



Forum

VOLUME 14, ISSUE 3

AUGUST 2010

It's Time for More DRBs in Canada

Editor's Note – The following is an extract of a more detailed article by one of our Canadian members describing and encouraging the use of DRBs in Canada. This extract focuses on the status of DRBs in Canada while the full article provides details of three case studies, complementary information on the mechanics of DRBs as well as industry comments on current DRB practices. The article is available on-line at www.revay.com.



By Gerald McEniry, Eng.

Alternative Dispute Resolution in Canada

Despite efforts over the years to introduce alternate dispute resolution

techniques such as arbitration and mediation into construction contracts, Canadian contractors and owners are still frustrated with the time and expense required to resolve construction disputes. Once thought to be a potential panacea for our industry, construction players are increasingly disappointed with arbitration which may even be more expensive and time consuming than litigation, with equally uncertain outcomes. Mediation was also touted as a solution. While it certainly is less expensive and less time consuming than arbitration, its success depends to a large extent on a skilled mediator, realistic expectations and the willingness of the parties to compromise.

Perhaps the biggest disappointment is that mediation and arbitration are rarely initi-

ated during the course of a construction project, despite contract provisions promoting such. Although certain standard Canadian construction documents require ADR procedures be initiated within 10 working days after a dispute becomes official, more often than not these procedures are put off until the end of the project. Partnering has provided an initial collaborative environment to manage a project, this collaborative atmosphere does not always survive the test of the first major dispute. It lacks an independent, neutral, experienced third party.

DRBs can provide a valuable complement to the above methods because they are practical, foster a common sense approach and allow for “real time” dispute resolution during the course of the construction. Moreover the DRB process is more than alternate dispute resolution because it functions as a vehicle to avoid disputes in the first place rather than simply resolve them. Figure 1 compares the timeframe for the resolution of disputes by DRB with other forms of ADR.

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“...the DRB process is more than alternate dispute resolution because it functions as a vehicle to avoid disputes in the first place rather than simply resolve them.”

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President's Page

I wish to inform you on the recent major events organized by your Foundation and to appraise you on the near and medium term principle activities in hand.

The International Conference in Istanbul last May has been very successful with an ample turnout of delegates from all the continents, notable the amount of participation from Region 1 members. The comments from the delegates have been very positive, and a number of suggestions for further improvement have been received which will help in planning future events.

Other conferences and activities have and are taking place on both sides of the Atlantic and both sides of the Pacific.

The organization of the DRBF Annual Meeting and Region 1 Conference which will be held in Charleston, SC in October is well advanced. The DRBF invitation to participate has been issued (go to www.drbf.org). All Region 1 and Region 2 DRBF members are warmly invited to join and further contribute to the achievement of the purpose and objectives the Dispute Resolution Board Foundation.

Looking into the medium term future, you should know that Foundation volunteers are already preparing for the next International Conference which will be held in Brazil in May 2011. Plans are also being laid for the 2012 conference. Similarly, plans are in hand for the next Annual Meeting and Region 1 Conference to be held in Seattle in 2011; and the 2012 conference is planned in New York.

The DRBF ten year plan implementation is continuing, and all members have been asked to propose individuals for the open positions on the Executive Board, and Region 1 and Region 2 Boards. In August the members will be requested to vote for the above position with the ballot results to be announced at the Annual Meeting in October. All members are warmly invited to participate both in helping with the organizational efforts of the Foundation and to respond to the ballots.

The DRBF Executive Board has also decided to tackle once more the matter of access to Dispute Boards. We all know how difficult it is for anybody to receive the first appointment as a DB Member. While the reasons are well known and understood (in short any party would like to nominate an individual with ample experience in DBs and are afraid of any newcomer), the DRBF considers it imperative to help in enlarging the number of active DRB and DAB Members with proper qualifications.

The DRBF, as you know, holds training workshops, some DRBF Members are doing "mentoring," the DRBF encourages members to promote themselves to employers and contractors, and so on.

The DRBF has moreover decided to extend invitations to DRBF events to more representatives of prominent employers to make them aware of the benefit of DBs, to meet and know interested DRBF members and inform us on their projects.

While it should be clearly repeated that the membership to the DRBF is not to provide to the members DB appointments, we hope that these efforts may help in the enlargement of the practitioners. This matter is further dealt with in an article in this Forum (see pages 4-5).

I wish once more to request Members to send comments, advice and suggestions to the DRBF on how the Foundation may best help the members in starting and/or enhancing their DB activities.

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Executive Board of Directors

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Gwyn Owen, Director, Past President
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Joe Sperry, PE, Founder, Honorary Director

The Executive Committee meets monthly. Recent topics have included:

- Australasia Chapter presentation on the prospects of developing into Region 3 in 2012
- Election Committee efforts for 2010 election
- Database project revival and results
- Redesign of the DRBF website
- Revival of Manual Committee, to update *Practices & Procedures* Manual

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.drbf.org. Click on the **Member Login** button, and then click on **DRBF Board of Directors**.

Executive Board of Directors Meeting Schedule:

August 20, 2010 by conference call
September 17, 2010 by conference call
October 1, 2010 in Charleston, South Carolina

Region 1 Board of Directors

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

Region 2 Board of Directors

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

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

Dispute Resolution Board Foundation
19550 International Blvd. So., Suite 314, Seattle, WA 98188
Phone: 206-878-3336 Fax: 206-878-3338 Toll free (US only) 888-523-5208

New Efforts to Break the Entry Barrier to Board Appointments

“It’s a good old boys network” is a common refrain from DRBF members anxious to earn their first DRB appointment. Most can agree that it is easy to see why the parties would select experienced members who they already know and respect. However, owners with advanced DRB programs also recognize the need to expand their base of qualified panelists and are seeking new strategies to achieve that goal.

