



Forum

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Case Study: Pacific Motorway Upgrade Springwood (South) to Daisy Hill

To learn more about Relationship Contracts, view McLennan and Peck's paper, "Experiences with DRBs in Relationship Contracts in Australia," which was presented at the DRBF's 10th Annual International Conference in Istanbul.

Go to www.drbf.org and enter your member login to access the DRBF publications library.

Preface by Alan McLennan, a consulting engineer specialising in project development and delivery. He is the current Queensland Representative and Vice President of the Australasian branch of DRBF (Dispute Resolution Board Australasia, or DRBA).

The article which follows this introductory commentary was prepared as a Case Study for publication in the Australasian Collaboration Insight Series by the Alliancing Association of Australasia Ltd (AAA), a not-for-profit, independent, cross sector initiative connecting the infrastructure industry to create better projects.

This commentary is intended to provide some background for readers not familiar with relationship contract concepts. It draws upon the content of a paper presented to the 10th Annual DRBF International Conference in Istanbul in May 2010 by Graeme Peck and Alan McLennan which described a number of experiences with relationship contracts utilising DRBs within the Australian construction industry.

A relationship contract can be any contract which seeks to emphasise the relationship between the parties to achieve optimal outcomes for the job to be done by

employing some form of management regime (whether within or outside the terms of the contract) to manage the relationship.

The simplest form of relationship contract is the original 'project partnering' introduced to the American construction industry in the late 1980s by the U.S. Army Corp of Engineers. This is usually set up on a contract by way of a contractually non-binding partnering charter.

At the other extreme, the 'pure Alliance' arrangement initially developed by the offshore petroleum industry in the early 1990's typically contains a "no disputes" clause. All differences are to be resolved by unanimous decision of the controlling group of the Alliance (the 'Alliance Leadership Team' or 'Alliance Board') and the contract typically contains express provisions that participants will have no legal or equitable cause of action against any other participant except in the case of wilful default.

Partnering and Alliancing have a similar philosophy - achieving cooperation and

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President's Page



Dear DRBF Members,

In preparation for writing the president's letter for the February *Forum*, I started thinking back to when I attended my first DRBF Annual Meeting in Minneapolis, Minnesota on October 4 & 5, 1997, with an attendance of 75 people. At the time our total membership was approximately 297, made up of 248 US members and 49 international members. Since that time the DRBF has grown to over 700 members with approximately half from the US and the other half from the international side. We are now divided into two regions, Region 1 being the US and Canada and Region 2 being the rest of the world, and next year we will be adding Region 3 that will be based in Australia. The exact area to be covered by Region 3 is still under discussion at the Executive Board level of the DRBF. Presently we have three DRBF chapters, one in Australia and one in Texas and one in Florida, with the Florida chapter being the largest with approximately

90 members, all of whom are also members of the DRBF. The DRBF has grown from its beginning in 1996 with approximately 50 members to the organization as it is today, with 14 times the members with whom we started. However, just think how big we could be if everyone who has been a member and dropped out for one reason or another had kept up their membership. We would have a membership of well over 1,500 individuals worldwide. The overall growth in the last few years has been in the neighborhood of 3 to 5 %, but each year we loose approximately 20 % of the previous year's membership. That's the point of the above figures, we need to keep our members and would welcome ideas on how to do that.

The biggest reason members leave, in my experience, is because they joined expecting to become members of a DRB and after a year or two haven't been picked for a Board so they leave the organization. I know that in all the Administration and Practice Courses I've assisted with, and other DRB courses offered here in Florida it is stressed that neither the DRBF nor the DRBF chapter can guarantee anyone a DRB position. Getting on a DRB is usually the result of contacts within the owners, or contracting organizations, requiring members for a specific project. The Chair position is filled, except in unusual circumstances, by an individual known to the other two DRB members and possibly to the owner and/or contractor. So as you can see it's a job of each individual marketing themselves, and their experience, with the organizations that are potential users of DRBs.

I think that everyone needs to realize this is a professional organization, and we join because we are professionals. Examples of other professional organizations are the American Society of Civil Engineers (ASCE) or American Bar Association (ABA), and many of their members join only because they are professionals, and want to be part of a professional organization, not because the organization will provide them a job. How many of the members of those two organizations are active in the organization?

We as your Executive Board are continually looking for ways to improve the value of your membership by keeping abreast of new projects and mining for new areas to use the DRB/DAB/DB concepts. We will continue to post in the *Forum* opportunities for large projects, usually in the form of Request for Proposals (RFP) and other opportunities as we learn of them.

In closing I would like to thank Kathleen Harmon, Phd. for completing the DRB database. She has been working long and hard to complete the task. The database should soon be available to all members for their information and use, either as the complete data base or as summaries for various purposes. Please, as you are placed on a DRB or DAB relay the information to the DRBF office for inclusion in the data base. Now that it has been brought up to date we need to keep it updated regularly and for that to happen each member must report any new DRB/DAB assignments. And by all means, if you are serving on a Dispute Board with someone who is not a member of the DRBF, please encourage them to join our professional organization.

A handwritten signature in black ink that reads "John C. Norton". The signature is written in a cursive, flowing style.

John C. Norton
President, DRBF Executive Board of Directors

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Executive Board of Directors

The members of the Executive Board of Directors are:

John C. Norton, President
Volker Jurowich, President Elect
Romano Allione, Past President
William B. Baker, Secretary
James P. Donaldson, Treasurer
Roger Brown, Director and President, Region 1 Board
Nicholas Gould, Director and President, Region 2 Board
James J. Brady, Past President
Peter M. Douglass, Director, Past President
Gwyn Owen, Director, Past President
Joe Sperry, PE, Founder, Honorary Director

The Executive Committee meets monthly. Recent topics have included:

- 2011 budget planning
- Training workshop planning for 2011
- Efforts of the Region 1 Marketing and Outreach Committee
- President's List review

Summaries of the Executive 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:

February 18, 2011 by conference call
March 18, 2011 by conference call
April 15, 2011 by conference call

Region 1 Board of Directors

Roger Brown, President
Doug Holen, President Elect
Kerry Lawrence, Past President
Deborah Mastin
Blasdel Reardon

Region 2 Board of Directors

Nicholas Gould, President
Richard Appuhn, President Elect
Volker Jurowich, Past President
Murray Armes
Alina Oprea
James Perry
Paul Taggart

The Board of Regions 1 and 2 also meet on a monthly basis. Questions for the Executive or Regional Boards should be addressed to the Board President, 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
Email: info@drb.org Web: www.drb.org

Call For Nominations: Region 2 Board of Directors

Region 2 of the DRBF has a seven person Board of Directors. At the upcoming International Conference in May, the Board will transition and the positions of President Elect and general Board member will be vacant. The Nominating Committee, consisting of Dick Appuhn, Nicholas Gould, Volker Jurowich 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

Nominations are due by March 2, 2011. Ballots will be distributed to all Region 2 members in April.

**Forum Editor:
Ann McGough**

Editorial and subscription address:
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
amcgough@drb.org
www.drb.org

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

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***Thank you for
your support!***

The Merits of DRBs Over DABs Revisited

By Derek Griffiths

Introduction

The February 2010 issue of *Forum* aired my preference for DRBs over DABs as a procedure. In short, in the face of unfolding events, it is a better means of keeping the participants' attention focused on "partnering" and the execution of the project, so that it is completed as close to time and within budget as humanly possible. In February I was unaware of Christopher Seppälä's article, "An Engineer's / Dispute Adjudication Board's Decision is Enforceable by an Arbitral Award", drawn to my attention later by Romano Allione. The thrust of Seppälä's article was that the decision in ICC Case 10169 provided an antidote to concerns about failures (seemingly by employers) to implement the binding DAB decisions agreed to by the parties in clause 20.4 of the FIDIC suite of contracts.

