asked to consider whether to change the bylaws from an indefinite term position to a three year term. It was suggested that after the second year of the treasurer’s term (if the person is not willing to continue to a second term) then a “treasurer-elect” should be appointed to assist the current treasurer for the third year of his term to create an overlap. It was further noted the current bylaws grant voting rights to the Secretary/Treasurer. With the division of this position into separate individuals performing as Secretary and as Treasurer, voting rights need to be clarified. The Board agreed that both Jim Donaldson (incoming Treasurer) and Bill Baker (incoming Secretary) would each have voting rights until bylaws revisions are completed. After some discussion, a motion was passed unanimously to clean up the bylaws to reflect separate appointees for each of the positions, revised voting rights, and a three year term for each. It was also reported that a decision had been made to defer naming a World Bank replacement. Armando Araujo indicated his replacement at the bank was expected to be named soon.

International Conference

The International Conference is scheduled for Budapest in May 2006, but the Foundation does not currently have a representative in Hungary. Budapest was chosen because of its desirability in the region. The Austrian rep, intended to serve as the coordinator, is facing some personal challenges that interfere with her ability to plan the event. Peter Chapman has temporarily taken over the responsibility, but has raised some concerns about being able to do it effectively. He asked the Board to consider hiring a London-based event organizer to work under his oversight, with an anticipated cost of \$7,500 pounds (~\$15,000 and close to the total budget for the event). Peter also proposed that we host a workshop in conjunction with the conference, as was done in Dubai. The topic was deferred until the Nov. Board meeting, when the group can fully evaluate the hard numbers from the previous conference, and the International Committee can be prepared to discuss options.

Executive Director

Larry Delmore began with a review of recent marketing efforts, including those with state DOTs, elementary and secondary schools, and colleges/universities.

Larry Delmore then presented a number of items for Board consideration:

- A request to partner with a company to create a one-person DRB model for the high end single home building industry.
- A feasibility study to consider hosting a construction claims conference with the University of Washington Law School. This would be a revenue source and reach an expanded audience for our message.
- He asked for the Board’s input on how to police members who don’t follow the DRB rules as laid out in the Manual (he gave the example of a Board being paid solely by the contractor).
- A program of DRBF logo items to foster pride in the organization.
- Board feedback on his report comparing DRB benefits with other dispute resolution processes.

- Publication of a monthly list of organizations seeking DRB members.
- Input on pricing for in-house training. The BOD reviewed prior training fees. It was agreed to determine what the DRBF needs, and then price accordingly. There is a big market for in-house training, and it does not compete with existing training.

Membership Grades

The membership grades proposal is on the agenda for the Annual Meeting. The goal is to gather feedback from members during the meeting, apply it to the plan, and share it with the full membership by the end of the year. The membership would then be given the opportunity to vote on it in the Spring of '06 for implementation in '07.

Local Chapters

Florida is the only U.S. chapter, and there are several overseas chapters. Recently, a Fla. member put together a training course to teach highway personnel how to prepare for a hearing. This course could be used to spread the use of DRBs into new industries (schools, buildings, etc.). Currently based on Florida's unique DRB procedures, this course could be modified for other states in the future.

Discussion turned to the challenge in identifying good regional representation to expand the local chapter program. President Hal McKittrick offered to help the committee chair contact each regional representative personally to try to inspire renewed effort.

International Committee

Committee Chair Gwyn Owen was unable to attend the meeting, but distributed a report in advance. Gordon Jaynes, a former International Committee chair, addressed the challenges the committee is facing with regard to leadership from the country reps. Romano Allione was asked for his perspective on the situation, and stated he does not feel much action is taken because the issues presented are not terribly compelling. He suggested focusing on 2 or 3 main issues. President Hal McKittrick asked Gwyn Owen to draft a short description of responsibilities and assign a few tasks to the reps.

Manual

Joe Sperry and Bill Edgerton offered opposing viewpoints on whether Section 3 should be limited to DRBF members only. Joe's main argument is that the success of the DRB **process** is the most important function of the Foundation, and full access to the complete Manual information supports that goal. Bill raised the opinion that reserving the Member's Guide (Section 3) for DRBF members only provides a tangible benefit to DRBF membership, and therefore we should protect it as such and not give away all of our work product. It was also pointed out that in either case the Manual will continue to be available to anyone for purchase from the Foundation for \$29.99. After some discussion, the board vote resulted in a 6-6 tie. Therefore, the proposal to offer Section 3 unrestricted did not carry.

Web Report

Ann McGough distributed a summary of the statistical report data for 2005 YTD, including increases in visitation, top sections within the site, and top referring web pages. She showed how the data was being used, in addition to user feedback and awareness of DRBF strategy, to make changes to the site for 2006. There would be changes to the toolbar to improve access to the popular pages within the site, and the removal of sections that are duplicates of information in the Manual. The Board expressed approval of the report and the proposed changes to the site.