Bill Baker reports Caltrans is working on new language for the specifications that should make it easier to appoint a qualified candidate to their first DRB post. “The previous Spec required that the third member, nominated by the first two after their approval, would be the Chair of the DRB. Because it would not be prudent to have a Chair with no experience, only veteran DRB people would be nominated as the third member,” says Bill. “The new Spec (now in use by Caltrans) provides that the first two nominated and approved nominate the third. Once the third is approved, the three nominate one of them to be Chair. This allows the first two to nominate someone who while otherwise fully qualified has little or no DRB experience, with one of the two ‘veterans’ to be the Chair.”

To view the new specifications and learn more about the Caltrans program, visit www.dot.ca.gov and enter “Dispute Resolution Board” in the search box.

Jack Norton says the Florida Disputes Review Board specification already addresses the issue Caltrans is implementing by stating in their specification

that, “Normally, the third member will act as Chairman for all Board activities” and this has allowed one of the original two picks to serve as Chairman when an inexperienced third member is chosen. This has been done on several projects in Florida. In addition the Florida Department of Transportation and the Florida Chapter of the DRBF have chosen individuals to work together on a Task Team to improve the DRB specification.

The Florida Disputes Review Board Specification 8-3.7.3 states:

“The Disputes Review Board will consist of one member selected by the Department and approved by the Contractor, and one member selected by the Contractor and approved by the Department. The first two members will mutually select and agree on a third member. **Normally**, the third member will act as Chairman for all Board activities.”

The key word is *normally*, but Jack notes that on occasion a third member has been picked and then one of the original two has acted as Chairman.

To view these proposed specs and submit comments, please go to the following website:

<http://www2.dot.state.fl.us/SpecificationsEstimates/Development/IndustryReview.aspx>.

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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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The DRB Fairy Won't Come Knocking at Your Door

The DRBF will continue to report on new efforts to tackle this issue. In the meantime, DRBF members may also wish to review articles previously published in the *Forum* which cover tips and strategies for positioning yourself to increase your chance of getting a DRB appointment. Members can login in to the members only section of the website to access the full archive of *Forum* publications. Look for these articles:

“DRB Members and What Owners Look For When Selecting Them” by Jimmy Lairscey – August 2009 page 11

“How to Maximize Your Involvement in the DRBF in 2009” by William B. Baker - February 2009, page 12

“Dispute Board Member Pupilage” by Gwyn Owen – November 2006, page 14

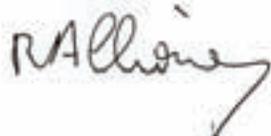
“President’s Page” by William B. Baker—April 2001, page 2□

(continued from page 2)

The DRBF has also to apply further and continuous efforts in maintaining and enhancing the relationship with the international financing agencies (World Bank, Asian Development Bank, Inter American Development Bank, etc.). Most of these agencies have agreed on standard Conditions of Contract (MDB) to be utilized on all projects financed by the agencies. These MDB Conditions of Contract are based on the FIDIC (International Federation of Consulting Engineers) Conditions of Contracts and provide for Dispute Adjudication Board for the prevention and resolution of disputes. There is therefore the need for numerous and properly trained DB Members to be active on the agencies financed project as well as training for all users (employers, contractors, engineers, as well as staff at the financing agencies). It is evident that a vast amount of work is still confronting the Foundation, and members participation and contributions are welcome and needed.

See all or at least most of you in Charleston!!!!

Sincerely,



Romano Allione
President, DRBF Executive Board of Directors

DRBF International Conference

Istanbul Report

The 10th DRBF International Conference was held in Istanbul between 14 – 16 May 2010, which was preceded by DRBF International Workshop on the 12th and 13th of May. This year's event revealed some extraordinary results, which ultimately encouraged us to continue our efforts for future undertakings, both locally and globally. This year, we had a record number of participants; 160 delegates from more than 30 different countries, representing 6 continents. This is an impressive growth in 10 years since DRBF's 1st International conference in London.

The workshop was a 2 full-day event. A total of 84 delegates participated. On Day-1, we covered topics on: (1) risk allocation in the FIDIC Conditions of Contract under Yellow and Silver Books, (2) handling of claims by the parties and (3) role of the Engineer and Employer's Representative. On Day-2, the topics were (1) establishment of Dispute Adjudication Boards, (2) the Adjudication process and (3) the effects of DAB decisions under FIDIC contracts. The format of the workshop was designed to give delegates more opportunity for group discussion and interaction. This format was extremely well received by the delegates based on the feedback we received. It also proved to be the most effective method where delegates split into smaller groups engaging in interactive discussions with the tutors.

The conference was spread over 3 days, with half-day sessions. There was a big demand that the afternoons left open for delegates for sightseeing or city tours in the beautiful city of Istanbul. Many of our delegates took advantage of this opportunity and spent invaluable moments discovering this historical city.

On the 1st day of the conference, following my opening speech, Romano Allione, the President of DRBF, thanked Volker Jurowich as the outgoing President of DRBF Region-2 for his outstanding contributions to the

DRBF and introduced Nicholas Gould as the new Region 2 President. Romano announced that Dick Appuhn became the President Elect for Region 2 and congratulated him for his new position. Romano also announced the names of those DRBF members from Region 2 who had been members of the DRBF for more than 10 years and thanked them for their continued membership and contribution to the DRBF. The names of those DRBF members who were given Certificate of Recognition at the conference are: Romano Allione, FIDIC, Andy Griffiths, Gordon Jaynes, Toshihiko Omoto, Graeme Peck and Gilberto José Vaz. (Those not in attendance received their certificates by mail.)

Lastly, Nicholas expressed his appreciation for Volker's continued contribution to DRBF Region 2 and outlined his vision for the future of Region 2.