In November, *Arbitration*, the journal of the Chartered Institute of Arbitrators (CI Arb), published an updated version of the *Forum* article in which (having worked in-house as legal counsel for the contractor and the employer) I set out reasons why, despite Seppälä's article, I maintained my preference for DRBs as trumping DABs in creating successful construction projects. The main reason is repeated below.

Since the November version of the article, account needs to be taken of a few other developments: an article by Giovanni di Folco and Mark Tiggeman in the Dispute Board Federation's September 2010 Special Edition, Levent Irmak's article in November's *Forum* ("Do We Really Need Dispute Boards?"), and the decision of the Singapore High Court in PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation [2010] SGHC 202 (Perusahaan).

Response to Messrs Seppälä, di Folco and Tiggeman

I see nothing in Seppälä's article that leads

me to believe that an interim arbitral award requiring a party to implement binding DAB decisions would support partnering. The DAB decision in ICC Case 10169 was made after completion and the interim award was ignored, so that neither event could have had a bearing on "partnering". If the DAB decision, and the failure to implement it, whether followed by ignoring the interim arbitral award or not, had occurred before completion, the likelihood is that, at the very least, partnering would have been ruptured to the detriment of the project. In any event, the article does not say whether the final award itself was honoured, so that the winner was not required to trot off to some court to enforce it, as Perusahaan had to and failed.

Turning to those aspects of their article that are relevant to my position, di Folco and Tiggeman tell us that: disputes arose in the course of the works, culminating in the employer serving a Notice of Termination on the contractor; the DAB handed down a binding decision in favour of the contractor and the contractor sought a partial rather than an interim arbitral award. This was because the former was considered to be more straightforward than the latter to enforce before the courts of the employer's jurisdiction should it become necessary. The authors set out their views on the partial award made by the tribunal, but they do not tell us whether the employer complied with it, nor whether it was enforced if he did not. In any event, inasmuch as the project ground to a halt before the DABs intervention, as far as this contract was concerned the procedure failed in the objective of keeping the show on the road.

The "Perusahaan" affect

This is a case where (in accordance with Clause 20.4 of the FIDIC Red Book, First Edition 1999) DAB decisions were being made in the course of construction, all of which were accepted bar one. The excep-

tion was a binding (but not final) decision that Perusahaan should pay CRW just over \$17.25 million, for which Perusahaan issued a Notice of Dissatisfaction in accordance with the contract. This led CRW to commence an arbitration, in which the majority of the tribunal decided that Perusahaan was obliged to pay that amount immediately to CRW as decided by the DAB. Not having been paid, CRW applied to register the award as a judgment in Singapore, to which Perusahaan responded by applying to the court to set aside the registration. More seriously, it also applied to set aside the award itself, pursuant to section 24 of the Singapore International Arbitration Act and Article 34(2) of the UNCITRAL Model Law. For reasons that I do not intend to rehearse here, the court set the award aside.

I have no insight into how all these off the pitch shenanigans might have affected CRW's site operations. However, it is not difficult to imagine the havoc that would be wreaked along the construction time line at any time before completion, if other courts around the world were to emulate the Singapore High Court by not enforcing arbitral awards, or worse, setting them aside. Of course, the world is a patch work quilt of legal jurisdictions with myriad arbitration laws. Therefore, it is dangerous to generalise about the effectiveness of provisions that depend on arbitral awards being made in support of DAB decisions and those awards being enforced by a court should that become necessary.

Response to Mr Irmak

A proper comparison of the strength and weaknesses of Dispute Boards, and the growth rate in their use in the USA and in other parts of the world, must begin with distinguishing the nature of DABs as a procedure from that of DRB. It is misleading to simply lump them together in a discussion on Dispute Boards. When they are separated, it is evident that the growth in the use of DRBs in the United States outstrips the use of Dispute Boards anywhere else in the world. This includes the UK, where, as far as I am aware, in keeping with the statutory adjudication procedure enacted here, the Dispute Boards that have been used have been DABs.

Closing remarks

Leaving aside the wide discrepancy in cost, it is reasonable to infer that the reason for the wide gulf in growth has something to do with the mediatory nature of DRBs, compared with the adjudicatory, or judgmental, nature of DABs. In any event, as a non-American, I am left wondering why the rest of the world was proselytised to adopt the DAB procedure when the DRB procedure was thriving in the States: "If it ain't broke don't fix it" springs to mind.

The renewed interest in mediation in the UK, as an alternative or additional procedure to adjudication, indicates that adjudication here has not entirely lived up to what it was cracked up to be. In other words, it is broke and needs fixing; being similar in nature to statutory adjudication, the DAB procedure is not going to fix it. On the other hand, as its function is limited to making recommendations (with the added advantage of having some foreknowledge of the history of the project) the DRB procedure is mediatory in nature. This being so, its adoption by agreement in construction contracts is in keeping with the renewed interest in mediation and might fix the problem.

The developments commented upon in this piece have provided no reason for changing my view that DRBs trump DABs in creating more successful construction projects. This is as much here in the UK as elsewhere, even though, should it become necessary (as is increasingly the case with the decisions of adjudicators) enforcement of temporarily binding DAB decisions is more likely. The enforcement makes those decisions the equivalent of a temporary court decision, but as the Wembley stadium fiasco shows, going to court is no substitute for keeping the project flowing in the way DRBs seem to do in America and did on the Lesotho Highlands Water Project.

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.

Outreach & Marketing Progress Continues in Region 1

By Blasdel Reardon, Director, Region 1

Following his “President’s letter” in the last *Forum* issue, Roger Brown marshaled the Outreach/Marketing Committee together on Saturday December 4 for an all day brainstorming session. The committee consists of Region 1 Board members and Chairs for each of the following market sectors: Airport, Energy, Transportation, Tunnel, University/Hospital, and the regional sectors of Alaska and Canada. The purpose of this gathering was to design and schedule completion of a detailed plan and budget proposal for the DRBF’s outreach and marketing efforts in Region 1, for 2011 and beyond. Here are excerpts and sections from that document which Roger submitted to the Executive Committee of the DRBF in late December.

Goal: To Increase The Number of DRB User Agencies

Strategy 1: Identify large construction projects that are in development, and might be ripe for a DRB program based on size, project type, etc.

Strategy 2: Identify specific agencies such as State Highway Departments, City and Counties, Airport Authorities, Universities and Hospitals, and others. Make contact, submit marketing materials, follow up with meetings and presentations, and assist with drafting DRB specifications and training of potential DRB members in their local area.

Strategy 3: Identify and build relationships with industry organizations that can help expand our network and build credibility. Ask DRBF members to join local chapters and offer to speak on DRB con-

cepts. When applicable, the DRBF would join organizations. Submit proposals to sit on panels at annual meetings promoting and/or explaining the DRB process. A current organization list on which the committees will be focusing has been developed.