Testing Committee

Joe Sperry presented his report which included a proposal to test members at the end of workshop courses and at the Annual Meeting. Gordon Jaynes shared his perspective, suggesting that testing is a lot of work, brings a lot of complaints, should be integrated with the membership grades proposal, and should have no grandfather clause. It was mentioned that incoming board member Bob Smith has a strong position against certification and that his voice should be heard. Further discussion was tabled for a future meeting. □

Committee Reports

WORLD BANK

First, the aim to arrange a videoconference on the successful use of DBs sponsored by the World Bank Institute, Washington, DC, and the International Development Law Organization, Rome, Italy, has been achieved. On 09 December, there will be a simultaneous dialogue among the two sponsors and prominent individuals in each of three Asian locations: China, Thailand, and Vietnam. Videoconferencing facilities in the capitols of those three nations will be used simultaneously to enable a live three hour discussion among persons in Washington, DC, Rome, Beijing, Bangkok, and Hanoi.

The DRBF has been very active in the preparations, including assistance from DRBF Country Representatives in China and Vietnam, as well as from this Committee. Leading government representatives in each of the three countries are to participate. At least one active DB, serving in China, will participate, and all three members of that DB are DRBF members, including the DRBF Country Representative for Japan, and one DB member who serves on the DRBF Board of Directors. The aim of the Dialogue is to persuade relevant persons in China, Thailand, and Vietnam to “buy into” the DB system, and to use it with a determination that it shall succeed in amicable dispute resolution.

Second, following the May 2005 announcement of the multilateral development banks’ adoption of a “harmonized” edition of FIDIC's *Conditions of Contract for Construction*, FIDIC published in September an “MDB Harmonised Edition” of its 1999 document, generally known as “the Red Book.” This document will be used in the future by The World Bank and eight other multilateral development banks, as explained in the “Introduction” and “Terms and Conditions of Use” at the opening of the document. Both electronic and hard copies can be obtained by contacting FIDIC at fidic.pub@fidic.org. For details regarding FIDIC, see also www.fidic.org.

-Gordon Jaynes

EDUCATION AND TRAINING

Larry Delmore presented the first new Administration & Practice and the new Advanced & Chaining Workshops in Denver.

Based on the experience and feedback from a variety of sources, a recommendation was made to the Board of Directors to restructure the A&P workshop and make other revisions to our programs. The Board approved the following:

1. The A&P Workshop will be broken into two workshops. The Denver trainers and observers were unanimous in their belief that the program contained too much material because it was addressing two different audiences with different goals. The first new program will be oriented to owners and contractors and their project personnel. This program will focus on DRB concepts and application of those concepts by the owner and contractor, from a practical standpoint. This program will be approximately 4-6 hours long in order to address concerns expressed by many public agencies that overnight travel is very difficult to get approved, and full-day programs are a burden on owners, contractors and their employees. The second program will be a 7-8 hour program focused solely on training potential DRB members.

2. The new “Member Training” Workshop will be structured to provide a half-day refresher for members.

3. The Chaining Workshop was directly on point, but the program will be reorganized in minor ways to allow for a half-day refresher for experienced chairmen, similar to the refresher for board members.

We will be adding an “Advanced” workshop for experienced board members to answer member requests for a forum to cover difficult topics and brainstorm issues with other experienced board members.

We will be presenting these reformatted programs beginning in 2006.

DRBF Committees

If you have comments for any committee chairs or would like to get involved in their efforts, please contact the committee chair directly. Contact information is available on the DRBF website, www.drb.org.