Following the opening addresses was the 1st panel of the day, which was moderated by me, where the subject of discussion was the overview of dispute resolution in Turkey with a closing discussion on whether the Dispute Board concept would work in Turkey. Our panel members were Yalçın Tezcan and Necip Turegun. The two panelists' common conclusion was that Dispute Boards would work in Turkey, provided that some confidence building measures are taken. In the 2nd panel which was moderated by Gordon Jaynes, the panelists were Baris Nazlim, Ahmed Benbarka, Khalil-ur-Rehman Khan, Cumhuri Kaur and Stephen Hibbert. They shared their experiences in dispute resolution in their countries, particularly in the Middle East.

On Day 2 of the conference, which was chaired by Jim Perry, Calliope Sudborough gave us a great insight into the ICC Dispute Board rules and how they operate. Thereafter we switched back to the workshop format in the following sessions on Day 2 and Day 3

where the delegates split into three groups. The delegates in Group 1 dealt with the subject of main obstacles in resolving disagreements which may eventually escalate normal disagreements into formal disputes. This group was lead by Murray Armes, Alina Oprea and Andrew



Conference delegates enjoyed a gala dinner cruise on the Bosphorus

Sargeant. Group 2 examined the challenges of operating Clause 20 of FIDIC Conditions. David Brown, Oana Soimulescu and Michel Nardin were the tutors for this subject. And finally, Group 3 dealt with pathological Dispute Boards and the actions frustrating the effective use of the Dispute Boards. This interesting subject was lead by Romano Allione, Giovanni Di Folco and Nicholas Gould. During the lunch, we had the pleasure of having Graeme Peck and Alan McLennan, who gave us a presentation about the application of DRBs to Relationship Contracts in Australia. On the evening of Day 2, we had a quite a large group of delegates accompanied by spouses and friends gathered on a cruise boat for the Gala Dinner on the Bosphorus, which in my opinion was the most memorable event of the conference, particularly for those who had never had such experience of traditional Turkish folk dance, the Turkish cuisine, and of course the belly dancer.

On Day 3 of the conference, which was chaired by Paul Taggart, following the announcements for the DRBF Region 1 Annual Conference in Charleston, North Carolina and the 11th Annual DRBF International Conference in Sao Paulo, Brazil by Jim Brady and Gilberto Vaz respectively, three subjects concerning cost control in the use of Dispute Boards were covered in sessions.

The first session dealt with the effective use

of the Dispute Board process with emphasis on the appointment of a dispute board, site visits and adjudication process. This session was tutored by Andy Griffiths and John McSheaffrey. The second subject lectured by Robert Smith and Marianne Ramey was about the documents control and its potential effect on dispute board process. Lastly, Graham Easton and Paul Taggart lead the third session on fair hearing where the essentials of a fair hearing along with pros and cons of procedural issues were discussed.

Overall the conference in Istanbul went pretty well and beat our expectation for the number of participants. Perhaps the geographical location of Istanbul was the key factor which provided for a convenient destination for many delegates.

With this opportunity, I want to thank each member of our Conference Committee, all our tutors, speakers, panel members and of course the delegates for making the Istanbul Conference a success.

A Special Thanks also goes to the following sponsors and affiliating organizations for their support: Astaldi, CMC di Ravenna, EIC, Fenwick Elliott, FIDIC, ICC, Impregilo, Leach Group, Navigant Consulting, Salini Construttori, Taisei, and TechnoBee.

I hope to see you all in Sao Paulo next year.
Levent Irmak, Conference Chair



DRBF Region 2 Upcoming Conferences

**September 23, 2010
3rd UK Member's Meeting
London, United Kingdom**

“Things You Always Wanted to Know About Dispute Boards But Where Afraid to Ask!”

Join the DRBF from 1:30-6:00 pm at Nabarro LLP in London, UK for the UK Member's Meeting, and annual gathering of Dispute Board users and practitioners in the UK. This workshop style event will cover the following topics:

- How to Persuade Employers to Use DBs
- Should Retainers be Paid? and Risky Rules
- Is there a place for mediation in the DB process?

Delegates will be split into small groups to allow for in depth discussion of each subject with discussion led by experienced tutors, followed by a question and answer session.

Save the Date!

**DRBF 11th Annual International Conference
May 14-15, 2011
São Paulo, Brazil**

Visit the Meetings & Conferences page of the DRBF website for updated information regarding conferences and training workshops.

**Major
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Contributors
to the DRBF**

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**Do you know some-
one interested in
joining the DRBF?**

The DRBF attracts new members as the DRB process advances into new industries and regions throughout the world. Help us expand by sharing information with your colleagues. Complete membership information can be found on the DRBF web site (drb.org) or contact the main office for details.

WELCOME TO NEW DRBF MEMBERS

MEMBER ADDITIONS APRIL THROUGH JUNE 2010

Omar S. Alfazza
Amman, JORDAN

Bharat Bahadur KC
Melamchi Water Supply Project
Kathmandu, NEPAL

Madhav Belbase
Kathmandu, NEPAL

Bhupendra Chandra Bhatt
Department of Roads
Kathmandu, NEPAL

Suvash Nirdosh Bhatta
Kathmandu, NEPAL

Alberto Biancheri
Consulting Engineers Network-ITALIA
Milano, ITALY

Robert Alan Blood
AdvantA International Ltd.
Istanbul, TURKEY

Gerlando Butera
Nabarro LLP Solicitors
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Habib Al Mulla & Co.
Abu Dhabi, UAE