Next, each sector identified its specific goals consistent with the three strategies. They are:

Airports

Committee Chair: Deborah Mastin

Committee Members: John Macrae

Approach: Airport construction, both “vertical” (terminal buildings, cargo handling facilities, intermodal centers, parking garages, hotels, food, beverage, retail and other passenger facilities) and “horizontal” (runway extensions and enhancements, drainage improvements, utilities and fuel line installations) are ripe for the utilization of DRBs. Federal subsidies, including stimulus projects and ongoing FAA infrastructure improvement projects, and new efforts for public-private-partnership development projects are ongoing despite the general economic contraction. These projects are large, complex, high-profile public infrastructure projects on fixed budgets.

Alaska

Committee Chair: Jeff Callahan

Approach: Primary focus is on the Alaska Department of Transportation and Public Facilities, as well as ports, school districts and Borough agencies throughout Alaska. In addition to these public works areas, Alaska has a significant amount of Federal construction funds that come in through the military and US Army Corps of Engineers.

Canada

Committee Chair: Gerald McEniry

Committee Members: Don Marston, Tucker Elliott, Serge Pisapia

Approach: The committee will pursue the expansion of DRBs in Canada by targeting large energy and transit projects in development, as well as owners who are known to be struggling with disputes on current projects and eager to learn about the DRB process. In addition, the committee is targeting several industry conferences, which attract a large number of Canadian users and contractors, and will attempt to have an article published in an industry magazine.

Energy

Committee Co-Chairs: Blasdel Reardon and Kurt Dettman

Approach: The Energy Committee will initially focus on the top 2 or 3 strongest leads. The objective is to get a project or two on board/involved in using the DRB process and then pursue other potential projects. Conversely, if we do not get a couple of projects to use DRBs after a reasonable level of effort, then we propose to re-assess whether the Energy Sector should be a priority.

Transportation

Committee Co-Chairs: Eric Kerness, Kurt Dettman

Committee Members: Leland Caldwell, Ruth Franklin, John Jozwick, Dr. William Ibbs and other former regional reps.

Approach: DRBs have a strong track record in the Transportation Sector, and the committee will use those successful programs to attract State DOTs and other transportation agencies. In-house training is an important component in the presentation to these groups.

Tunnels

Committee Chair: Rich Redmond

Committee Members: Ray Henn, Jim Brady, Pete Douglass, Joe Keating, and Joe Sperry

Approach: The DRB process is relatively advanced in the tunnel industry, but there are still some key users not yet using the process. The committee has identified new projects scheduled for 2011-2015, and targeted key owners and agencies who are not yet using the process.

University/Hospital

Committee Chair: Doug Holen

Members: Bill Baker, Dan Meyer, Bob Rubin, Kurt Dettman, Roger Brown, Bill Hinton, Lynn McDonald, and Blase Reardon

Approach: There are some strong examples of successful DRB programs within the University and Hospital market sector. Similar owner groups have been identified for in person presentations as well as industry organizations.

Putting O/M Plans into Action

With these sector or regional goals, each of the seven committees listed specific projects, organizations, agencies, and owners to pursue for the increased use of DRBs.

The cost of each of these efforts was then estimated. Finally a summary financial budget chart or grid for the entire effort was developed. We are now awaiting direction and approval from the DRBF Executive Board before prioritizing which specific tasks to pursue. This will be the subject of a follow-up article in the May 2011 *Forum*.

To support the Outreach/Marketing efforts, extensive work under the leadership of Doug Holen and Ann McGough respectively is being done to update DRBF training materials and to establish a consistent/accessible library of DRBF promotional materials, articles, and information. This too will be the subject of future *Forum* articles.

Meanwhile, stay tuned as DRBF Region 1 is broadening its reach for increased use of DRBs in a very proactive way.

**Marketing & Outreach Committee Chair
Blase Reardon can be reached at
Reardon@bostonsolv.com.**

Forum Newsletter Editorial Deadline

Our readers love to hear DRB success stories, new ideas, and the latest industry news and events. If you have 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, 2011

WELCOME TO NEW DRBF MEMBERS

MEMBER ADDITIONS OCTOBER 2010 THROUGH JANUARY 2011

Michael Bruen
MWH
Bellevue, WA USA

Don Cronk
DMCCS
Palm Coast, FL USA

Ian H. Frank
Frantz Ward LLP
Cleveland, OH USA

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Milton Keynes, UK

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Oana Irina Soimulescu
Bucharest, ROMANIA

SCA Soimulescu Dragan Costin Si Asociatii
Mona Maria Dragan Costin
Bucharest, ROMANIA

SCE
Vincent Leloup
Nantes Cedex 3, FRANCE

Susan Tappan
California Dept. of Transportation
Fortuna, CA USA

DRBF 2011 Event Calendar

April 8-9
DRBF Regional Conference
The Use of Dispute Boards in Europe:
Expectations, Concerns, Experiences
Le Meridien Hotel, Vienna, Austria

May 12-13
Training Workshops:
Introduction to FIDIC and Dispute Boards in
International Construction Contracts
Dealing with Conflict as a Dispute Board for
Advanced Practitioners
Renaissance São Paulo Hotel, São Paulo, Brazil

May 14-15
11th Annual DRBF International Conference
Real Time Dispute Resolution in Infrastructure Contracts:
Latest Developments and Advantages of Dispute Boards
Renaissance São Paulo Hotel, São Paulo, Brazil

May 20
Northwest Regional Conference
Seattle, Washington

June 30
Introduction to International Adjudication
King's College, London, UK

September, *date to be announced*
4th UK Member's Meeting
London, UK

September 15-16
3rd DRBF Bucharest Regional Conference
Bucharest, Romania

September 22
Training Workshop
Hyatt at Olive 8 Hotel, Seattle, Washington

September 23-24
15th Annual Meeting & Region 1 Conference
Hyatt at Olive 8 Hotel, Seattle, Washington

November 17-18
DRBF European Conference
Marriott Hotel, Brussels, Belgium

(continued from page 1)

alignment of objectives. However, whereas the obligations in the Partnering Charter may be considered as non-binding on the parties, Alliancing includes those objectives as express terms in a construction contract. Since the appearance of the ‘pure Alliances’ of the offshore petroleum industry, there have been a variety of contracts developed which retain the focus on the benefits of co-operative and non-adversarial relationships developed in the original versions, but allocate risks between the parties in an agreed upon manner and maintain contractual arrangements whereby breaches by participants are actionable at law. The Early Contractor Involvement (ECI) form of contract discussed in the following Case Study is an example of this.

These contractual arrangements generally include a provision along the lines of a typical partnering charter that any decisions made by either party during the relationship management process are ...*“deemed not to increase, diminish, waive or otherwise affect a party’s rights, obligations or liabilities under or arising out of the Contract or vary the Contract”*.

The ECI concept used within Australia endeavours to capture the benefits of construction and buildability expertise at the earliest practical stage in the concept development, articulate and agree as between the parties with whom identified risks best sit, and finally enter into a contract agreement which incorporates the agreed risk allocation within the price structure. Each party remains responsible for its own contractual obligations.

The January 2007 edition of the DRBF Manual includes several references to the benefits of ‘Partnering’ in conjunction with a DRB. All of these references relate to the original and simplest partnering arrangement.

