



Forum

VOLUME 14, ISSUE 1

FEBRUARY 2010

Do DRBs Trump DABs in Creating More Successful Construction Projects?

By Derek Griffiths



Some History

About thirty years ago Americans pioneered a procedure considered to be more appropriate than litigation or arbitration to deal with the more dispute riddled and under-performing parts of their construction industry. It was the early appointed, recommendation making Dispute Review Board (DRB) procedure. Later, the World Bank recommended its use on international construction contracts based on the FIDIC 4 and it began to be used on some international projects.¹

Some twenty years later the British government took actions based on reports from Sir Michael Latham and Sir John Egan² to tackle the same problems in the UK construction sector. One was to endorse a form of contracting³ that espoused

collaborative working or “partnering.” Another was to introduce statutory adjudication⁴ where adjudicators would resolve disputes by decisions that would be binding unless overturned by agreement or subsequent action. This, it was said⁵, was a sensible way of dealing expeditiously and relatively inexpensively with disputes which might hold up completion of important contracts. Almost simultaneously, in the form of Dispute Adjudication Boards (DABs), FIDIC incorporated a similar form of adjudicatory procedure into its suite of standard conditions. The main difference is that with DABs a party has to act in the way agreed to in the contract⁶ if it wants to prevent a decision becoming final as well as binding.

At the beginning, some felt that adjudication as required by the Housing Grants, Construction and Regeneration Act of 1996 (HCGRA) would founder on

(continued on page 14)

“...Having worked with both, I am convinced that DRBs are more likely than DABs to encourage the partnering that drives the more successful projects with or without a sound bite. I say more likely because, like Lord Justice Dyson¹¹, I think that perfection is unattainable; in other words there is no “perfect dispute resolution.”

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President's Page

At the beginning of the New Year it is natural to look into the recent past and the near future.

At the beginning of December 2009 I did participate to a very interesting FIDIC International Contract Users' Conference in London and met there with several members of the DRBF. Much to my surprise, I found that several participants were practitioners from Italy and very much interested in promoting the use of DBs. These contacts resulted in a meeting of 10 lawyers and engineers held in Genoa on January 29th under the auspices of the University Faculty of Engineering; the high arched ceiling covered with original impressive "frescos" (Villa Giustiniani-Cambiaso 1548) saw animated discussion on the future of DBs in Italy. Our host was Prof DelGrosso, the newly appointed DRBF Representative for Italy. A development programme for the DRBF in Italy has been agreed, more in a separate report in the *Forum*. At the meeting the outgoing DRBF Representative Igor Valerio Leto was also present.

On 22 January, a high level conference organized by Beau-Rivage Palace Forum was held in Lausanne on "Key Concerns of the Construction Industries and Tentative Response." Your President had the honour to be invited as a panelist and, even more, DRBF member Gordon Jaynes was a speaker on Session 2. Several DRBF members, lawyers and engineers participated, contributing to a lively exchange of views. The promotion and proper operation of DBs was prominently featured in the discussions.

At Lausanne the outgoing DRBF Representative for Switzerland Pierre M. Genton was the main organizer, and the newly appointed Representative Michel Nardin was present. To Igor V. Leto and Pierre M. Genton the Foundation's warmest thanks for their contribution to the acceptance, development and implementation of the Dispute Boards in the world and the request to maintain their membership and keep providing their support to the Foundation.

I have moreover to mention the agreement, promoted by Region 1 President Kerry Lawrence, to participate to the AAA meeting to be held in March 2010 in Miami. The DRBF will be formally present and contribute speakers on DBs, mainly oriented to central and South America (more information is on page 23). Numerous projects are being developed in Central and South America with the tendency to utilize DBs issuing recommendations. Due to the logistics, practitioners from North America are going to be preferred. So I invite the interested Foundation members to look to this area with interest. On request I may provide a list of projects which may need DBs (write to romano.allione@tiscali.it). For USA please refer to project lists issued by courtesy of Blasdel Reardon.

In all there are many activities of the Foundation and its members which are taking place in addition to the main DRBF conferences; all the events are listed in the Foundation web site.

In closing, I repeat the suggestion to register to the DRBF international conference which will be held in Istanbul from 14 - 16 May 2010 and to book the days of the DRBF Annual Meeting and Region 1 Conference to be held in Charleston on 1 - 3 October 2010. Both conferences will be highly interesting both for the technical content and the possibility to visit historic Istanbul and wonderful Charleston.

Sincerely,

A handwritten signature in black ink, appearing to read "R Allione". The signature is fluid and cursive, with a long horizontal stroke at the end.

Romano Allione
President, DRBF Executive Board of Directors

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The Executive Committee meets monthly. Recent topics have included:

- Revival of the DRB Database project
- Marketing and outreach through owner presentations and speaker engagements
- Expansion of training program and updates to training modules
- Administrative issues such as expanded insurance coverage and staff additions
...and more!

Summaries of the Board meetings are available to all DRBF members on the DRBF web site. To access the **Board of Directors Meeting Minutes Summary**, go to www.drb.org. Click on the **Member Login** button, and then click on **DRBF Board of Directors**.

Executive Board of Directors Meeting Schedule:

March 19, 2010 by conference call
April 16, 2010 by conference call

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Kerry Lawrence, President
Roger Brown, President Elect
John C. Norton, Past President
Douglas Holen
Blasdel Reardon

Region 2 Board of Directors

Volker Jurowich, President
Nicholas Gould, President Elect
Richard Appuhn
James Perry
Paul Taggart

Questions for the Executive or Regional Boards should be addressed to the Board Presidents, care of:

Dispute Resolution Board Foundation
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Phone: 206-878-3336 Fax: 206-878-3338 Toll free (US only) 888-523-5208
Email: info@drb.org Web: www.drb.org

Dispute Board Awareness Conference Held in Brussels

By William Buyse, Country Representative for Belgium and James Perry, Director, Region 2

A Dispute Board Awareness conference was held in Brussels on 26 November 2009 in collaboration with KRID, the expert division of the Flemish Association of Engineers KVIV at the Berlaymont hotel next to the European parliament.