Janak Lal Karmacharya
Kathmandu, NEPAL

Anil Bhadra Khanal
Kathmandu, NEPAL

Vera Krochin
GEA S.R.L.
Lavagna, GE ITALY

Johann H. Kroyer
Landsvirkjun Power
Reykjavik, ICELAND

Bernhard Landauer
Stuttgart, GERMANY

Stephen Lines
ICL Inspectorate Ltd.
Dubai, UAE

Walter Narder
Leivi, GE ITALY

Richard D. O'Neil
Davidson & Troilo, P.C.
San Antonio, TX USA

Bhoj Raj Regmi
Nepal Electricity Authority
Kathmandu, NEPAL

John R. Oxley
Oxley & Brannon Construction
Consultants
St. Petersburg, FL USA

Roger Ribeiro
Orsay, FRANCE

Nicholas Pandey
Kalika Construction Pvt. Ltd.
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Basar Omer Sahin
Alstom Transport
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Bharat Raj Pandey
Butwal Power Company Ltd.
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Commission of the Investigation of
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Hari Bhakata Shrestha
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Kathmandu, NEPAL

Malalage Buddhini Peiris
State Engineering Corporation of Sri
Lanka
Panadura, SRI LANKA

Shashi Raj Shrestha
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St. Petersburg, FL USA

Christopher Miers to Chair International Training Committee

The DRBF Region 2 Board of Directors recently appointed DRBF member Christopher Miers to serve as the Chair of the International Training Committee for Region 2. He takes over the position from Dick Appuhn, who has chaired the committee for several years. Dick remain in an advisory position to ensure a smooth transition.

Christopher Miers is a Chartered Architect and Chartered Arbitrator and is the

co-founder and managing director of Probyn Miers. Alongside his continuing architectural practice, he specializes in dispute resolution as an arbitrator, adjudicator, Dispute Board member and mediator.

DRBF members interested in learning more about the international training program and plans for future workshops should contact Chris Miers directly at cmiers@probyn-miers.com. □

Region 2 Hosts “Training of Trainers” Program

By Gordon L. Jaynes, Esq.

The DRBF launched a new training program on 26 July 2010, entitled “Training of Trainers.” The three day training was held in London, England at the offices of Fenwick Elliott LLP, courtesy of Nicholas Gould, DRBF Region 2 President and a partner in the Fenwick Elliott firm, to which the DRBF extends its thanks for its generous support of the training program.

Training was conducted by two professional trainers, Mr. Gilles Blanchi, of Cuceron, France, and Ms. Kerin Pillans, of London, England. A total of 10 DRBF members attended, so the interactive training methods used were quite intense with each of the professional trainers being able to devote extensive time to each trainee. The purpose of the training was to strengthen the capabilities of the DRBF members to serve as future trainers of other persons who wish to serve as Dispute Board members. DRBF Region 2 sees an increasing demand for such training as a result of the Multilateral Development Banks (“MDB”) adoption of FIDIC Conditions of Contract which utilize Dispute Boards. Increasingly the MDBs (such as The World Bank, the Asian Development Bank, and the African Development Bank) are requiring that any contract for which they furnish any financing must provide

for dispute avoidance and dispute resolution by use of a Dispute Board. The result is a notable increase in the number of Dispute Boards appearing in developing countries within Region 2, such as Sri Lanka, Nepal, the Philippines, and Botswana.

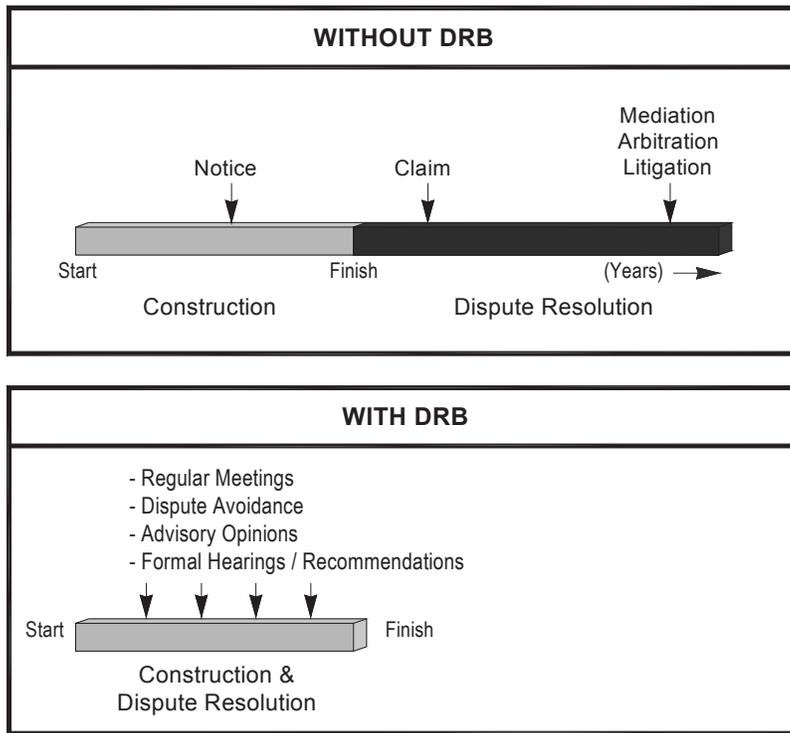
The DRBF members who completed the training were, in alphabetical order, Romano Allione, Murray Armes, Gerlando Butrera, Mark Entwistle, Simon Fegen, Gordon Jaynes, Pablo Laorden, Christopher Miers, Marianne Ramey, and Paul Taggart. Three other members had committed to attend, but two had to cancel at the last moment due to client emergencies and the third due to illness.

The professional trainers, Mr. Blanchi and Ms. Pillans, are lawyers and recently completed a lengthy USAID-financed program of training Judges in Indonesia, and Mr. Blanchi departed the DRBF program directly for Hanoi where he will lead a new five year program sponsored by the European Union, for the training of Judges and other Government lawyers in Vietnam. Ms. Pillans remains based in London and we hope she will be available for further work with DRBF members.

