



Forum

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FEBRUARY 2012

DRBs Down Under: Ready for Takeoff!

By Paula Gerber and Brennan J. Ong

Introduction

Although the use of DRBs continues to surge in the United States and around the world, this dispute avoidance process (DAP) has yet to be fully embraced by the Australian construction industry, although there are signs that this is changing, with a recent spike in the use of DRBs Down Under. In Australia, Alternative Dispute Resolution (ADR) continues to be a common method used to resolve construction disputes, and relationship contracting, particularly alliancing, continues to be popular. Notwithstanding the use of these processes, the Australian construction industry remains plagued by adversarial attitudes that are conducive to costly and drawn out disputes. In 2010, it was reported that in Australia, the direct costs of resolving construction disputes amounts to between US\$560-840 million annually. When this is added to the avoidable costs of disputes (such as delay and opportunity costs), total waste exceeds US\$7 billion annually.¹ DRBs have proven to be 98% effective in over 2,000

DRB projects around the world, and it appears that Australia is now ready to become part of this global DRB trend. This article discusses Australia's brief history with DRBs, before analysing the factors that may have contributed to the slow uptake of DRBs, and concluding with a look towards the future of DRBs Down Under.

DRBs in Australia

Australia was an early adopter of DRBs, having been the fourth country to try DRBs behind the United States, Honduras, and France. Despite this promising beginning, there are only 25 projects that have been completed using a DRB, in the 24 years since DRBs were first introduced to Australia in 1987. Most of those were implemented in recent years, with a spike of new projects since 2005. In addition, there are more projects in the pipeline that are slated to have a DRB, so this number is likely to increase further. Thus, the outlook for DRBs in Australia seems brighter than it has in a long time.

(continued on page 12)

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¹ Cooperative Research Centre for Construction Innovation, *Guide to Leading Practice for Dispute Avoidance and Resolution: An overview* (2009) <www.construction-innovation.info/index.php?id=1086> at 13 April 2011.

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President's Page

Dear Members, Supporters and Friends of the DRBF,

I wish that you had a good start into the New Year 2012 and that it will be a good year for all of us.

The year 2012 is expected by many with great anxiety: the Maya Calendar as well as Nostradamus' prophecies give a pessimistic outlook for the very end of the year. Whatever one's personal attitude towards such visions may be, it shall not be reason for relaxing in active support of our cause.

On 17/18 November 2011 the European Regional Conference took place in Brussels, Belgium under the headline:

The Use of Dispute Boards on Large Construction Projects (Advantages of Successful Dispute Avoidance and Resolution)

This conference was held in Brussels, the capital of the European Union, in order to bring awareness of the DB process to the European Commission and its Investment and Development Banks. The conference was started with an inspiring Keynote Address by the US Ambassador to the Kingdom of Belgium, Mr. Howard Gutman, while the first day focused on:

Introduction to Dispute Boards Practical Application of Dispute Boards Dispute Avoidance

And

Expectations from Employers, Contractors and Supervising Engineers

The second day was assigned to:

Information on the EU Commission's and the Investment and Development Banks' requirements, policies and activities;

As well as on:

Legal aspects of DBs, DB decisions and the possibilities of their enforcement.

The conference was very well attended by more than 90 delegates. The overall ratings from the evaluation forms was very positive, with 75% rating their conference appreciation "very good" to "excellent." For some the enforcement aspect was a bit overstretched, but in the international field (DRBF Region 2) it is an important issue. (See the full conference report on page 22.)

I would hereby like to express my gratitude to organizers and helpers. You did a very good job.

The beginning of the year started with Dispute Board Dissemination Seminars in Vietnam and Sri Lanka, organized and financed by JICA, the Japanese International Cooperation Agency with the aim to spread knowledge and acceptance of the DB concept within the governments and organizations involved in projects receiving JICA financing.

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JICA had invited the DRBF to assist in the seminars. Toshihiko Omoto and I were involved in Vietnam and Sri Lanka. Two future seminars will be held in the Philippines and in Indonesia, where Sebastian Hök will accompany Toshihiko.

I would like to commend JICA and its representatives for the valuable effort and thank them for inviting us to participate.

The seminars and surrounding meetings were very well attended. The importance and the standing of JICA brought many more owners' representatives to the audiences than we have at other events.

Increased awareness will lead to more application of the DB process and in consequence an increased need for first class DB members, such as the DRBF offers.