The Manual notes (1.3) that ...*When “partnering” is conducted on a construction project, the presence of a DRB has the effect of enhancing the partnering process by encouraging the parties to fully utilize the partnering process for dispute resolution.*

It further suggests (3.4.1) that ... *Board members do not attend partnering sessions, as that could inhibit free and open partnering discussions and could prejudice the Board members in later proceedings.*

Perhaps the most important concept is that at 3.4.3 ... *One of the primary benefits of the DRB process is that it can help the parties avoid disputes and is not there just to resolve disputes.*

The benefits of the use of DRBs in conjunction with Partnering in its simplest form were succinctly summarised in the August 2009 DRBF *Forum* paper by James R. Haggins dealing with the Washington Metro experience, as follows:

....we experienced better cost control, reduction in schedule growth, a significant reduction in paperwork, and successful attainment of our valued engineering objectives... and NONE of the contracts that embraced the principles of the DRB using non-binding recommendations and Partnering have resulted in litigation.

The Australian experience is that the very important 3.4.3 objective above could be watered down by the 3.4.1 provision if the DRB were to operate in isolation from the relationship contracting provisions of the contract. Rather, the Australian experience indicates that best practice is for DRB members to periodically attend Project Leadership Group meetings where the Board members increase their understanding of project and issue management and become more effective in assisting the parties to avoid disputes.

Features of the QMR relationship contracts include:

- defined joint governance framework involving a Project Leadership Group ('PLG') and a Project Management Team ('PMT')
- active relationship management processes at all levels
- a defined Issue resolution process that involves the DRB routinely participating with the PLG in issue avoidance and, if necessary, dispute resolution.

The regular DRB meeting includes the same Contract Party attendees as the PLG meeting and follows directly on from the PLG meeting. The DRB pursues an agenda which has a primary objective of dispute avoidance. It explores matters where experienced DRB members intuitively recognise the potential for escalation into disputes and it uses a dialogue process to assist the parties to openly deal with the matters before they grow. The DRB is not involved with the detail of the relationship management sessions (principally involving the

PMT and down-the-line personnel) which are similar in purpose to the partnering sessions referred to in 3.4.1 above.

The DRBF Istanbul conference paper by McLennan and Peck includes actual examples of contract provisions incorporated in the QMR contracts.

The AAA article which follows provides:

- insight into a complex and challenging project;
- an explanation of a common relationship contract form (ECI) used in Australia;
- a description of the nature and practice of the Relationship Management process;
- information on the joint governance and management structure appropriate to such a relationship contract, and
- information on the role and function of the DRB in the overall issue resolution process.

Pacific Motorway Upgrade, Springwood (South) to Daisy Hill

This case study was prepared by the Alliancing Association of Australasia Ltd (AAA), a not-for-profit, independent, cross-sector initiative connecting the infrastructure industry to create better projects. Visit www.alliancingassociation.org - Collaboration in the Business World.

INTRODUCTION

The Pacific Motorway (M1) south of Brisbane is an important commuter travel route and interstate freight corridor. During the late 1990s, a 40km stretch of the motorway was upgraded from four to eight lanes between Nerang and Logan City. Master concept planning on the next, six-lane section north from Logan City began in 2005 to progressively upgrade access, traffic flow and safety.

Planning was managed in three sections and the Springwood (south) to Daisy Hill component was prioritised as the first stage. More than 140,000 motorists use this busy section every day. It includes the Loganlea Road intersection, which carries significant traffic across the motorway and via on- and off-ramps. The Pacific Motorway Upgrade, Springwood (south) to Daisy Hill is upgrading the high traffic road pavement, improving pedestrian and bikeway access and reconfiguring the Loganlea Road intersection to improve safety and local access to the motorway for the Logan community.

Essential information

Client	Queensland Department of Transport and Main Roads
Project name	Pacific Motorway Upgrade, Springwood (south) to Daisy Hill
Project value	\$420m
Project participants	Designer: GHD Contractors: BHA JV, a joint venture between Bielby Holdings Pty Ltd, JF Hull Holdings Pty Ltd and Albem Operations
Location	Brisbane, Queensland
Timeframes	ECI design phase involving two tenderers in a double ECI (dECI): May 2008 – July 2009 D&C construction phase: November 2009 – Late 2011
Project description	First of three stages of the Pacific Motorway Upgrade between the Gateway and Logan Motorway. Works include rehabilitating 3.3km of the motorway with provision for future lane upgrades to preserve and maintain the road network for the next 20 years. Includes major upgrades of the Loganlea Road interchange, improvements to Paradise Road roundabout, construction of a bus-stop and park n ride and a new section of bikeway.

WHY ECI?

Queensland Department of Transport and Main Roads’ (QDTMR’s) Executive Director – Roads Delivery, Mr Allan Churchward, was instrumental in establishing the project’s ECI design phase.

Mr Churchward was a member of the selection panel during the tendering process in 2008-2009 and has continued his role on the Project Leadership Group during detailed design and delivery.

While the contract type could have been anything from a standard QDTMR Road Construction Contract (RCC) to a traditional design and construct (D&C), Mr Churchward said a relational approach with tenderers was preferred.

“ECI offered an interactive and open design process to address the relatively high risk profile of the extreme brownfield site,” Mr Churchward said.

“Traffic management is a serious challenge on the project, with restricted work areas on an extremely busy motorway,” he said.

“Other challenges include working safely and sensitively with the community in a highly congested area, while minimising disruption to residential and commercial access.”

Mr Churchward said the industry environment at the time also influenced the decision to choose an ECI tendering process for the project.



Traffic on the current two-lane Loganlea Rd Overpass Bridge

“When the process began in 2008, the infrastructure market was hot, prices were high and there was a risk QDTMR would not get a lot of interest from tenderers,” he said.

“We decided a competitive or ‘double’ tenderer Early Contractor Involvement (dECI) process would minimise the intensive resources required in D&C tendering, thus making the project more attractive to the market.”

Mr Churchward said QDTMR has seen the benefits of collaboration during design through its work in alliance contracting.

“The ECI process provides more informal interaction during design than a D&C contract. It allows us to collaborate with tenderers to build up a price and clearly allocate risk for this challenging project,” Mr Churchward said.

“There is more face-to-face engagement starting when tenderers are briefed during the initial design review,” he said.

“Ongoing monthly meetings allow us as a client to engage in a relational approach from the start. Our people have the benefit of regular communication through the cost development process to see how the proponents work.”

QDTMR has delivered five projects using the ECI process since 2005 and has another five ECIs underway. While single ECI processes predominated early on, Mr Churchward said the double ECI (dECI) approach has been introduced to reflect changes in the external environment.

“ECI processes are evolving all the time and the shift to dECI has been influenced by recent increased capacity in the market since the 2009 global financial crisis, resulting in more price competition,” Mr Churchward said.

“We are even going to three tenderers in some cases and have a well-defined methodology to ensure probity and confidentiality for competing teams,” he said.

“Other factors influencing the ECI trend include more market support for simpler contracts, like our RCC, and for relational frameworks to deliver projects,” he said.

SELECTION PROCESS YIELDS INNOVATION

QDTMR went to market in 2008 with a dECI approach to select two constructor / designer teams for the Pacific Motorway Upgrade, Springwood (south) to Daisy Hill. Two teams were selected in May 2008 to work with dedicated QDTMR representatives as they designed and priced the work.

Mr Churchward said the first round offers were higher than expected.

“We re-scoped the tender and invited the two parties back, providing them with a budget figure to meet. Both parties subsequently came under budget, delivering two innovative offers that met the required functionality and matched the scope,” Mr Churchward said.

“Both tenderers offered significant innovation to the reference design, including improved geometric layout of the interchange offering better efficiency with cross-motorway traffic,” he said.