DRBF members interested in undertaking such training should contact Christopher Miers at cmiers@probyn-miers.com. □

(continued from page 1)

Figure 1 – Timeframe for dispute resolution under typical contracts vs. contracts subject to DRB



In addition to their proactive nature DRBs are a relatively inexpensive approach to preventing and resolving construction disputes that has a reported rate of success rate of about 98%.

DRBs in Canada

The DRB Foundation database reveals that only nine Canadian projects have employed DRBs from the start of data keeping in 1996 until today. In light of the fact that construction disputes seem just as common in Canada as in the U.S., this is a surprisingly low number. Seven of these projects were related to the expansion of the Toronto Transit Commission (TTC) subway from 1996 to 2002. As such, one owner (TTC) and five Canadian contractors were exposed to the DRB process. The other two projects listed in the DRBF database involve two current tunnel projects: one in Niagara Falls for the Ontario Power Generation (OPG) and the other for the Greater Vancouver Water District (GVWD). However, these contracts were awarded to non-Canadian contractors.

There are however a few other projects involving Canadian contractors that employed DRBs in some form which are not listed in the DRBF database. These are the Confederation Bridge (1993-1997), and the north south route of the New Brunswick Highway (2006-2007). At the present time, the New Brunswick DOT is setting up a DRB for a 55 km section of the four lane Route 1 Gateway project and the TTC is considering optional participation in the DRB process for several major contracts on the York-Spadina Subway extension project to be tendered in the near future.

The few cases in Canada allow us to delve more deeply into some of the lessons learned from these disputes. Many of the seven TTC projects involved the construction of subway stations as well as tunnel sections. As mentioned before, DRBs were not mandatory on the TTC projects; rather they were an option that could be exercised by the contractor and the TTC if both were in agreement. The DRB process appears to have helped since only three disputes (two of which were on

the same project) out of the seven projects went to a formal hearing of the DRB. These disputes were settled after the DRB hearings, but one of the TTC cases came very close to litigation as described below.

Toronto Sheppard Subway Twin Tunnels Project - A claim for a Differing Subsurface Condition (DSC) was initially submitted to the TTC who responded that there was no entitlement. After preliminary settlement discussions were unsuccessful, the parties agreed to bring the matter before a formal hearing of the DRB. The DRB panel was comprised of three very experienced engineering consultants with substantial underground expertise. Shortly after the formal hearing, the DRB released a comprehensive written “recommendation” unanimously rejecting the contractor’s claim stating that it *“has not made a reasonable case for extra compensation based upon arguments that lay within the four corners of the contract”*. The DRB panel felt the problem was a risk assumed by the contractor, but the contractor rejected the DRB’s non-binding recommendation and commenced litigation procedures. The case then followed the expensive and time consuming litigation route. After about 2.5 years it settled before trial when it became clear that the DRB recommendation would be available to the court, and that the unanimous recommendation of the three experts rejecting the claim would be a formidable obstacle to overcome at trial.

This case underlines the important principle that in preparing its recommendation the DRB must respect the terms of the contract, no matter how harsh or unfair. The DRB cannot rewrite the terms of the contract to provide a seemingly more equitable adjustment to one party. This case also makes clear that although the DRB generally provides a non-binding “recommendation” it must be given respectable weight by the parties. In fact, in many cases such a recommendation can be discovered in subsequent legal proceedings.

Niagara Tunnel Project - The contractor put the owner on notice alleging several “Differing Subsurface Conditions” (DSC) which required changes to its means and

methods. After initial discussions between the parties, no agreement was reached with regard to entitlement for any DSC. The owner alleged that the excessive overbreak was the result of the contractor’s decision to change its means and methods, not the result of any DSC. After excavating only 2000 to 3000 meters of tunnel, (i.e. 20-30% completion), the project was facing a significant schedule overrun and an unsupportable expected increase in cost for the contractor to complete the work.

The parties eventually agreed to put the matter before a formal hearing of the DRB which responded with a comprehensive recommendation examining each alleged DSC. The DRB rejected many of the contractor’s allegations but did recognize some shared responsibility with regard to the difference between anticipated overbreak quantities and expected rock support types in the Geotechnical baseline Report (GBR) versus the actual overbreak quantities and rock support type that was installed. Interestingly, although neither party fully accepted the recommendation of the DRB (neither party got what it wanted) these recommendations formed the basis of negotiations between the parties to revise the lump sum design build contract into one with a target cost and schedule with incentives and disincentives related to achieving the revised target cost and schedule.

This case underlines that a DRB is especially useful in technically complex disputes and can intervene at a critical juncture to save a project from being interrupted and forced into legal proceedings.

Seymour-Capilano Tunnel

During the excavation of the vertical access shafts, the contractor encountered reaches of difficult mixed rock conditions. These conditions and their impact were the subject of the first formal DRB hearing and were resolved by the parties with the help of a DRB recommendation. However, the success of the DRB process on this project remained limited to this one issue. Another important problem was not brought before the DRB.

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(continued from page 13)

Rock stability problems occurred in the deepest part of the alignment when the tunnels were about 55% into their long drive. A safety issue was declared and work could not restart until the problem was resolved. The Owner believed that the tunnel designer and construction supervision engineer had prepared a plan that addressed the safety concerns and allowed for the resumption of work. The contractor did not accept the plan and high-level discussions between contractor, client, designer, provincial safety authority failed to resolve the stalemate. Although the contractor requested that the situation of perceived unsafe conditions in the tunnels be taken to the DRB, the Owner declined to participate. The contract's DRB clause permitted the GVRD to terminate the contract at any time, instead of passing before the DRB.