Let me inform you on a change in the Chair of the Manual Committee: Joe Sperry has asked to be released from that position, and Dan Meyer has agreed to take over the important duty. Joe's leadership of the committee dates back over six years, when the committee first formed and created the current Manual. I would like to thank Joe for his work for our Manual, making it into a most helpful and appreciated tool for users and Dispute Board members; and Dan for his future commitment.

Let me conclude with reminding you of the upcoming conferences and workshops:

February 16-17, Lusaka, Zambia
May 3-5, Sydney, Australia
May 31, Seattle, Washington, USA
September 28-30, New York, NY, USA

Besides the most interesting topics, these give the opportunity to meet each other, discuss and enjoy the DRBF community.



Volker Jurowich
President
DRBF Executive Board of Directors

Executive Board of Directors

The members of the Executive Board of Directors are:

Volker Jurowich, President
Roger Brown, President Elect
John C. Norton, Immediate Past President
Murray Armes, Secretary
James P. Donaldson, Treasurer
Doug Holen, Director and President, Region 1 Board
Richard Appuhn, Director and President, Region 2 Board
Romano Allione, Past President
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:

- Creation of a Policy & Procedures Manual for internal governance.
- Upcoming conferences and training workshops.
- Expansion of the process to new markets.

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 17, 2012 by conference call
March 16, 2012 by conference call
April 20, 2012 by conference call

The Boards 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

Region 1

Board of Directors

Doug Holen, President
Deborah Mastin, President Elect
Roger Brown, Past President
Kurt Dettman
Don Henderson
Eric Kerness

Region 2

Board of Directors

Richard Appuhn, President
Paul Taggart, President Elect
Nicholas Gould, Past President
Murray Armes
Christopher Miers
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James Perry

Forum Editor: Ann McGough

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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!***

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 Paul Taggart, 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.



Ethics in Today's World of DRBs:

After listening to the parties' presentations, DRB, while in deliberation, finds a section in the contract documents, not cited by the parties, that it believes controls the disputes

By Jim Phillips Ph. D.

The question posed at the end of the last volume of the *Forum* prompted several readers to write in. I am delighted that they did so because the purpose of this Column to generate discussion and sharing of ideas so that better decisions regarding ethical issues can be reached in our practice.

Colin Marshall from Ireland wrote in and said that he would point the parties to the contract section(s) identified by the DRB and request their positions and ideas as to whether the language had direct relevance and application to the disputes before the Board. Also, Ernie Holt wrote and said that this issue has given rise to much debate during DRB workshops sponsored by Caltrans. He also suggested that because recommendations from the DRB are supposed to be based on the **entire contract language**, that therefore the DRB has no other option but to consider it in constructing the Recommendations to the parties. He also reminded all of us, "When all is else fails, read the contract!" I completely agree Ernie!

Bob Robertory wrote and commented that if the language in the contract could have a dispositive effect on the disputes, which the question suggests that it does, then the parties should be questioned as to their views on the language's impact. He goes on to suggest that the DRB should send a written inquiry to the parties and request comments and positions on the effect the language has on the disputes. He also suggests that the hearing process might need to be reopened to allow the parties the opportunity to fully explain their positions. Finally, Bob suggests that the section discovered by the DRB may even have been modified without the Board's knowledge and that this is why it was not included in the position papers and the arguments at the hearing. This is a distinct possibility and the DRB should confirm that the section in the con

tract it found remains in effect in the same language as it found.

Thanks again to Bob, Ernie and Colin for writing in with these comments. Taken together, the considered view is that the DRB has the duty to bring the section to the parties' attention before it reaches a final recommendation. Otherwise, the Board could be viewed as recommending a solution to the disputes before it by ambush. The cornerstone of the DRB process is open and complete discussion of all of the arguments and positions regarding the parties' interpretation of the contract and other controlling documents.

Canon 5 of the DRB Foundation Code of Ethics provides that the DRB has the responsibility to issue recommendations "... based solely on the provision of the contract documents and the facts of the disputes". This language supports the opinions expressed in this discussion. The inference, as Ernie points out is that the entire contract should be looked to, not just sections that the parties point to in their position papers and arguments.

The DRBF's Practices and Procedures Manual has language directly on point. Section 3.7.2 provides in part. "[T]he DRB must not ignore any provision of the contract documents, even if not discussed by either party." This language makes clear the duty of the DRB in this situation.

I want to underscore a point I made above. The issue of fairness, I believe, requires the DRB to allow the parties to brief and offer their position on the newly discovered contract language in order to project to the parties that they are being given every opportunity to express their side of the dispute. This is critical to the sense of fairness and will more than likely lead to a greater likelihood

that the DRB's recommendation will be accepted.