William Buyse, DRBF Country Representative for Belgium organized the half day affair, which was attended by twenty-five representatives of the Belgian engineering, contracting and legal communities. Invited representatives of the various government authorities were not in attendance. However, other efforts to increase awareness of the benefit of dispute boards at the Belgian government level are already being taken, including soliciting direct meetings, and the introduction of government employee conference rates in the future.

The first presentation was given by William Buyse in Flemish. Striking examples were given of Belgian projects which went out of control in regard to both the increase of the contract sum and the extension of execution period, which could have been controlled better through the use of a Dispute Board. William mentioned that a very important project to start in Antwerp has a Dispute Board foreseen in the bid documents, which would be the first use in Belgium.

Special attention of the participants was drawn to the increasing use of Dispute

Boards internationally i.e. by The World Bank and MDBs. A very thorough overview was given of the workings of Dispute Boards and a description of the various variants including DRBs, DABs, CDBs, standing and ad hoc boards. The possibility to obtain from the DB either an advisory opinion, a recommendation or a decision was clarified.

Special attention was drawn to the “binding third party decision,” a special judicial figure which resulted from the judicial practice in Belgium and this would imply that a decision in case of a DAB would be final without possibility of recourse to arbitration or the courts for a final decision.

The working method of a DB was explained in detail as well as the requirements to become a DB member. The structure of the costs involved for the parties and figures resulting from statistics and real experience were given of these costs. The elements for a successful DB were explained and the advantages and benefits were highlighted but also the barriers to DBs were answered in detail. As a conclusion of the presentation, William enumerated the areas of possible use of DBs: infrastructure projects and high-rise buildings but also projects in the chemical, petro-chemical sector and important erection of machinery projects could benefit.

The second presentation was delivered by Jim Perry, a Director of Region 2, in French. Jim’s paper looked at the use of adjudication in the UK, which is similar to an ad hoc DAB, but which is covered

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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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by framework legislation giving the system a strong enforcement capability, and consultative committees in France, which are comparable to an ad hoc DRB, but which are not as frequently used as adjudication in the UK. Jim compared the advantages and disadvantage of these systems to Dispute Boards, and concluded that the strength of the Dispute Board system is most apparent when there is a standing board who can fully play their dispute prevention role. It is interesting to note however the strength of adjudication in the UK, which was implemented following the Housing Grants, and Reconstruction Act of 1996, due to the legal structure which makes the adjudicators' decisions enforceable even pending further litigation.

The French system of ad hoc DRB-like committees is also supported by legislation, which establishes the expert committees nationally and regionally. Parties to a public works contract are guaranteed access to these committees, known as the CCRA (Consultative Committee for Amicable Resolution). While these committees remain under utilized, it very interesting to note is that they are well respected, and it seems the recommendations have a high level of acceptance according to reports from users. Unfortunately statistics are not available.

Jim concluded his paper by outlining examples of projects where Dispute Boards have been credited with saving time and money on major projects such as Euro Tunnel, the Big Dig in Boston and the WMATA program in Washington D.C.

Following the seminar William Buyse reports having received eight request from participants to have full day Dispute Board seminars for their own organizations. William expects to be developing this program with implementation

in 2010, including a Dispute program to be tailored for the European Investment Bank, which suggested having an initiation conference at their head office in Luxemburg.

Participants consistently expressed their view that the Dispute Board system was appealing, but to make inroads into the original European countries more work needs to be done to draw the attention of European level politicians, who are already aware of mediation techniques, and European Directives are in the offing to support such practices. Region 2 has recognized that Dispute Boards as a concept need to have similar exposure and we are developing our own initiatives in this regard.

Belgium Country Representative William Buyse can be reached at buyse@cem-eao.be and Region 2 Director Jim Perry can be reached at jperry@francois-associes.com.

Save the Date!

**Dispute Resolution
Board Foundation
14th Annual Meeting
and Conference
October 1-3, 2010
Francis Marion Hotel
Charleston
South Carolina
USA**



Promoting the DRBF and DRB Use

By Blasdel Reardon, Director, Region 1

Over the past thirty-five years, the use of Dispute Review Boards (DRBs) has grown nicely. As we saw at the DRBF's Annual Meeting and Conference in Houston in October 2009, up until 2005 more than 1,500 DRBs had been used in all types of construction: civil, highways, buildings, power plants and so forth. However, to date there has been no overall effort — at least within Region 1 — to take a proactive approach to marketing DRBs.

Now, under the guidance of Jim Brady, Jack Woolf, and Blase Reardon, and with the assistance of Ann McGough, the DRBF has undertaken a formal outreach/marketing program for actively including DRB clauses in all types of construction contracts. A natural byproduct of this effort will be to spread the DRBF message and to increase opportunities for trained DRBF members to participate in and benefit from DRB assignments.

The major components of the DRBF outreach/marketing (OM) program will be:

- Improvement of the DRBF website, marketing brochures, educational materials, and speaker training program for those DRBF members willing to talk to construction industry “influencers,” especially owners, contractors, designers and lawyers.
- Increased reliance on the DRBF North American Regional Representatives (RR) to carry the DRBF message to these “influencers” to advocate the inclusion of DRB clauses in upcoming construction contracts.
- A financial budget and control procedures for the foregoing DRBF

OM project to pay for promotional/educational materials and to reimburse expenses of those who perform OM efforts on behalf of the DRBF.

Here are specific steps that will be implemented to complement this OM effort:

- Monitoring selected news media daily to identify specific projects for direct contact by the appropriate DRBF member (RR or other) to encourage consideration of a DRB in its contract by owners. Already, since July 1, 2009, approximately 48 North American projects have been identified as being potential users of DRBs in the immediate future. These include tunnel, highway, transit, transmission, airport, factory, hospital, office building, and stadium projects throughout the US and Canada.
- Delivering presentations to selected construction user groups (such as public authorities of all types, colleges and universities, commercial and industrial corporations, medical facilities, and other organizations whose members are major constructors. (In this regard, all DRBF members recently received a brief questionnaire authored by Jim Brady and Jack Woolf to learn more about the contact resources we already have among DRBF members. See article on opposite page.)
- Adding to the DRBF website a list of potential DRB user projects and a won/lost record of each.
- Updating and improving the DRBF database for DRB projects, possibly using a graduate research student under the direction of Kerry Lawrence and Kathleen Harmon.