“In September 2009 we selected the tender which offered the best value for money from a cost point of view. The successful team included designer GHD with contractors, JF Hull Holdings Pty Ltd, Albem Operations and Bielby Holdings Pty Ltd.

“Now in May 2010 we are in the detailed design phase and have started site activities such as service relocations, further pavement investigations and manufacture of concrete elements. We expect to deliver the whole project in late 2011.”



Allan Churchward,
Queensland Department of
Transport and Main Roads

THE PROJECT

Managing relationships under a D&C contract

Mr Churchward said while the D&C contract is not incentivised in terms of pain or gain share between the contractor and QDTMR, as is typical in alliance contracting, there is a relationship framework in place to facilitate communication as the team works through challenges.

“This approach provides the best of alliancing and has the advantages of price competition, without compromising probity,” Mr Churchward said.

“The relational framework promotes good understanding of each-other’s drivers and interests,” he said.

“The project’s relationship charter is surveyed monthly to track relationship health during delivery.

“A relationship facilitator conducts workshops with the team and quarterly in-person interviews are undertaken with a cross section of the team to identify learnings and any issues.

“These surveys provide useful information to the project management team, particularly on how things can be improved. For example, the efficiency of our meeting structure was questioned and improvements have now been made to consolidate a number of meetings, thus saving time.

“Results also reinforced the need to continue driving the expected behaviours down into lower levels of various organisations involved, by way of workshops attended by their senior management. It is the old ‘walk the talk’ strategy,” he said.

Management and leadership forums were established from the outset including a Project Management Team (PMT), Project Leadership Group (PLG) and a Dispute Resolution Board (DRB).

Membership of these groups has remained consistent to build and keep relationships into the delivery phase.

The PMT includes the Project Manager and discipline heads and meets monthly or fortnightly as required. It is focused on delivery – a similar format to PMTs used in alliance contracts.

The PLG includes three senior people for QDTMR, including Allan Churchward, Trevor Los and Dale Jepson; and a senior representative from the BHA JV; John Hull (JF Hull Holdings Pty Ltd), Terry Cogill (Bielby Holdings Pty Ltd) and Mark Panizza (Albem Operations).

Mr Churchward said the PLG meets monthly with a strategic focus on a number of areas such as:

- Overall direction and performance of the project
- Leadership and relationships
- High level of support to the Project Management Team and
- Dealing with issues escalated to it from the PMT.



Construction site showing new Longlea Overpass

The DRB includes third parties who provide fair and independent guidance and advice. They are experienced and respected industry leaders, including highly-regarded relationship contracting advisor Allan McLennan; independent project management advisor Ken Casley; and Bill Blake with a legal background.

DRBs are a feature of D&C contracts and the first DRB in Queensland used as part of an ECI process was on Townsville's Ross River Dam Upgrade Project completed in 2007. Alliance contracts do not have DRBs as this role is fulfilled by the Alliance Leadership Team mechanism.

Mr Churchward said the members of the DRB started with more of a commercial focus, similar to the related D&C mechanism; however this broadened and it is now rarely used for resolution.

"Our DRB members see their role as resolving disputes before they escalate, serving as a powerful early warning mechanism," he said.

Challenges and achievements

Traffic management and community communication

Managing and undertaking roadworks in a busy traffic environment is a significant challenge.

The project established a Traffic Management team during the ECI phase including representatives from both QDTMR and the contractor team to foster a highly interactive approach.

Allan Churchward said this short-circuits the process as both parties work together to develop a single plan.

"Typically a contractor develops a traffic plan in isolation and submits it for review, then refines and re-submits – collaboration makes this process more efficient.

"We undertook a recent ramp closure successfully using this approach. We also ensured good community communication."

Design efficiency and opportunity

Likewise, the design process involves both QDTMR experts from the department's internal Engineering and Technology section and several external consultants who have developed a close working relationship with GHD.

"This facilitates a quick Permission To Use (PTU) outcome, rather than waiting for plans to be submitted, reviewed, rejected or amended," Mr Churchward said.

"GHD is still responsible for certifying the design, but there is confidence through collaboration that designs will be to specification," he said.

"Early interaction eliminates much wasted effort as we can address issues before they progress too far.

"It also allows us to look at any proposed variations in the contract and scope in additional functionality if deemed value for money.

"Under a traditional D&C contract, we would normally pay a premium for extra scope introduced after the lump sum price was agreed.

"An additional southbound auxiliary lane was added in during the ECI process and a local street network was realigned to improve functionality."

Environment

Fauna-sensitive road design principles, fauna exclusion fencing and structures to assist fauna crossing the motorway will be provided. This includes the Winnetts Road culvert, which will be modified to allow fauna crossing and provide protection from predators. The entrance near the culvert will be revegetated using local flora, logs, rocks and / or upright poles.

Fauna impact mitigation measures have been employed to minimise the extent of clearing and avoid core habitats wherever possible. Qualified wildlife officers undertake fauna surveys prior to works starting, identifying potential fauna habitat trees, hollows and other likely habitats.

Hollow trees are preserved for relocation to revegetated areas and manufactured tree hollows and nest boxes will be placed within the project site.

Any animals found are carefully located to closest areas with similar habitat values and attributes. The officers also work during construction to minimise impacts.

LEARNINGS AND CONTRIBUTION TO ALLIANCING

Mr Churchward said the planning and time put into the relationship framework has reaped healthy dividends for the project.

“Having a framework to encourage the right conversations during the pricing phase means there are no surprises about any impacts on scope,” he said.

“In our case, both initial offers were more than our budget, so we went back to the drawing board to look for more innovation.

“We have gained valuable learnings along the way, including the benefit of being completely open and up front about the budget before tenderers start pricing.

“At the time when both tenderers were working up their offers, we thought competitive pressure would bring the prices in on or under budget.

“We have taken this learning forward to other projects. It is now a criteria for tenderers to at least match budgets and we share budgets at the outset.

“There is a common fear that if the budget is shared, then that is the price which will be offered. However this was not the case when the second round of offers from both tenderers came in under budget, even though both parties knew the figure.”

Mr Churchward said learnings from QDTMR ECI and alliance experience guides decision making about what level of collaboration to adopt, depending on maturity of design.

“If the design is reasonably mature, then it is more of a pricing exercise. Early Tenderer Involvement (ETI) has emerged where tenderers are invited to bring innovation to design through a review process, then are invited to offer a price,” he said.

“However if design is only at the planning layout stage and the delivery risks are manageable for the contractor, then it is more suited to ECI, which can achieve efficiency through design refinement.

“And if there are significant delivery risks, among other complexities, then we look at alliancing.”

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Status Quo of DRBs in Germany

By Dr. Götz-Sebastian Hök, Rechtsanwalt (Solicitor) with Dr. Hök, Stieglmeier & Kollegen, Adjudicator, Arbitrator, and FIDIC Trainer

The bad news is that there is currently no statutory dispute adjudication though there is strong need for alternative dispute resolution methods in Germany^[1]. The good news is that German practitioners seem to be ready to use it. However, the most frequently used standard form of contract in Germany, also referred to as the General Contract Terms for the Execution of Construction Works - Part B (abbreviated: VOB/B) does not provide adjudication as a normal feature of dispute resolution. Also FIDIC standard contract terms are rarely used in Germany. Hence there is very little experience with Dispute Boards. On the other hand an overflowing discussion grew up as to whether dispute adjudication could solve some cardinal problems within the German construction industry, which have been identified as being expensive and lengthy procedures, all of which are inherent in the recovery of any debt^[2]. Those who have been involved in dispute adjudication proceedings throughout the world will presumably confirm that these problems could be resolved by implementation of DABs.