Faced with the contractor's refusal to return to work, the Owner terminated the contract expressing the position that it was left with no practical alternative in terms of completing the work. The Owner also took possession of the equipment on site, re-bid the project and awarded a contract to complete the work to another joint venture at almost double the original value of the remaining work. The Owner has sued to recover these additional costs from the original contractor. In return, the contractor is suing to recover its losses, including many millions of dollars for equipment confiscated by the Owner, as well as millions in unpaid labor and materials supplied to the project prior to termination.

This case is a study in contrast to the successful use of DRBs for technically complex disputes such as was the case in the Niagara tunnel. While resolution of the differences between the original contractor and the Owner ultimately rest with a judge to decide years from now and no doubt after significant expense has been incurred by both sides, one wonders if this situation could have been settled more quickly, more economically, and perhaps more amicably, had the parties accepted to bring the matter before the DRB.

Why So Few DRBs in Canada ?

The sum of the past, present and future projects averages less than one project per year employing the DRB process throughout all of Canada, as opposed to more than 100 such projects annually in the United States. Reluctance to use DRBs in Canada in the past may be explained by the unfamiliarity of Canadians with the DRB process.

The legal community in Canada has been more comfortable working within the bounds of established procedures and jurisprudence. Lawyers might have been resistant to including provisions for a DRB into the contract clauses thinking a DRB could work outside the terms of the contract. This fear is unfounded because all disputes must be reviewed in strict reference to the contract's terms and conditions. A DRB cannot rewrite the contract. There may also be some concern from lawyers about being trapped by an unappealable DRB recommendation. Again, this fear is unfounded. The current popularity of the DRB process is due in part to the fact that advisory opinions and recommendations are non-binding. The disputing parties get the benefit of a neutral panel's experience and opinion about the case. This advice is given at a time when costs and impacts can still be mitigated.

Consulting engineers and architects might have been reluctant to include DRBs into a contract believing the DRB could usurp their authority as first deciders when a dispute arises. This fear is also unfounded. Consulting engineers maintain their right to express themselves first regarding any dispute that arises. The DRB will intervene only after a dispute is brought before it at the request of both parties. Consulting engineers and other experts are also able to express their opinion during any DRB hearing.

Owners may have been hesitant to impose the process on contractors unfamiliar with this approach. In such a case, the TTC's approach of including optional DRBs with the approval of both parties seems wise at this time.

Considering all the positive aspects, proven record of success and growing popularity throughout the world, it is suggested that the Canadian construction industry seriously consider the use of DRBs in Canada. This suggestion is not ours alone, in fact articles by several prominent Canadian lawyers and engineers over the last few years have already suggested the same. The concluding remarks of one of these articles [1] are reproduced below:

“The DRB process, properly organized and implemented, makes a great deal of sense. As governments and the private sector prepare to embark on various infrastructure project initiatives, through public-private partnerships or otherwise, the implementation of project-based DRB dispute

resolution can provide important savings and benefits too valuable to ignore.”

The time has come for more DRBs in Canada.

REFERENCES

- 1 “Dispute Resolution Boards (DRBs) – Creative ADR for Infrastructure Projects”, Marston, D., Canadian Arbitration and Mediation Journal, Fall 2009

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Contact details are available on the DRBF website:

www.drb.org

Ethics in Today's World of DRBs:

Owner alleges that the DRB is being asked to hear a dispute for which there has been no notice or briefing



By Jim Phillips Ph. D.

As many of you are aware, the Foundation's Annual Meeting and Conference will be held this year from Friday, October 1, 2010 through Sunday, October 3, 2010 in Charleston, South Carolina. I encourage all members, as well as readers who are presently not members, to attend this very important event as it always is a great chance to meet new colleagues, renew relationships that we have previously established and learn more about the process and ongoing DRBs around the world.

Since this will occur before the next edition of the *Forum*, I wanted to take this opportunity to request that anyone who has an ethical dilemma that they would like some feedback on, or some different ideas as to how it might be resolved, to forward them to me at jphilip@richmond.edu or 804 921-5855. I will be leading a discussion at the Annual Meeting about ethical issues and will be willing to include any issues you may have in the discussion. As always, we will discuss these issues in a fashion that protects the identity of the parties and our DRB members.

At the conclusion of the last discussion, I posed a question regarding an allegation by the owner, during a formal hearing of a dispute properly brought before the DRB for a Recommendation that the contractor was attempting to introduce a new dispute at the hearing that had not been briefed by either of the parties. The

question also assumes that the DRB Procedures for the Project, agreed to by the parties, provided that only those disputes that had been briefed by both parties were eligible to be heard by the DRB at a formal hearing.

This issue is basically one of notice of a dispute. The DRB Procedures adopted by the parties in this hypothetical, and typical of most DRBs in real world operation, only allows disputes to go to the Board that all parties have notice of and all parties have had the opportunity to present written position statements that set forth their factual and contractual arguments as to why the DRB should find a Recommendation in their favor. If the DRB were allow a party to "sneak" a new dispute previously not briefed into a DRB formal hearing, the outcome would most likely be, as I like to call it, a "hearing by ambush". This flies in the face of the very essence of the DRB process.

Canon 4 of the Code of Ethics of the DRB Foundation provides that the Board shall conduct hearings in "an expeditious, diligent, orderly and **impartial** manner" (Emphasis added). To allow a party to present a dispute to the DRB for a formal or informal Recommendation, of which the other party has had no notice or opportunity to respond to the moving party's arguments, would, in essence, show favoritism to the moving party. This would destroy the credibility and the fairness of the DRB process and the neutral and impartial position of the Board members.

Canon 5 of the Code of Ethics also addresses this problem. It provides also that the DRB “shall impartially” consider all disputes referred to it. Again, if the contractor in our hypothetical were allowed to introduce a new dispute in the middle of a formal hearing and the DRB were to issue a Recommendation, the impartiality of the Board would be compromised.