Annual Meeting and Awards

Robert Rubin

Data Compilation

John Nichols

DRBF Best Practices and Other Publications

Marianne Ramey

DRBF Bylaw Revisions

Robert Smith

DRBF Manual

Joe Sperry

Education/Training USA

Kerry Lawrence

Education/Training Multinational

TBA

Executive Director Oversight

Harold McKittrick

Finance and Administration

James Donaldson

International

Gwyn Owen

Membership

Harold McKittrick

Nominations

Jack Woolf

Professional Conduct

Robert Smith

US Regional Chapter Coordination

John Nichols

Web Site/Advertising

Ann McGough

World Bank Liaison

Gordon Jaynes and Armando Araujo

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WELCOME TO NEW DRBF MEMBERS

MEMBER ADDITIONS AUGUST THROUGH OCTOBER 2005

Allan Adderley Brooksville, FL USA	Kenneth Jones Anaheim, CA USA	Marcia Scully Metropolitan Water Dist. of So. California Whittier, CA USA
Leland Eugene Backus, Esq. Backus Carranza Las Vegas, NV USA	Richard A. Jones U.S. Bureau of Reclamation Weaverville, CA USA	Kent A. Selzer Verification Technology, Inc Thonotosassa, FL USA
CMC Di Ravenna Faustetti Fausto Ravenna, ITALY	W. Joseph Leford Fair Oaks, CA USA	Stanley P. Sklar Bell, Boyd & Lloyd, LLC Chicago, IL USA
Nick Crennan Colin Biggers & Paisley Sydney, NSW AUSTRALIA	Peter G. Merrill Construction Dispute Resolution Services, LLC Sante Fe, NM USA	Robert A. Sliwinski Wright Hassall Leamington Spa Warwickshire UK
John Daly John K. Daly & Co. Ltd Banbury, Oxford ENGLAND	Ronald J. Minarcini Marco Island, FL USA	William Timothy Sullivan Oakdale, NSW AUSTRALIA
Darren J. Duzyk Sullivan & Duzyk Lexington, KY USA	Paul A. O'Leary Jacobs Babtie London, UK	David G. Waddle Leicester, UK
David E. Edfors D.E. Edfors Const. Services Rockville, MD USA	B. Peng Conciliation Centre of CCPIT/CCOIC Beijing, PRC	Michael Walters Sutton, Surrey UK
Jesse B. Grove III Thelen Reid & Priest LLP New York, NY USA	Louis Persons Oklahoma DOT Oklahoma City, OK USA	Michael James Weatherall Simpson Grierson Auckland, NEW ZEALAND
L. Tyrone "Ty" Holt, Esquire The Hoty Group LLC Denver, CO USA	Andrew J. Price Jr. Price Consulting Sarsota, FL USA	Pierre de Wet Windhoek, NAMIBIA
Mahir Jalili London, ENGLAND	Michael Lennox Scott La Massana, Principat d'Andorra	Krzysztof Woznicki Komorow, POLAND □

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These trainings will all be presented by a two-person team, with Larry Delmore as the primary presenter. The DRBF is accepting requests from individuals who are interested in being a co-presenter. The co-presenters are not compensated, but will have their reasonable out-of-pocket expenses reimbursed by the Foundation. Obviously, being a co-presenter will provide an opportunity to become known to potential users of the DRB process. If you are interested in becoming one of the co-presenters, please send a statement of interest and your resume to Kerry Lawrence at kerryclaw@aol.com, or by fax to 425-462-9682. The Committee will review all requests and make recommendations to the BOD on approval of co-presenters.

-Kerry Lawrence □

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(2) How proactive should DRBs be?

The “proactivity” of DRBs has been debated for some time. DRB members once felt that the DRB should be passive in order to maintain total objectivity, and the process would be used only if the parties decided to take a dispute to the Board. The current feeling is that more proactivity is advisable in order to meet the underlying purpose of DRBs: “To assist the parties in resolving and avoiding disputes.” In furtherance of the latter concept, some DRB members would argue that they should do “whatever it takes,” including prodding. The attendees concluded that DRBs should urge discussion while maintaining their objectivity. Although there was general agreement that proactivity was good, DRBs must “walk carefully.” It was pointed out that all DRB members should reach previous agreement on how proactive they want to be, as a group, and when/how such proactivity should be expressed. Another point brought out was that during the site visit, DRB members who are registered professional engineers are generally required by state law to point out obvious, serious safety violations and should do so.

The group prepared a list of ways that DRBs could be proactive:

- Insist that the Chair make the agenda for regular meetings, following correspondence with the parties
- Urge the parties to establish a schedule for negotiations
- Review the list of RFIs, PCOs, potential disputes and claims at each meeting
- Ask questions, rather than making statements that could be perceived as giving advice
- Request that “pending issues” be listed on the meeting minutes
- Ask questions about how the parties are communicating. By so doing the DRB can sometimes surface a communication problem, which, when brought into the open can be resolved.
- Inquire on various topics that appear to be pending issues
- Request the minutes from partnering meetings

There was also discussion about how and when to assist the parties in helping identify the problem, particularly if the parties haven’t clearly identified it. Although the DRB has to be particularly careful not to make the parties case for them, it was pointed out that if the DRB can identify the underlying problem, either before the position papers are due, after they have been submitted, at the hearing, or during deliberations, it may assist in resolving the dispute by finding a way through the complexity of issues.

In parting, one attendee posited that the purpose of the periodic site visit is to see potential issues, and no DRB wants to hear a dispute that they haven’t had the opportunity to see in the field. Without personally viewing the work, the DRB has a more difficult task recommending resolution.

(3) Under what circumstances should an advisory opinion be suggested to the parties?