However, a further more detailed look at what happens in Germany will lead to the observation that the complaints about long and expensive court proceedings are most often the result of missing records and documentation and frequently also the result of an intensive use of expert evidence because the judges usually do not have particular experience in the industry and must heavily rely on experts for dealing with such cases. Unfortunately German practice does produce much less records, documents and let us say evidence than is needed. Compared with standard practice in Anglo-Saxon countries the documentation outcome in Germany is a nightmare. Rather it is common practice to prepare the file for court when the project has been completed, staff and equipment are no longer on site and usually the responsible persons are not available any more. Thus, the implementation of dispute adjudication which will not go along with a substantial change in current German practice of programming, record keeping etc., will not change too much because even an experienced adjudicator will not be able to give its professional opinion without having been fed with information and evidence. Hence DAB's will encounter huge problems if not based on a FIDIC form of contract.

However, during the past years, advantages, disadvantages, pros and cons of dispute adjudication have been discussed in detail^[3]. Though inspired by English law, this discussion mainly focused on how to use dispute adjudication as a feature, which is assumed to be better and more appropriate than court proceedings and thus suitable to replace court proceedings and arbitration ignoring:

- the fact that the availability of and the access to a sophisticated judicial proceeding is always something which is not only desirable but at least something which is one of the basic elements of a modern jurisdiction, and
- the fact that English statutory dispute adjudication promotes a concept which mainly intends to ensure that payments will not be withheld unreasonably.

The aforementioned approach limits heavily the scope of discussion. The main concerns by German authorities and authors are that dispute adjudication promotes a model of rough justice, producing decisions, which are not suitable to become enforced by the courts^[4]. Some authors even have put in the discussion that dispute adjudication may contradict with fundamental rights^[5]. Practical experiences have not been put in the discussion because there are none or very few.

With regard to the implementation and use of dispute adjudication in Germany three main issues can be identified:

Dispute adjudication can very easily be confused with expert determinations as covered in Sections 317, 319 BGB^[6]. According to the majority of German authorities dispute adjudication has the very nature of an expert determination^[7]. This leads to the following observations.

Under Sections 317, 319 the parties of a contract may agree to appoint an expert who shall submit an expert determination rather than an expert witness statement. According to the courts the purpose of such an expert determination is to obtain conclusive evidence for a fact or circumstance meaning that the parties are bound to what the expert has determined and that further evidence is not accessible^[8]. However, the expert is not bound to follow any procedural rules, such as to hear the parties. Also it is not required to form a legal opinion. What the expert shall do and what he actually does in most cases is to use its knowledge, skills and experience in order to come to its decision. In other words the expert forms its professional opinion by reference to its own knowledge or facts, which were investigated by it. It is not there to consider the parties' arguments or the law. Although the expert's commitment may require the consideration of the law it is not an essential or natural element of it. Hence an expert determination constitutes the expert's opinion or view on the subject matter. It is binding on the parties who may not question the determination unless it is harshly unfair or harshly wrong. Jurisdictional issues may not arise and procedural fairness is not required.

[1] See Gralla/Sundermeier, [2007] BauR 1961; Schulze-Hagen, [2007] BauR 1950

[2] See Greger/Stubbe, Schiedsgutachten (2007), § 1 et seq.; Schramke, [2002] NZBau 409 et seq.; Lembecke, [2007] NZBau, 273 et seq.; Schulze-Hagen, [2007] BauR 1950; Hök, [2010] IBR 378

[3] See Schulze-Hagen [2007] BauR 1950 et seq.

[4] See Schulze-Hagen [2007] BauR 1950 et seq.

[5] See Quack [2010] ZfBR 211 et seq.

[6] See for example Lembecke, [2007] NZBau 273, 276; Stubbe, [2006] SchiedsVZ 150, at 153; Greger/Stubbe, Schiedsgutachten, note 194; Schramke [2007] BauR 1983, 1990 et seq.; Walter, 103 (1990) ZfP 141, at 150; Weick, in: FS Coing, Vol. 2, 543, at 560; Borowsky, [2007/2] ZKM 54; Denzer, Stellung und Bedeutung des Engineer, 213; Schmidt-Gayk, in: IBB, 57, 70; Mahnken [2007] BauR 1994, 2000

[7] Compare Lembecke, [2007] NZBau 273, 276; Rosener in: Münchener Vertragshandbuch, VI.1 notes 18, 19

[8] German (former) Empire Supreme Court, [96] RGZ 57

It derives from the aforementioned that a DAB will not ask whether it has jurisdiction to decide the dispute and that it will not comply with any procedural standards such as natural justice or similar. Such a Board may not act *ex parte*. It does not apply the law. Such a DAB simply does not make any sense.

It must be questioned that German courts will understand a DAB clause constituting a bar to exercise jurisdiction. Rather German courts will at best argue that unless the DAB acted as an expert the claim cannot be due yet. However, the court will accept its jurisdiction.

DAB decisions whether provisionally or finally binding can hardly become enforced. The courts shall hear the case on the merits and make their decisions on the merits. Summary judgments are not admissible or possible. So that the German courts can directly enforce a DAB decision it must constitute an independent entitlement or at least conclusive evidence of such an entitlement. For both theories justifying arguments are missing, at least if a provisionally binding DAB decision is concerned.

An expert determination may not constitute an independent entitlement or in other words it may not constitute a cause of action. It constitutes evidence. However this type of evidence does not originate from the parties themselves which prevents the courts from relying on it in document evidentiary proceedings. Hence, an expert determination may prove two things only: the fact that an expert has issued a determination and what the expert has said and/or determined. Its determination will not have *res judicata*. The obligation to give effect to the DAB decision might be construed to constitute nothing else than the confirmation that no further evidence as to the claim is admissible. However, all kind of defence is still available and admissible. Also the claimant will still be required to substantiate its claim for which the expert determination may serve as either partial or full evidence. The scope of evidence will depend on what the parties have agreed on to submit as a question to the expert. The court will then decide to what extent further evidence is inadmissible. In no case the existence of a DAB decision will make it useless or unneeded to represent a full claim or case. The court shall finally consider the facts and come to a decision. It may open up and review the expert determination if it is harshly unfair or wrong (see Section 319 BGB).

For instance German courts had no opportunity to consider a case based on a DAB decision. However, it was held that an Italian *lodo irrituale* does not fall under the 1958 New York Convention^[9]. Rather the courts concluded that the *lodo irrituale* lacks enforceability because of its mere contractual nature as opposed to the nature of an arbitral award^[10]. The courts held, that unlike an arbitral award, a *lodo irrituale* constitutes an interim decision, which opens the way for obtaining a decision from a court. Hence a *lodo irrituale* serves a basis of an action upon the action. It is submitted that a DAB decision has a very similar nature to that of a *lodo irrituale* and that German courts will therefore recognise it as a basis of a claim^[11]. However it is noteworthy that the former Empire Supreme Court was reluctant to accept a foreign award as full evidence for a claim unless it is recognised in accordance with Sections 328, 723 Civil Procedure Code having the same effects like a domestic award. Rather the foreign award proves the existence of the award as such and it may also show evidence for the cause of action on the merits of the case. However, it does not determine the claim. Hence, based on the authority the claimant was obliged to show full evidence for its claim^[12].