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 Pegasus Global Holdings
 Robert J. Smith P.E., Esq.
 Schiavone Construction
 Company, LLC
 Techno Engineering
 Watt Tieder Hoffar &
 Fitzgerald

- Finally, developing some measurements to track DRBF OM expenditures and efforts versus results achieved.

Kerry Lawrence, Region 1 President, recently summed up the Outreach and Marketing activity very well when he said to me, “This is a 4-5 year effort by the DRBF to broaden widely the use of DRBs for the betterment of the entire North American construction industry.”

Region 1 Director and Regional Representative Coordinator Blasdel Reardon can be reached at reardon@bostonsolv.com.

DRBF Survey

There are hundreds of DRBs currently in operation throughout Region 1 (US & Canada). Yet there are many owners and agencies that have never heard of the DRB process or don't fully understand its usefulness and effectiveness (98% success rate).

Your DRBF has challenged the Outreach & Marketing Committee (Blase Reardon, Jack Woolf, and Jim Brady) with an aggressive goal to raise industry -wide awareness on the benefits of DRBs and to increase the number of DRBs by 50% in 24 months, starting January 1, 2010.

We need your help to advance this effort. A survey of five short questions has been emailed to all Region 1 members. Please take less than five minutes and complete this survey for your DRBF. A link to the survey can also be found on the DRBF website, in the Member's Only section of the site.



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New Country Representatives Announced for Region 2

DRBF Region 2 is please to announce the appointment of six new Country Representatives in the last quarter. These are:

- **Tilak Kolonne** - Sri Lanka
- **Maria da Conceição Oliveira** - Portugal
- **Pablo Laorden** - Spain
- **Andrea Del Grosso** - Italy
- **Michel Nardin** - Switzerland
- **Sanjeev Kiorala** - Nepal

This brings the DRBF Country Representatives in Region 2 to a total of 35. Country Representatives do the important job of mapping the DB terrain, identifying opportunities and plotting a way forward for the promotion of the system in their home countries. CRs also undertake the important role of instruction and educating employers, contractors and potential DB members through training and seminar events, some in conjunction with FIDIC and the ICC. Contact information for all CRs can be found on the DRBF website, www.drb.org.

Would you like to be a Country Representative?

If you are interested in taking a leadership role in your country, please contact Paul Taggart CR Coordinator and Region 2 Board Member at ptag1956@aol.com.



Forum Editorial Deadline

Our readers love to hear DRB success stories, challenges facing the process, and the latest industry news and events from around the globe. If you have new information about DRBs, DRBF members, or an article to share, please tell us! Contact Forum Editor Ann McGough by email at amcgough@drb.org.

*Deadline for the
May issue is*

April 1, 2010



Country Representative Reports

DRBF Country Representatives work throughout the year promoting the process in their regions. The following reports summarize work over the past year and touch on future prospects. Contact information for each representative is available on the DRBF website. For more information about the program or to express an interest in becoming a Country Representative, contact coordinator Paul Taggart at ptag1956@aol.com.

DRBF Country Representatives

Australia & New Zealand
Graeme Maxwell Peck

Austria

Marcus Theil

Belgium

William Buyse

Brazil

Gilberto José Vaz

Canada

Donald L. Marston

China

Hongwei Zhao

Ethiopia

Michael Gunta

France

Marc Frilet

Germany

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Greece

Rohan Shorland

Iceland

Páll Ólafsson

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Shri K. Subrahmanian

Ireland

Dr. Nael G. Bunni

Italy

Andrea Del Grosso

Japan

Toshihiko Omoto

Libya

Emhemmed Ghula

Malaysia

Sundra Rajoo

Mexico

Dr. Lic. Herfried Wöss

Netherlands

Lyda Bier

Nepal

Sanjeev Kiorala

Pakistan

Khalil-Ur-Rehman Khan

Philippines

Salvador P. Castro, Jr.

Poland

Krzysztof Woznicki

Portugal

Maria de Conceição Oliveira

Qatar

Wayne Clark

Romania

Alina Oprea

Singapore

Christopher Redfearn

Southern Africa

Andrew L. Griffiths

Sri Lanka

Tilak Kolonne

Spain

Pablo Laorden

Switzerland

Michel Nardin

Thailand

Victor James Smith

Turkey

Levent Irmak

United Arab Emirates

Frank Leech

United Kingdom

Murray Armes

Singapore – Chris Redfearn

There have been no dispute boards appointed in Singapore during the last year. There is a reluctance to use this form of dispute resolution as there is statutory adjudication in place under the Security of Payment Act.

Promotional efforts in the region include providing assistance to the DRBF/ICC Dispute Board Workshop event held in Bangkok on 19 and 20 June 2009 by way of promoting the event around Asia, assisting with the CIArb meeting held in Bangkok during August 2009, and sending over 600 letters to construction development projects in and around Asia informing them about dispute boards and the DRBF. In the coming year, I will speak about Dispute Boards at a Society of Construction Law event in Singapore and other events in the region.

Pakistan – Justice (R) Khalil-Ur-Rehman Khan

The main event over the past year was the inclusion of the topic/subject “Dispute Settlement Mechanism in Construction Contracts” in the curriculum of the LL.M Programme of the International Islamic University, Islamabad and the successful completion of the thesis on the subject by Mr. Majid Bashir, a student of the University. I supervised the thesis as the nominated Supervisor of the University. This exercise essentially recognizes the importance of the dispute resolution process and the efforts that the Dispute

Resolution Foundation is making in dissemination of information to the stakeholders.

In addition, on my recommendations and with my assistance, the government of Punjab Province has established a Judicial Academy for providing training and capacity building of judicial officers, lawyers and others connected with the administration of justice. The training programme on ADR Process and Dispute Resolution is a primary focus, and engineers as well as lawyers will participate to promote the process of mediation, conciliation and Arbitration. The Academy is making arrangements to hold video conferences, which may be promoted to other participants throughout Asia and Africa.