Recognizing that advisory opinions are an informal method of advising the parties on how to resolve potential disputes before they become real ones, it was noted that both parties have to agree to an advisory opinion: If one party does not agree, then it can’t happen. It was suggested that the method for requesting and issuing advisory opinions be discussed by the DRB at the project kick-off meeting.

In an advisory opinion, typically the DRB offers their opinion based on the information provided, but does not make a formal recommendation, and does not include an impression of the strengths and weaknesses of the parties’ position, nor any other rationale for their opinion. It was also pointed out that any such advisory opinion should be suitably disclaimed with respect to “only based upon information available at the time,” “subject to change later based upon further information,” “not to be used or referred to in future disputes on this issue,” etc. It was also agreed that advisory opinions should not be issued on an impromptu basis.

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Although there was complete agreement that the DRB should make the advisory opinion verbally, there was a wide variation of opinion as to whether the DRB should make it in written form as well. Many attendees said it should “never” be in written form, and others argued just as strenuously that it could also be submitted in written form. Those who argued for the written form gave as reasons: (1) avoiding disputes as to the words of the advisory opinion, i.e., each party may hear what they want to hear, and (2) one of the parties may need to carry the DRB opinion to higher authority for approval. Those arguing for verbal-only focused on maintaining the informality of the proceeding. Nonetheless, all present agreed that if a written advisory opinion was issued, it should be at the specific request of both parties.

The question was asked as to whether there are specific types of disputes which do not lend themselves to an advisory opinion. For instance, a differing site condition dispute might have several possible entitlement bases, and allowing an advisory opinion might provide one party an advantage in subsequent formal dispute hearings. The attendees generally agreed that if, after listening to the parties positions in an advisory opinion hearing, the DRB feels the issues are more complex than can be realistically dealt with in an advisory opinion, they could (and in some cases should) refuse to issue an opinion, stating what types of further information would be necessary to do so.

In summary, all attendees felt the history of success that advisory opinions have achieved (only one of 40 or so experiences reported by the attendees had gone on to a formal dispute hearing) warranted their continued inclusion on all projects.

In the next issue of the *Forum*, we will present a summary of the discussions regarding how minority positions should be presented and how extensive disclosures should be. In the meantime, we welcome comments on the issues and comments addressed so far. This input will be integrated into discussions for future Manual revisions. □

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and WB model documents, plus seminars and practical examples, helped make such financing viable and effective.

We tried our best to promote the DRBF at EFCA meetings, composed of the EU consulting engineers’ associations. I myself presented the subject twice, once in Prague in 2002 and again in 2005 in Krakow. Both times it aroused vivid interest.

As to the effects, the DRBF received first report on a sole member DAB in 1998 for the Warsaw Agricultural Market with a contract valued at 70,000,000 €. It resulted in two disputes resolved by the adjudicator, and none referred to arbitration, then it may be considered successful. Since that time, many other DAB have been formed and manned by members of SIDiR. Many are still running, but I have to admit no system of recording exists, so we simply do neither know about the effects, nor about their very existence. The system of recording is badly needed, but not easy to enforce.

We propose to arrange a new training seminar aiming to up-date the qualifications of our experts, adjudicators and arbitrators, and increase their number by training new ones. This shall be in place by January 2006, and we plan to invite candidates from neighbor countries.

NOTE: Adam Heine, M. Sc. Eng., is a consulting engineer and co-founder and past president of SIDiR. He received a B.S. degree in Power Engineering from Technical University of Warsaw and a M.S. from Technical University of Szczecin. He has extensive experience in power plant operation, commissioning, and designing and supervision of works in Poland and abroad. He has served as a translator and lecturer on FIDIC publications in Poland since the early 1980s, and as an independent consulting engineer, tender and contract facilitator. Adam Heine is married to Danuta, a physician and his companion from the Warsaw Uprising over 60 years ago, and has two children and three grandchildren. He can be reached by e-mail at heine@poczta.fm. □

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 January 1, 2006



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Gordon L. Jaynes Receives Prestigious AI Matthews Award

The Dispute Resolution Board Foundation bestows the **AI Matthews Award** to one or more members who have given exemplary service in advancing the use of Dispute Resolution Board concepts, and the DRBF. On October 8, the award was given to DRBF charter member Gordon L. Jaynes, Esq. He has served the Foundation in a number of roles, and currently is active on the Board of Directors and as co-chair of the World Bank Liaison Committee.

In addition, outgoing president Bob Rubin gave the President's Distinguished Service Award to Ann McGough "In appreciation for (her) excellent work as Forum editor and Website coordinator of the DRB Foundation."

Past Winners of the AI Matthews Award include:

- 2001 AI Matthews
- 2002 Robert Matyas, Robert Smith, and Joe Sperry
- 2003 Jimmy Lairscey
- 2004 Jim Donaldson, Pete Douglass, Carlos Ospina, and Steve Fox