However, even if the court assumes that the meaning of the words “the losing party shall give effect to the decision” is that the parties shall in fact immediately do what the DAB has decided to be the law, the court will still have problems enforcing the DAB decision unless the decision has become final and binding because German law does not know interim awards as a regular type of court decision. Rather it provides for interlocutory measures (Sections 916 et seq. Code of Civil Procedure). Unfortunately it must be doubted that a court will understand that the enforcement of a DAB decision is by nature urgent in order to avoid painful and irreversible damage for the claimant. However it being urgent and not doing it creates a painful and irreversible situation is a condition precedent wherefore the claimant shall show evidence. In practice the claimant will not be able to do this.

Hence, German authors usually suggest that using dispute adjudication as a means of dispute resolution presupposes a change in law. This view is of course questionable as the principle of freedom of contract applies. Hence, contractually based dispute adjudication is admissible. A FIDIC DAB may be established and it may act in accordance with the contract. However, since the parties do not intend to obtain an expert determination Sections 317 et seq. BGB do not apply. The question arises then how to deal with DAB proceedings and DAB decisions. The standard of natural justice has no homologue in German law, though of course German law sets out standards for a fair and unbiased procedure. Also German law does not yet define a clear approach as to how to enforce a DAB decision. However, as an increasing number of encouraging decisions world-wide do exist which have confirmed the enforceability of DAB decisions there is no reason to refrain from using dispute adjudication as an appropriate means of dispute resolution to the extent that it is embedded in a FIDIC contract.

In this regard, under the auspices of the German Association of Consulting Engineers a national list of dispute adjudicators has been successfully established over the past five years. All listed adjudicators were assessed by experienced and assessed FIDIC experts also and thus the future for Dispute Boards in Germany or at a minimum international style adjudication for construction disputes appears promising.

[9] German Federal Supreme Court, decision from 8.10.1981 - III ZR 42/80, NJW 1982, 1224 citing Sanders, Yearbook Commercial Arbitration (YCA), Vol. IV 1979, 232 et seq.

[10] See Hök, [2007] ZfBR 416, at 424

[11] See OLG Brandenburg, [2005] BauR 605; Hök, [2007] ZfBR 416, at 424

[12] German (former) Empire Supreme Court, [129] RGZ 385 et seq.

Ethics in Today's World of DRBs:

Parties request for DRB to resign because "There are no disputes!"



By Jim Phillips Ph. D.

The question posed in the last issue of the *Forum* is one that I have talked to some of you about, and have also heard from others that it is regular part of

the discussion both at the outset and during the life of construction projects with DRB Specifications. In fact, a DRB Foundation colleague and I were making a presentation to a state Department of Transportation not long ago when one state official asked us this question point blank. "Why do we need a DRB when we generally have good relationships with our contractors?"

Our response seemed disingenuous. We both basically answered his question by saying that the presence of a DRB on a project goes a long way toward dispute avoidance and resolution without the assistance of a DRB. I am not sure he was fully satisfied with our answer because he replied that the projects in his state certainly spent a lot of resources in dollars and employee hours devoted to a DRB that never held a hearing. I think, therefore, that this question deserves further discussion.

The DRBF *Practices and Procedures Manual* recites that the purpose of the DRB process is to assist the project participants in **avoiding and resolving** disputes. As practitioners in dispute resolution, most of us share stories of how a DRB handled a particular case, or what would be the ethical way to assist the parties resolving this or that dispute brought to the Board at a hearing.

I think it is valuable to discuss how a Board can operate to assist the parties in preventing or avoiding disputes. I say this because the parties' main focus throughout the life of a project is on time and on or under budget project completion. Not having any formal dispute hearing process goes a long way toward achieving that goal because, as we all know, the time devoted to preparing for a hearing, conducting a hearing and interpreting and executing a DRB Recommendation takes away from the goal of prosecuting the work.

The purpose of regular project site visits and tours by the DRB is to provide opportunities for Board members to confer with contractor and owner representatives and to discuss project operations. At these meetings, Board members become familiar with project participants and procedures, and are able to observe site conditions that inform the documentation of progress reports and correspondence the members have been receiving. Most DRB members on projects today receive weekly or monthly progress reports by email, which provide "real time" indicators of the progress being made, the challenges or obstacles, and how the parties are addressing those challenges.

Accordingly, DRB members should attend each regular meeting knowledgeable about the project status from carefully reading the provided project correspondence and prepared to ask questions about trouble areas that might give rise to a formal dispute. I know many of us have attended

regular project meetings where both parties claim there are no disputes, and only after skillful and careful questioning by the DRB does a discussion develop about a problem that is festering and ready to ripen into a full dispute. According to the Manual, the Board is to assist the parties by “facilitating a harmonious atmosphere” and by encouraging prompt solutions to job problems.

A DRB that can respond to the claim of “no disputes or problems” with a direct reference to project reports or correspondence that is inconsistent with that position does a great service to both parties and the project by starting a conversation that neither party perhaps wants to have.

Often by just having to answer a Board member’s direct question in the presence of the other party will prompt a productive discussion than can avoid a dispute, or at least go a long way to resolving it. Moreover, to be able to have such conversations between the parties and the DRB, and then have the immediate opportunity to visit the job site and **observe directly** the circumstances surrounding the problem, goes a long way toward resolving the question. The use of informal hearings and advisory recommendations on regular project meeting days can also be a useful tool in avoiding formal hearings.

Accordingly, assisting the parties avoid disputes is an equally important duty of the DRB, if not more so, than assisting with resolving the parties’ disputes. However, dispute avoidance requires an active DRB whose members closely follow the project correspondence, appear prepared at regular project meetings, and are willing to lead the parties through a discussion process that resolves underlying issues that could lead to costly and time consuming formal disputes.

This is how I would answer the question presented in the last *Forum* and this is how my colleague and I answered that state transportation official. Data compiled by the Foundation indicates that 60% of the projects that had a DRB Specification over a certain time frame had no disputes. While to some, this is similar to proving, along with Sherlock Holmes, that the dog did not bark, to others it is an important consideration when deciding to have or continue to have a DRB operate on a project, especially in view of the enormous costs attendant to the formal claims process, arbitration or litigation.

NEXT ETHICS CHALLENGE

Assume you are serving on a DRB and have had several formal hearings and that neither party has agreed to accept the DRB’s Recommendations for those disputes. Assume that at the next regularly scheduled meeting after a very contentious formal hearing, the contractor approaches the Chair of the DRB and says that he/she and the contractor have lost confidence in a Board member’s impartiality and would like that member to resign. What would you do as the Chair?

What would you do as the Chair?

Ethics Commentary or Question?

Please contact:

Jim Phillips
DRBF Ethics
Committee Chair
phone: 804-289-8192
jphillip@richmond.edu



Dispute Resolution Board Foundation 11th Annual International Conference

Real Time Dispute Resolution in Infrastructure Contracts *Latest Developments and the Advantages of Dispute Boards* May 14-15, 2011 Renaissance Hotel, São Paulo, Brazil

The DRBF's 11th Annual International Conference offers the latest information and ideas about the growing use of the Dispute Board process around the world. Optional training workshops are offered prior to the conference for beginner and advanced practitioners. Discounted rates are available for DRBF members; visit www.drbf.org for rates and registration details.