Thailand – Victor Smith

In June, there was a joint DRBF/ICC Dispute Board Workshop. Articles for the event have already been published on the ICC and ICC Thailand websites. In addition, information on DBs has been disseminated to contractors and developers on a one to one basis. Contractors have welcomed the concept of DBs but they have in general met resistance from developers/employers when trying to incorporate DBs into the conditions of contract. Over the past year I have been consulted on a number of projects where Dispute Boards were being considered but were not incorporated in the final conditions of contract. In 2010 I shall begin teaching ADR at Thammasat University in Bangkok for the LL.M

Master of Laws Program in Business Laws, and I intend to include DBs as part of the curriculum.

Libya - Emhemmed Ghula

Activities have included the promotion of Dispute Boards in the region to private and public agencies, including a meeting with a committee member who has submitted a request to the government to approve the use of arbitration in construction contracts. Topics included the importance of getting organisations such as the DRBF and FIDIC involved in introducing the system in Libya.

Overall, while contractors and owners are pleased to learn that Dispute Boards are an option in Libya and FIDIC contracts are more widely accepted, there is still misunderstanding about the DRB and DAB systems. I will continue to promote the process at future seminars and events, including the Skyline Libya Exhibition in December 2009.

France – Marc Frilet

Promotion of the Dispute Board process has occurred through participation as secretary-general of the French Institute of International Legal Experts (IFEJI) and as head of the PPP working group of the Paris Bar, with a focus on best practices. My colleagues and I actively participated in the creation of the book *International Public Procurement: A guide to best practice* published by Globe Law and Business (<http://www.globelawandbusiness.com/IPP/>), which includes the DRB process and how it is appropriate in PPP projects in developing countries.

In cooperation with various associations, Marc Frilet participated in many interesting international conferences during which he took the opportunity to promote dispute resolution and the work of

the DRBF. At the Confederation of International Contractor Association meeting in Washington, he made a presentation on “preventing, defusing and resolving disputes in international contracts.” This was the occasion to explain that it is impossible to fully avoid disputes in international construction contracts but that there are many ways to prevent disputes or to provide alternative resolution such as conciliation, mediation or dispute boards ; it was also the occasion to emphasize the work of the DRBF, which is most useful to assess the need and optimisation of DB. This was also promoted before the American College of Construction Lawyers in Florida in February 2009. At the 10th International Conference of the International Federation of Commercial Arbitration Institutions in May in Tunis, he made a presentation on “dispute avoidance and dispute resolution for resilient PPP projects,” emphasizing the need of a truly structured partnering system, the need of a structured conciliation system, with /ad hoc/ committee or dispute boards and the success of Dispute Adjudication Boards.

Finally, work is underway on a project law on PPP in a Middle-East country and we are trying to put in place a complete dispute resolution system. The discussions with the government are on goings; they have understood the necessity to prevent disputes, to put in place an efficient regulatory system and a true partnering process, and they have accepted on principle the idea of a Dispute Board.

Greece – Rohan Shorland

Recently participated as a lecturer on the French language module of the “international construction law” module of the IDLO programme in Rome. IDLO is an international intergovernmental organization dedicated to

promoting the rule of law and good governance in developing countries. A great part of the programme was devoted to internationally practiced dispute resolution procedures with a heavy emphasis on Dispute Boards. The “students” were all high level members of government of francophone countries (mainly by not limited to African eg. Sengal, Tunisia, Egypt, Madagascar, DRC, etc).

The immediate and medium term response was extremely positive and I have remained in contact with many of them in order to promote the DB principle and to provide them with written support materials in the French language.

Furthermore, I have been in contact with the principal PPP companies (mainly French and German with local partners) in Athens to increase awareness of DBs. For the most part the main concession contracts already contain some kind of “expert panel” which many confuse with the DBs as we know them. For those contracts already in place there seems not much scope for change. However, within the overall concession framework (concessionaire/main contractor, main contractor/subcontractor and so on) there may still be an opportunity and the awareness effort may bear fruit. Lastly, talks are underway with the Athens chapter of the ICE to arrange awareness talks for the purpose of spreading the word.

United Arab Emirates-Frank Leech

The use of DB's in the UAE is not very extensive. Several contracting entities (including the standard Abu Dhabi Municipality contract) call for ad hoc DBs. With the newness of the procedure being included in contracts and general contracting procedures ingrained

in the UAE, there is little awareness of the DB process. Moreover, the current climate of contracting leads to a desire for quicker finality rather than what is perceived as an additional step (not to mention cost) in the ultimate resolution process. There is a general lack of knowledge and experience in the contracting community and with employers as to what a DB is, how it is to be used, and the positive benefits of a DB.

Therefore, a two pronged approach is underway to build awareness of DB's and the process:

1. Focus on educating the QS/Contract's management community by promoting DRBF (and DB education) at RICS and Engineering Society Events, thereby building awareness of DB's and increasing membership in DRBF.
2. Build relations with local government and private employers who have included the DB provision in their contracts and provide education/support to their contracts staff in use of DBs.

Going hand in hand with the above is the need to get local experts trained in being DB members, and somehow qualified. Discussions are underway to meet with the Abu Dhabi Commercial Conciliation & Arbitration Center to discuss their list process. Currently the arbitrators list is populated with ex-judges.

Editor's Note: Several Country Representative Reports were published in the November 2009 issue of the *Forum*. Contact information for all representatives can be found on the DRBF website. □

Ethics in Today's World of DRBs:

Contractor Requesting a Hearing on a Dispute at a Regular DRB Meeting with No Prior Notice to the Owner



By Jim Phillips Ph. D.

The question I raised in the last Forum that involved a contractor requesting a DRB hearing at a regular on sight DRB meeting, with no previous notice

to the owner, other parties and the Board, raises a number of important issues.

It also caught the attention of new DRB Foundation member Steve Davis of Torrance, California. Steve is a founder of the firm Pinnacle One, has over twenty years of experience in the construction industry and has recently become a member of the Foundation. Steve writes that during his career he has had the opportunity to represent owners at DRB hearings as a claims consultant and that the question I posed is one with which he has direct experience.