In many circumstances issues of delay, differing site conditions, contract and plan inconsistencies and others, are very complicated and intricate and require detailed analysis by the parties, as well as the DRB. In some cases when a party is going back to revisit the facts of the project construction to prepare a position paper and oral argument for a formal hearing, one dispute uncovers either a different but related issue, or the accumulation of several distinct disputes. This results in a different dispute or one of more magnitude. For example, a weather delay coupled with other delays may cause the contractor to have to prosecute the work in a different sequence than the contract provides, giving rise to other disputes. In some instances these newly uncovered disputes or arguments, regarding them, are discovered during the course of preparing for a hearing.

In my opinion, it would natural for the party, like our contractor in the hypothetical, to want to make his arguments about these types of issues during the hearing of the disputes for which he/she has already given notice to the other party and the DRB. The problem, however, is that it places the other party at a distinct disadvantage. In these cases, it is up to the Board to determine the scope of the issues/disputes that are properly before it and limit the hearing to just those disputes.

**Ethics
Commentary
or Question?**

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Other attendant disputes should be heard a later hearing in order to preserve the parties’ rights for a full and fair hearing on all disputes.

The Foundation’s Practice Manual also speaks to this issue. In Section 3.6.1 Hearings Preparation, provides that soon after the hearing date for the dispute has been set, “...the parties should strive to jointly agree on the exact wording of a statement of the dispute”. The Manual goes on to state that if the parties can not agree to such a wording, they should define it as best they can and then allow the Board to phrase it in a way that the Board analyzes it. The key here is to have a **written** agreed upon statement of the dispute that the parties have agreed to **before** the hearing begin

As I indicated earlier, any close calls should go to the side of caution to prevent one party from being in a posture of having to defend their position about an issue without any prior notice. The DRB can always come back at a later time to hear a dispute, even if it is closely related to another one previously heard.

The DRB Rules of Procedure adopted by the parties at the beginning of the project should ensure that the parties have the opportunity to jointly construct a statement of each dispute prior to it being heard by the DRB. This will ensure the neutrality and impartiality of the DRB and the integrity of the process.

**NEXT ETHICS
CHALLENGE**

Assume you are the Chair of a DRB that has been operating on a project for quite some time. You are chairing a formal hearing of a dispute brought to the Board by the contractor for a Recommendation. Assume also the same facts as in the last question discussed above and that the
(continued on page 18)

Board postponed the hearing of the new issue attempted to be introduced by the owner at the previous hearing. As the contractor is putting on his position on the new case, the owner now argues that the dispute should not be heard again, because it was covered in essence at the last hearing, and that for the DRB to hear it again would be unfair and allow the contractor a “second bite of the apple.”

What should you do?

Forum Editorial Deadline

Our readers love to hear DRB success stories, challenges facing the process, and the latest industry news and events. 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 November issue is

October 1, 2010

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DRBF 2010 Elections

The DRBF is holding elections for open positions on the Executive Board of Directors and the Region 1 and Region 2 Board of Directors. Ballots are available online and are distributed to all members via email or hardcopy.

All DRBF members are invited to vote for the President Elect position for the Executive Board. Region 1 members are invited to vote for the position of President Elect and a Director position open on that Board. Region 2 members are invited to vote for two new Director positions on the Region 2 Board.

Summary statements of each candidate's experience and approach are distributed to all members with their ballot. Ballots must be submitted by September 15, 2010.

Candidate for Executive Board of Directors—President Elect

Volker Jurowich

Candidates for Region 1 Board of Directors

President Elect

Doug Holen

Director

Kurt Dettman

Eric Kerness

Deborah Mastin

James Phillips

Candidates for Region 1 Board of Directors

Director (2 open positions)

Murray Armes

Peer Dalland

Pratim Ghose

Levent Irmak

Michel Nardin

Alina Oprea

Graeme Peck

Chris Redfearn

Training Workshops Charleston, SC

Offered in conjunction with the DRBF Annual Meeting & Conference

Introduction to Dispute Boards

**What lawyers, project owners, contractors and design professionals
need to know about Dispute Boards**

September 31, 2010

10am - 3pm

Embassy Suites

The use of Dispute Boards for dispute avoidance and resolution on construction projects, especially infrastructure projects, has grown rapidly in the U.S. and internationally. Project owners, construction professionals and their legal counsel all need to understand how Dispute Boards can change the owner-contractor dynamic. Lawyers dealing with international construction or commerce will learn about Dispute Boards under the FIDIC contract documents and the International Chamber of Commerce Dispute Board Rules.

Agenda topics include:

- Overview of the DB Process in North America and Internationally
- Drafting the DB Clause and Agreements (FIDIC/ICC and U.S. DRB)
- Case Studies
- Selecting and Training DB Members and DB Users
- Presenting to a DRB
- DRB Recommendation/DAB Adjudication: An Interactive Exercise
- Panel Discussion: Pros and Cons of DRBs and Perspectives on the DRB Process

This program is jointly sponsored by the Dispute Resolution Board Foundation, the American Bar Association Forum Committee on the Construction Industry and the American Arbitration Association. Fees are \$150 for general admission, \$100 for government employees.

DRB Update Workshop

September 31, 2010

1 - 5pm

Francis Marion Hotel

This program is design for advanced practitioners who have already completed other DRBF workshops. New advances in the process, ethical challenges and success stories will be discussed. Registration is \$150.

Registration

Visit the calendar of events section of the DRBF website to access complete event details and register online.