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Dispute Boards in Latin America – *A discussion of experiences throughout Latin American countries, including accomplishments, challenges, and future potential.*

Latest Developments on Resolving Controversies in Construction Projects in the World – *Trends and issues regarding the methods of dispute resolution in construction projects around the world, and insight on how local perspective affects the process.*

Day 2 Rules for Dispute Boards: Model Clauses and Institutional Procedures – *An overview of the developments of Dispute Boards in terms of institutional rules and model clauses, analyzing the advantages and problems of adopting them. Perspective from the DRBF, ICC, FIDIC, and local organizations CAM-CCBC and CAMARB.*

Dispute Boards and Legal Systems – *Analysis of this fundamental issue regarding the perspective of Dispute Boards in civil law countries in comparison to common law countries. The dilemma of "recommendation vs. decision" under the light of legal systems. The use of DBs in public contracts in both systems. What are the challenges and possible solutions?*

The 11th Annual International Conference and training workshop are open to employers, contractors, consulting engineering firms, law firms and 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.

Conference Sponsors:



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

Training Workshops

The DRBF is presenting three workshops at the Renaissance Hotel in conjunction with the 11th Annual International Conference in São Paulo:

May 12-13 Introduction to FIDIC and Dispute Boards in International

Construction Projects: This 2-day workshop in English with Portuguese translation introduces participants to the key concepts of dispute resolution and the use of Dispute Boards in international FIDIC and other construction contracts. (The same workshop will be held concurrently in Spanish.)

Day 1: Session 1: **Introduction to international construction contracts**
Session 2: **Principal obligations of the parties**
Session 3: **Common areas of dispute on construction projects**
Session 4: **Duties of the owner and the contractor**

Day 2: Session 5: **Introduction to alternative methods of Dispute Resolution**
Session 6: **Avoidance of disputes**
Session 7: **Dispute Boards: recommendations, decisions, procedure, effectiveness**

May 12-13 Introducción a FIDIC y Dispute Boards en Contratos Internacionales

de Construcción: Con carácter previo a la 11ª Conferencia Internacional de la DRBF se celebrarán unas jornadas de trabajo (workshops) encaminadas a introducir a los participantes en los principales conceptos relacionados con la formación y el uso de las DBs en los proyectos de construcción. Estas sesiones de trabajo son en español.

Día 1: Sesión 1: **Introducción a los contratos internacionales de construcción**
Sesión 2: **Principales obligaciones de las partes**
Sesión 3: **Controversias habituales en los proyectos de construcción**
Sesión 4: **Actuaciones del propietario y del contratista**

Día 2: Sesión 5: **Introducción a los métodos alternativos de resolución de controversias**
Sesión 6: **La prevención de controversias**
Sesión 7: **Las Dispute Boards: recomendación, decisión, procedimiento, efectividad**

May 13, 2011 Dealing with Conflicts as a Dispute Board: This 1-day workshop is for experienced Dispute Board members and focuses on handling difficult issues of conflict between the parties and within the Dispute Board. **Space is limited to 30.**

Session 1: **Conflicts of interest for DB members**
Session 2: **Dealing with conflict between the parties**
Session 3: **Dealing with differences between the DB members, during site visits**
Session 4: **Dealing with differences between the DB members, during the hearing and drafting of decision/recommendation**

**Workshop registration is available online through the conference website.
Visit www.drb.org for details.**

Dispute Boards Debut in Libya

By Ahmed Benbarka

On 26 May 2010 Libya FIDIC Day was celebrated in Tripoli at Corinthia Hotel. The seminar was widely publicized and well attended by approximately 70 participants from different nationalities. The event featured Mr. Peter Boswell, General Manager of FIDIC, who travelled from FIDIC headquarters in Geneva to Tripoli for the celebration, and five Libyan speakers: Eng. Muftah Rwemi, President of the Libyan Engineers Association, Dr. Adel M. Elwefati, Managing Director, Bonyan Consulting Engineers, Eng. Faysal Sbita, General Manager of National Union Consultants, Eng. Emhemmed Ghula, Libya Branch Manager, Maabar International Investment, and Mr. Ahmed Benbarka, Chairman of Tasyeer Training Center and Consultancy.



Ahmed Benbarka addresses workshop delegates.

The following subjects were covered during the events: FIDIC Service for Members; Libyan Consulting Industry, A Vision into the Future; General Comparison between Public and FIDIC Contract Conditions; Procurement as a Tool for Development; and Arabic Version of FIDIC Contracts.

Libya is embarking on a \$150 billion infrastructure and housing programme and Libyan DRBF members Emhemmed Ghula, Ahmed Benbarka and their colleagues of Tasyeer Training Centre and Consultancy, arranged Libyan FIDIC Day in cooperation with Mr. Boswell, to promote the use of Dispute Boards in this massive construction programme.

The event was so successful a training programme was arranged for presentation in Tripoli on 30 – 31 October 2010. The programme covered the following topics:

- FIDIC Contract Documents
- Responsibilities of the Main Parties
- The Management of Projects
- Financial Clauses and Procedures
- Risk, Force Majeure, Termination
- Claims and Disputes Resolution

In addition, there were also two workshops exercises:

- Taking Over
- Variations

The training was conducted by Mr. Geoffrey Smith of PS Consulting of Paris, France, a Civil Engineer and an English Barrister. This initial training attracted 37 participants (from different nationalities) who were so enthusiastic that additional training is being planned for the future. It is hoped to increase dramatically within Libya the utility, efficiency and, ultimately, the economy, realized by the use of internationally recognized contract conditions such as FIDIC and in turn the utilization of Dispute Boards on large Libyan construction projects.



For details of future training programs in Libya, contact Mr. **Ahmed Benbarka** at a.benbarka@tasyeer.ly or ahmedbenbarka@hotmail.com or Mr. **Emhemmed Ghula** at e.ghula@tasyeer.ly.

Delegates at training workshop in Tripoli, Libya



FOUNDATION FORUM

Dispute Resolution Board Foundation
19550 International Blvd. So., Suite 314
Seattle, WA 98188

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DRBF Regional Conference **The Use of Dispute Boards in Europe: *Expectations, Concerns, Experiences*** **April 8-9, 2011 ~ Le Meridien Hotel, Vienna, Austria**

Dispute Boards are widely used worldwide and international lending banks frequently insist on their use. However, the response to DBs in Central Europe has been mixed — employers are concerned about losing control over their project, and contractors have been reluctant to use this tool. Join experienced Dispute Board professionals and users (contractors, engineers and employers) who will share their experience with this dispute resolution tool, and discuss opportunities for the process in the region. Topics include:

What Users Expect from Dispute Resolution Methods - *A round table discussion with representatives from employers and contractors, and an overview of the Dispute Board process.*

Practical Application: A Site Visit – *Tour a major construction project in Vienna, and explore the on-site challenges and dispute resolution approach.*

The Context of DB Procedures – *Panelists will explore the legal context, comparisons with other dispute resolution tools, enforcement of decisions, and crucial issues with Dispute Boards.*

Experiences and Lessons Learned – *Construction dispute practitioners will share their experience on some of the world's most interesting projects currently underway, including the Marmaray Tunnel Project and the Panama Canal Expansion.*

Dispute Resolution in the Region – *Dispute Board practitioners from Austria, Germany, Switzerland, and other EU countries will present current practice, opportunities, and challenges facing the process in their countries.*

Conference sessions will be in English, with translation from German for some speakers if required.

For more information, visit www.drb.org