Steve's position on this question is that the DRB has an important gate keeper function, and that the Board should only hear disputes that are brought to it according to the terms of the contract, after administrative procedures provided for in the contract have been exhausted. If the DRB should hear a dispute, not in accordance with the contract, then Steve argues that the parties' contractual rights have been usurped by the Board. Steve goes on to state that in his view an important function of the DRB is to encourage the parties to negotiate issues, fully vetting each other's positions, and only after following the contract's notice

and administrative procedures, should a dispute be ripe and ready for DRB review, hearing and recommendation. The DRB, Steve argues, has an ethical duty not to upstage or usurp the parties' contractual rights and responsibilities.

I think Steve is right on point. As I wrote in the last Forum, I believe that the DRB's ethical responsibility in part is to place the parties' contractual relationship's first. In every DRB Specification that I have worked with, the parties are required to give each other notice, change orders, differing site conditions, excusable delays, acceleration and constructive acceleration among others, as to their disagreements with the other's positions on contract administration issues, and only after all of those appeal procedures are exhausted, can a party request a DRB hearing.

Canon IV of the DRBF Code of Ethics provides that the DRB "...shall conduct meetings and hearings in an expeditious, diligent, orderly and impartial manner." Should the DRB in the question posed above attempt to conduct a hearing without proper briefing and preparation, in my opinion the outcome or the DRB recommendation would most likely not do justice to the parties' arguments and positions. This would in turn undermine the function of the DRB on the project.

Moreover, the Foundation's Practices and Procedures Manual, in Part 2, the User Guide, offers further direction.

Section 2.5, “Referral of a Dispute to the DRB,” provides that “[t]he contracting parties should make every effort to resolve issues without taking them to the DRB.” This section goes on to state that “[t]he DRB must operate within the contract ... requirements. It may be necessary to ... clearly identify where in the process the DRB will provide dispute resolution assistance.”

The only caveat to this discussion is the fact that the owner in the question as posed, after initially objecting to having the DRB hearing on the spur of the moment at the DRB meeting, decides to move forward and agrees to have the hearing as requested. Should this change the DRB’s position? There is an argument to be made that if both parties are in agreement to hold a hearing without a briefing to the DRB and without the exhaustion of the contract’s rights and responsibilities, the DRB should comply, since in effect the parties have modified by agreement the contract.

I do not believe that this is the best outcome, despite the parties’ agreement. I agree with Steve that there is an ethical duty for the DRB to uphold the integrity of the process. In my view, the Board should respond by advising the parties to first exhaust their contractual remedies, and at that point the Board will schedule a hearing according to the contract provisions. Often I have found that just having the option of being able to take a dispute to the DRB for a recommendation is in and of itself, enough to encourage the parties to reach an agreement.

Thanks again to Steve for writing and expressing his views about this issue and welcome to the Foundation! If the reader has a different opinion on this, by all means write or call and we can continue this discussion.

NEXT ETHICS CHALLENGE

Assume you are sitting on the DRB of a large highway and bridge construction project. Assume also that the DRB has held hearings on several disputes and has issued recommendations on each. Assume the parties have not accepted any of the Board’s recommendations. Prior to a regularly scheduled meeting, the contractor advises the Chairperson that she is going to suggest at the meeting that the DRB resign, since the contractor believes the DRB is a waste of time and money. Also assume that the owner is in favor of keeping the DRB in place.

What should the Board do in response to the contractor’s suggestion of having the DRB resign?

Ethics Commentary or Question?

Please contact:

Jim Phillips

DRBF Ethics Committee Chair

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(continued from page 1)

the UK courts' jurisprudential reluctance to back the innovation by enforcing decisions should it become necessary. This point seems not to have concerned those advancing DABs, even though there was no equivalent to the UK courts to enforce the decisions DABs would make if that became necessary.

Reviewing the Record to Date

In reviewing the DRBF's statistics through 2001, the use of DRBs in the USA construction sector has grown exponentially. Even allowing for a later start, the statistics show that the use of the Dispute Board procedure in the construction sector is lagging behind in the rest of the world.

The early belief that construction would no longer need court services has not materialised. The Technology and Construction Court is crammed with enforcement proceedings, as losing parties look for some reason for not doing what a procedure enacted for their industry's benefit requires them to do. For the most part, the courts have backed the procedure by enforcing decisions, but they have also been critical of the use to which it has been put, especially on long running and complex projects⁷. Whether

as a result of these experiences or not, there is a growing lobby in the UK that says that mediation is the next hot thing for curing construction ails. As to the other levers (including partnering) advocated by Latham / Egan a recent report⁸ has scored the success rate as 4 out of 10. On the international front, I have heard many anecdotes that point to a growing disillusionment with DABs that might explain the differences in the growth rates of the process. The reasons given are that DABs are costly to maintain, their decisions are not being implemented as agreed and there is no relatively easy and inexpensive way of enforcing them.

Partnering

Partnering conveys a feeling that contractors, employers and their agents should be part of an equation that delivers the best construction projects (rather than protagonists on either side of a battlefield). This sound bite is useful, but it only expresses good intentions and, as we know, good intentions can pave the road to hell. Despite HGCRA adjudication and the theories of management consultants, large scale, long running construction and civil engineering projects in the UK are still providing hellish examples⁹. The danger is increased on

¹See, for example, the Lesotho Highlands Water Project (LHWP).

²See the Latham Report "Constructing the Team," 1994 and the Egan Report "Rethinking Construction," 1998.

³See the NEC contractual package now in its third edition.

⁴See Housing Grants, Construction and Regeneration Act 1996 (HGCRA).

⁵Lord Ackner in the debate in the House of Lords (see Hansard HL, Vol 571 cols 989-990).

⁶See, for example, the fourth paragraph of clause 20.4 of the MDB Harmonised Edition (MDB Conditions) of the FIDIC standard form of contract that is commonly known as the Red Book.

⁷See, for example, Balfour Beatty Construction Limited v London Borough of Lambeth [2002] EWHC 597, paragraph 36 and CIB Properties Limited v Birse Construction Limited [2004] EWHC 2365 (TCC) paragraphs 2 and 8-11. There had been a previous adjudication in this case which cost £2million.