Report on the 2nd DRBF Regional Conference, 9-11 June 2010 Bucharest, Romania

Remember the first ever DRBF Regional Conference...? It was held in Bucharest, Romania, in October 2009, because people from Romania and from the region were eager to learn more about dispute boards – how they can prevent or solve the disputes in the construction contracts – and because the Annual DRBF International Conference was held here in May 2007, and another annual international one could not be organized in the same location so soon... Thanks to the understanding, flexibility and help of the DRBF leadership, the “Regional Conference” was created. It was so successful, that people wanted a 2nd one...! And now they want a 3rd one – actually, they are simply asking when it will be the 3rd one...!

But let’s tell you about the 2nd DRBF Regional Conference...

It was asked at the gala dinner of the first one... “What about another Regional Conference...?” I asked Volker Jurowich, the President at that time of DRBF, and Romano Allione, the President of DRBF... “Let’s have another one!” said they. “But, please, do not make it before the end of this year...” added Volker, still feeling the efforts made for organizing the first one (Volker was deeply involved in organizing the first Regional Conference).

It was settled in June 2010, feeling that this one and the Annual International Conference in Istanbul – not far from Romania – would not jeopardize each other, since in this year of crisis, people from the region and from Romania would not be able to travel to Istanbul. The reasoning was correct: despite the late start of advertising, the Bucharest 2nd DRBF Regional Conference of 9-11 June 2010 brought together 58 participants from 9 countries – most of them from Romania, leaving to the Annual Conference of Istanbul, in middle May 2010, the cheer of large and numerous international participation.

What the participants really appreciated the most – besides the location, downtown Bucharest, the facilities of the hotel Novotel – especially the free wireless internet, the organization (thank you, Ann McGough for your valuable input) and the quality of the presentations, was the opportunity of interacting – the event was really a big and almost continuous brainstorming about understanding Dispute Boards – how they work and how they can be better used for preventing and solving disputes.

Edward Corbett was of big help in both settling the agenda and in presenting interesting things, which we all appreciated very much. The speakers, tutors, presenters and performers (we had 1 day active workshop, 2 days interactive conference, which included discussions and a mock Dispute Board hearing) were Nicholas Gould, Volker Jurowich, Edward Corbett, Bogdan Oprea, Florin Niculescu, Leo Grutters, Marius Lancranjan, Nabil Abbas, Giorgiana Tecuci, Adriana Spassova, Boiana Berchi, Frederic Gillion, Augustin Purnus, Nigel Grout, Sorin Ionescu, Stefan Ciobotarencu, James Dow, Cremona Cotovelea, David Brown, Marcus Theil, Anthony Albertini, John Redmond and I. The presentations, interactive sessions, exercises, the mock case – all were perfect pretexts for debates, comments, questions and answers which pleased very much the participants, who decided that this is the best size, in terms of number of participants, to have the most lively conference, from which all participants can learn the most about specifics of the region in dealing with Dispute Boards and enforcing their decisions, as well as about each theme of the events.

The workshop covered:

- Introduction to the FIDIC Contracts (the conference was supported by FIDIC; Roles of the parties; Risk allocation; Role of a balanced contract in preventing disputes; Claims and claims procedures;

- Programmes and Records);
- FIDIC in Romania and in the region (The Romanian and regional experience; Standing and ad hoc; Dispute prevention; Selection; What is a Dispute? Background of Dispute Resolution; Alternative Methods of Dispute Resolution; Application in the USA and Europe);
 - Dispute resolution (Under FIDIC Contracts; Under ICC and other Rules; Legal status of an Adjudicator and DABs);
 - DAB Establishment and Responsibilities (Selection Process; Appointments; Contract Agreement; Full term and ad hoc responsibilities; Fees, expenses and payment terms; Termination and replacement of a DAB);
 - Procedural Rules (Routine procedures; Full-term visits; Opinion and advice; Dispute referral; Jurisdiction; Site visits and reports);
 - Dispute timetable and position papers (Referral; Establish timetable; Nature of position papers; DAB Directions; Evidence statements; Hearings; Pre-hearing requirements; Attendees; Agenda; Evidence; Conclusion of hearing; After the hearing; Dispute decision);
 - Reaching the decision (Three-person DAB discussion; Format of decision; Unanimity; Dissatisfaction; Enforcement of decisions).

Then, at the conference itself the debates were about:

- Dispute Resolution in Romania and the Region – Past, Present Trends, Future;
- Dispute prevention – the role of the DB and other factors;
- DABs and DRBs, Ad hoc v Standing – current thinking;
- Selection and appointment of DBs – how to get the best DB, Agreements;
- Paying for DBs – funding, retainers, unequal fees, avoiding problems;
- Site visits and informal advice – prevention in practice;
- Site visits – Experiences and Case Studies;
- The dispute resolution role of the DB;
- Jurisdiction: “Is there a dispute?” and other efforts to disrupt DBs;
- Referrals, position papers and evidence – what do DBs want?
- Procedure – how proactive should a DB be to find the truth?
- Hearings – unnecessary or a key to fair resolution?
- The Decision – how should it be reached and what should it look like?
- Enforcement and appeal to arbitration – Case studies and discussion;
- Mock hearing – solving problems at hearings...



Edward Corbett in full character for an interactive exercise

How could it be more interesting and exciting...? It will be a big challenge to find other interesting subjects for the 3rd Regional Conference Bucharest 2011...

Who's proposing the first subject...? Let me know at alina.oprea.v@gmail.com! We will ask our participants to vote for the most interesting subject and the winner will receive a prize, a certificate, and his/her name will be published in *Forum* newsletter!

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Join conference delegates, presenters and guests for a low country feast at Middleton Place, a carefully preserved 18th century plantation. Motor coaches will transport attendees to and from the Francis Marion hotel. After dinner, there will be a brief presentation of the Al Mathews Award, given each year in recognition of efforts to advance the DRB process.

Hope to see y'all there!