⁸"Never Waste a Good Crisis" by Andrew Wolstenholme, commissioned by Constructing Excellence, a body dedicated to excellence in construction performance.

⁹One example is the litigation record of building the new Wembley Stadium. A second is the refurbishment of the dockyard in Devonport. In each there had been previous adjudication and in the latter there had been internal bodies tasked with preventing disputes. A third was between the contractor and the project manager involved with constructing part of the Channel Tunnel Rail Link.

international contracts, where the “parties often adhere to differing legal theories and fundamental notions that can lead to misunderstandings ... that can wreak havoc with them.”¹⁰

DRBs or DABs as Agents of Partnering

Having worked with both, I am convinced that DRBs are more likely than DABs to encourage the partnering that drives the more successful projects with or without a sound bite. I say more likely because, like Lord Justice Dyson¹¹, I think that perfection is unattainable; in other words there is no “perfect dispute resolution.” Incidentally, being adjudicatory and not mediatory in nature, in my view DABs cannot be classified as ADR. They are only alternative in that they replace the judge or arbitrator as decision maker: they are not an alternative procedure.

The Case for DRBs

I think the American construction sector saw the benefits of DRBs for partnering to be that they:

- prevent claims from diverting the production and project management teams in both parts of the equation from their main duty: this is to complete the project as closely to time and budget as unfolding events will humanly allow;
- prevent claims from becoming even more disruptive disputes. Failing that, they facilitate the resolution of disputes as amicably as possible with the help of recommendations made by independent people, who will

have followed the story of the project as it unfolds; and

- provide a real time, quicker, and more cost effective procedure than more traditional forms of dispute resolution like litigation and arbitration.
- I would classify the procedure as a superior form of mediation cum early neutral evaluation. Superior precisely because the DRB members are not complete strangers to what has to be mediated or evaluated.

International Experience

The international experience is afforded by the Lesotho Highlands Water Project (LHWP), which had adopted the DRB procedure on Phase 1A by the time I joined the Lesotho Highlands Development Authority (LHDA) in 1994. It was woven into the contract as part of the FIDIC amicable settlement process (as found in the forerunner of the Multilateral Development Bank Conditions) so that (assuming that it had reserved the right to do so as required by the contract) a party could not commence arbitration without first obtaining the DRB’s recommendation.

Despite some misgivings (following some unfortunate misunderstandings) the LHDA decided to continue with the procedure on Phase 1B. I doubt it would have happened with the DAB procedure. Firstly, the DAB procedure would concrete misunderstandings or, even worse, substantive mistakes into binding decisions, leaving no room for party correction afforded by a recommendation. Secondly, a binding decision would be

¹⁰“FIDIC – An Analysis,” edited by Robert Knutson.

¹¹See “Finality in Arbitration and Adjudication,” Eversheds Lecture (2000) Volume 66, No.4 Arbitration 288-298. Lord Justice Dyson is steeped in construction disputes.

¹² I have seen no express mandate to this effect and suggest that there should be one.

¹³ See *The Times*, Thursday 11 June 2009, page 53.

¹⁴ See the Balfour Beatty case, paragraph 36 above.

an imposed solution, not a consensual one built around a recommendation. It would be against the grain of Basotho culture, which prefers a consensual solution to differences until an imposed one is unavoidable. The same applies to a lot of the worlds' cultures and in any part of the world it must be better to go with than against the grain.

The Case Against DABs

The procedure impedes partnering for the following reasons:

- It is as much an adjudicatory procedure as the court and arbitration procedures it is intended to replace. It introduces the idea of construction being a battle, rather than a joint endeavour, with a winner and a loser from the outset. As happened on the Channel Tunnel, there is a danger of collaboration going out of the window and the parties being caught up in the “win at all costs” mentality mentioned in an interview by Lord Woolf last year.
- Either party can choose any point along the construction timeline to refer a dispute to a DAB. This makes it vulnerable to a use “for which it must be doubted it is intended.” Additionally, if the same party is consistently faced with binding decisions against it, there is a danger of the party (rightly or wrongly) losing faith in the procedure or the members of the DAB.
- There is no certain (let alone relatively cheap and quick) way of enforcing the temporarily binding decisions that the parties agree they will promptly implement¹⁵. In the hiatus there is a danger of a party taking precipitate action that will endanger the project. The contractor

threatening to and/or actually walking off site leaps to mind as an example. The action might also come back to haunt the party later, at considerable expense to reputation and finances.

Cultural Sensitivity

It is not enough for members of international DBs to be independent, impartial and competent. They will serve people from many cultures and should for two reasons inform themselves as much as possible about each culture. The first is to avoid offence being taken by what might be interpreted as discourtesy or cultural arrogance. The second, as “FIDIC – An Analysis” points out, is that the claims and disputes that confront them might be the result of different legal theories and fundamental notions. If these are understood solutions might be found for what appear to be intractable problems.

Expense

Neither procedure will fly if the price is prohibitive. Price is not an inhibitor in the USA, but appears to be elsewhere. With an appropriate adjustment for international travel and accommodation costs, potential DRB members might ask for remuneration akin to rates inside America. This would mean sharing a smaller loaf, but if employers do not adopt DBs there is no loaf anyway.

DRB +

I would give DRBs power to decide any disputes (not resolved by their earlier efforts) as arbitrators so that they are a form of Mediation-Arbitration. Some will see jurisprudential difficulties with

¹⁵ See for example the fourth paragraph of clause 20.4 of the MDB Conditions. Anecdotally failures to implement decisions seem to be increasing.

this but the prize that it might reap (in cost savings and the availability of a system for the enforcement of foreign arbitral awards) makes the idea worthy of trying.

Conclusion

Being a mediatory procedure DRBs trump DABs in fostering common sense dispute resolution and partnering better than DABs. As an adjudicatory procedure DABs sit uncomfortably with keep-

ing the show on the road through partnering. In international contracting, for lack of a clear enforcement system, DABs are also a potentially futile, and, therefore, dangerous procedure.

About the Author: Derek Griffiths qualified as a solicitor in 1966 and entered the construction industry in 1970. He has practiced as an in-house lawyer on each side of the industry. He can be reached at info@dgaconstruction-law.com. □

WELCOME TO NEW DRBF MEMBERS

MEMBER ADDITIONS NOVEMBER 2009 THROUGH JANUARY 2010

Michael Cover
Michael Cover ADR Limited
London, ENGLAND

Adrian-Gabriel Cringas
Bucharest, ROMANIA

Kailash Dabeesingh
Kailash Dabeesingh Arbitration
Chambers
Port-Louis, MAURITIUS

Himal Suranga Jayasena
Wadduwa, KT SRI LANKA

Brian Jenkins
Dubai, Dubai UAE

Angelico Lumanlan
Univ. of Washington
Seattle, WA USA

John Lyons
Beaumont Consultants
Bucharest, ROMANIA

David Milne
Ft Lauderdale, FL USA

Denise L. Nestel
Porter & Hedges, LLP
Houston, TX USA

Lindy Patterson
Dundas & Wilson CS LLP
Glasgow, UK

G. Buddhika Perera
Dehiwala, SRI LANKA

Timothy P. Ristau, Esq.
Weston Hurd LLP
Cleveland, OH USA

Stacy Sinclair
Glasgow, SCOTLAND

Milt Tremblay
Univ. of Washington Tacoma
Buckley, WA USA

DRBF Event Calendar

The Dispute Resolution Board Foundation hosts meetings and conferences throughout the year, as well as training workshops. Some workshops are private, in-house training for agencies using Dispute Boards, and others are stand alone or held in conjunction with a conference. New events are added as the dates are confirmed; visit the DRBF website for the most recent schedule.

Administration and Practice Workshop
Florida DOT
April 23, 2010
Deland, Florida

Training Workshop:
“The Allocation of Risk and
The Duties and Responsibilities of the
Dispute Adjudication Board Under FIDIC Contract Conditions”
May 12-13, 2010
Istanbul, Turkey

10th Annual International Conference:
“Construction Disputes at the Crossroads”
May 14-16, 2010
Istanbul, Turkey

Northwest Regional Conference
June 4, 2010
Seattle, WA USA

DRBF Conference - Bucharest
June 9-11, 2010
Bucharest, Romania

International FIDIC Contracts Training Course
“The Responsibilities and Duties of Dispute
Adjudicators and Parties to Disputes”
June 14-15, 2010
Vienna, Austria

**DRBF 14th Annual Meeting and
Region 1 Conference**
October 1-3, 2010
Charleston, SC USA

Visit www.drb.org for details!

Call for DRBF Region 2 Board of Directors Nominees

Region 2 of the DRBF has a five person Board of Directors. At the upcoming International Conference in May, the Board will transition and the position of President Elect will be vacant. The Nominations Committee, consisting of Volker Jurowich, Nick Gould and Jim Perry, invites all Region 2 members to propose candidates to serve on the Region 2 Board of Directors.

To be considered, candidates must meet the following criteria:

- a) Each candidate must have a proposer and a seconder. Candidate, proposer and seconder must be members of the DRBF at least 3 years.
- b) The candidate must be, or commit to become, a sustaining member of the DRBF.
- c) A candidate for the position of President Elect (other than regular Board Member) must provide, with his/her CV demonstration of having participated actively in the organization of the DRBF (be it as Country Representative, committee member or other).
- d) All candidates must supply their CV, which will be distributed to the membership with the invitation to vote.
- e) All DRBF Region 2 members have a vote.
- f) Voting is done by e-mail, in advance of the annual International Conference.
- g) The Nominating Committee is the organizing body of the election.
- h) The President Elect serves for 3 years: President Elect, President, Past President.
- i) Terms start and end at the annual International Conference, usually held in May each year.

Proposals may be sent to the DRBF office by email (info@drb.org), fax (206-878-3338) or letter to:

DRBF
Region 2 Board of Directors Nomination
19550 International Blvd. So Suite 314
Seattle, Washington 98188 USA

We ask that all nominations be made by **March 15, 2010**. Ballots will be distributed to all Region 2 members in April.

Thank you for your careful consideration and recommendation of candidates to help lead our Foundation as it continues to grow and spread the message of the Dispute Board process.



Dispute Resolution Board Foundation 10th Annual International Conference

“Construction Disputes at the Crossroads”

May 14-16, 2010

Marmara Taksim Hotel, Istanbul, Turkey

The Dispute Resolution Board Foundation's 10th Annual International Conference offers the latest information and ideas about the growing use of the Dispute Board process around the world. Sessions end in early afternoon each day to allow delegates to participate in group tours of this remarkable city. The optional Gala Dinner on Saturday evening is always a highlight of the International Conference.

Registration and Reservations

Conference registration fees are US\$525 for DRBF members, \$640 for non-members, and \$415 for local participants. An early bird discount of up to \$75 is available for conference registrations made by March 14, 2010. Workshop fees are \$450 for members, \$525 for non-members, and \$340 for locals. Registration is available through the DRBF website (drb.org), or by contacting the DRBF office. The host hotel, Marmara Taksim, is offering reduced group rates for rooms booked using the booking form available on the registration website.

**Early Bird
Deadline:
March 14**

Conference Agenda

Day 1 Keynote Address

Overview of Dispute Resolution in Turkey - Moderator and four speakers representing Turkish contractors, employers, engineers, and construction lawyers. Round table discussion will be led by the moderator, directing questions to speakers concerning the following subjects before taking questions from the audience: (1) Traditional Methods in Resolving Disputes in Turkey & Problems Encountered; (2) Can the DB Concept Work in Turkey? If So, What Are the Future Expectations?

Trends in Construction Dispute Resolution in the Region - Moderator and four speakers from countries in the region. A second round table discussion on the following subjects: (1) Can a DB Member of Common Law Background be Effective in a Civil Law Country? Does the Answer Change if the Civil Law Country is One Where Sharia Law Exists?; (2) What are the Problems of Foreigners Seeking to Avoid Disputes in the Country of the Project? How Does the DB Concept Fit in the Region?

Day 2 Problems in Administering Resolution of Disputes - The day's chairperson will preside over three tutor-led breakout sessions on: (1) Main Obstacles in Resolving Disagreements (considering typical actions which escalate normal disagreements into formal disputes); (2) Challenges of Operating Clause 20 of FIDIC Conditions; (3) Pathological DBs (considering actions which frustrate the effective use of DBs).

Day 3 Cost Control in Use of DBs – Breakout session structure addressing the following issues: (1) Effective Use of the DB Process; (2) Document Control (use of party agreement on facts, use of common documents bundle); (3) Fair Hearing.

Training Workshop

“The Allocation of Risk and The Duties and Responsibilities of the Dispute Adjudication Board Under FIDIC Contract Conditions”

May 12-13, 2010

**Marmara Taksim Hotel
Istanbul, Turkey**

The DRBF will present a two-day workshop in conjunction with its 10th Annual International Conference. This year’s workshop will address basic concepts of risk allocation in all standard FIDIC Conditions of Contracts as well as the handling of claims by the parties and the employer’s engineer/representative. Due to the ever increasing use of the Design-Build contracts by employer organizations both in the region and internationally, there will be emphasis on the use of the FIDIC forms for Plant and Design-Build and EPC Turnkey Contracts. The workshop will also examine the duties and responsibilities of the parties, the engineer/employer’s representative and the Dispute Adjudication Board to resolve the disputes that commonly arise under FIDIC forms of contract.

The first day will concentrate the delegate attention to (1) the common risk areas in traditional construction contracts with an emphasis on design and variation risks; (2) the operation of the claim and dispute resolution provisions of the contract and (3) the roles of the engineer and employer’s representative under the Design-Build and EPC forms.

On the second day, the workshop will turn attention to (4) the establishment of the Dispute Adjudication Board; (5) the adjudication process starting with informal advice and then procedures for obtaining DAB decisions and finally (6) the effects of DAB decisions under FIDIC standard contract forms.

This training event is co-sponsored by the DRBF and FIDIC and will be fully CPD and CLE accredited.

Conference and training workshop are open to all construction industry and dispute resolution professionals interested in learning more about the Dispute Board process with an emphasis on best practices and practical experience.

**Visit the Meetings & Conferences page of the DRBF website
for updated information and registration details.**

DRBF Committees

Executive Committee of the B.O.D.

Romano Allione

Annual Meeting and Conference

Jim Brady

Al Mathews Award

Romano Allione

Country Representatives

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James Donaldson

Implementation Oversight of the 10 Year Plan

Harold V. McKittrick

Institutional Funding and Grants

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International Funding Institutions

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Newsletter

Ann McGough

Nominations

Bill Baker

Regional Representatives

Blasdel Reardon

Website

Ann McGough

Get Involved!

There are many ways to become involved in the DRBF. Join a committee or become active in local efforts through a regional chapter or by contacting your US Regional or Country Representative. Complete contact information for all committees, chapters, and representatives is available on the DRBF web site:

www.drb.org

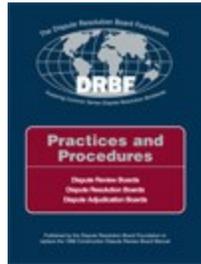
ICDR International Arbitration Conference in Miami to Feature DRB Panel Discussion

DRBF member Gwyn Owen will moderate a panel of DRBF representatives at the **8th Annual International Arbitration Conference** March 21-22, 2010 in Miami, Florida. Presented by International Centre for Dispute Resolution (ICDR), the International Division of the American Arbitration Association (AAA) and the AAA's Construction Division, the conference will explore cost effective and efficient dispute resolution systems for today's increasingly complex international construction projects.

The panel discussion, "Benefits of Dispute Boards and their Effectiveness for International Construction Projects" will explore the benefits and limitations of

the different types of Dispute Boards (DRB, DAB), as well as the types of projects best suited for each. They will examine the ICDR's and AAA's latest developments regarding their Dispute Board initiatives. Moderated by **Gwyn Owen**, the panel includes former DRBF Presidents **Jim Brady** and **Bob Rubin**, DRBF Country Representative for Brazil **Gilberto José Vaz**, and AAA/ICDR Representative **Michael Marra**.

The conference will be held at the W Hotel in Miami Beach, Florida. Visit www.aaauonline.org and click on the 'courses' tab to download a copy of the conference brochure, with complete agenda details and registration details.



DRBF Practices and Procedures **Dispute Review Boards** **Dispute Resolution Boards** **Dispute Adjudication Boards**

The Dispute Resolution Board Foundation publishes the *DRBF Practices and Procedures Manual*, making it available for download free of charge on the web site. Bound copies are available for purchase online. Copies are \$40 for DRBF members and \$60 for non-members. Visit the Manual section of the DRBF web site (drb.org) to learn more.

Have an idea or question for the Manual Committee?

The DRBF Practices and Procedures Manual is an authoritative and up-to-date explanation of the dispute board process. Because the process is continuously developing, the format has been tailored to allow it to be updated as necessary. Help the Manual expand by sharing your ideas and input with the Manual Committee: info@drb.org.



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FOUNDATION FORUM

Meet Us at the Crossroads of East and West

DRBF heads to Istanbul, Turkey for the 10th Annual International Conference. Situated on the Bosphorus Strait where Europe meets Asia, Istanbul offers an interesting blend of culture and history in a city that has attracted tourists for centuries. Named a “European Capital of Culture for 2010,” this is a great opportunity to attend the conference and extend the trip to explore this vibrant city.

The International Conference moves to a 3 day format to allow delegates to take advantage of group tours to some of the city’s top attractions. Take in the Hagia Sophia, Blue Mosque, Topkapi Palace and more! Be sure to check out the Istanbul City Guide prepared by the DRBF’s Country Representative, Levent Irmak, available for download on the DRBF’s registration website.

Saturday night, delegates will enjoy impressive views of all the city’s top attractions from a spectacular dinner cruise on the Bosphorus.

For registration details, visit the meetings & conferences page of the DRBF website: www.drbf.org.