Ethics Commentary or Question?

NEXT ETHICS CHALLENGE

Assume you are sitting on a DRB and that during one of the regular site visits by the Board, the contractor complains that the Chair of the DRB has been having extensive telephone conversations with the owner about the project and that the owner has been repeating to the contractor what the DRB's position would be on disputes should the matter come to a hearing.

What should the DRB do?

Please contact:

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

DRBF 2012 Event Calendar

Visit www.drb.org for complete event details and registration.

The DRBF will announce dates for two events in the fall, the 5th Annual UK Member's Meeting in London, UK and a Regional Conference in Doha, Qatar. Stay tuned for details!

February 16-17

Introduction to FIDIC and Dispute Board on International Construction Projects

In conjunction with the Association of Consulting Engineers of Zambia
Lusaka, Zambia

May 3-5

DRBF 12th Annual International Conference

Dockside Conference Centre, Darling Harbour
Sydney, Australia

May 31

DRBF Northwest Regional Conference and Workshop

Radisson Gateway Hotel - SeaTac Airport
Seattle, Washington, US

September 28

Training Workshops: Administration & Practice Advanced/Chairing Introduction to International Practice

Sheraton Hotel & Towers
New York, New York, US

September 29-30

DRBF 16th Annual Meeting and Conference

Sheraton Hotel & Towers
New York, New York, US



Region 1 Board Continues Outreach Efforts to New Users and Markets

Dear Members,

It has been five months since we met in Seattle. The time has flown by. I would like to bring you up to date on some of the activities of the Region One Board.

Early in 2011, the Board made application to present at the annual COAA, CMAA and Southern Regional SCUP Conferences. COAA is the Construction Owners Association of America, a very large organization that counts over 250 colleges and universities among its members. The current president is from the University of Chicago and the immediate Past President is from the University of Maryland. CMAA is the Construction Management Association of America and SCUP is the Society of College and University Planners. Both organizations are have thousands of members with representation in higher education.

This past summer we learned that all three of our applications had been accepted. In October I attended the Southern Regional SCUP Conference in San Antonio. I spoke for an hour at a breakout session. Approximately 60 people were in attendance, including contractors and design professionals, representatives from Georgia Tech, the University of Texas as well as representatives from several other smaller colleges and universities. The attendees seemed interested in the DRB process and the discussion was lively. In early November, Board Member Deborah Mastin and I made a similar presentation at the Annual CMAA Convention in Washington DC. We had the last breakout session on the last day. I thought we would be speaking to an empty room, but I was wrong. The room was packed. As in San Antonio, there was a lot of interest and the discussion was lively. Deb then jumped on a plane and flew to Las Vegas where she made yet another presentation...this time, to the Construction Owners Association of America, which she did with Eric Smith

from the University of Washington.

I tell you this for two reasons: One, this is a continuation of the outreach program Roger Brown initiated last year; and two, because I remember my boss, the Vice President for Capital Projects at the University of Washington returned from one of these conferences in the early 1990's and was inspired to institute a DRB program at the University. The rest is history. It would be nice to get another "hit" like that.

Our outreach efforts have gone in other directions also. Gerald McEniry, our Country Representative in Canada has been working diligently for two years, attending and speaking at conferences, publishing articles and networking. His efforts spawned interest and several ADR professionals from Canada attended the DRBF Annual Meeting and Conference in Seattle this past fall. Gerald, Kurt Dettman and Eric Kerness have followed up and will soon be making presentations and conducting DRB training in Quebec. Quebec Hydro is interested utilizing DRBs on its projects.

One last development worthy of note: the DRBF has received un-solicited calls from Michigan DOT, Denver Regional Transit and San Bernardino Omnitrans, all of whom plan to utilize DRBs on their projects and needed assistance with some aspect of their implementation. This is great news and obviously the result of someone's good work in the past. If I counted correctly, Michigan DOT would be the 26th state transportation organization to institute a DRB program.

Warmest regards,

Doug Holen
President
DRBF Region 1 Board of Directors
dholen@comcast.net

WELCOME TO NEW DRBF MEMBERS

MEMBER ADDITIONS OCTOBER 2011 THROUGH JANUARY 2012

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Cascais, PORTUGAL

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W.B. Britt, Inc.
Camarillo, CA USA

Mag. Markus P. Fellner, LL.M., Attorney at Law
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Sebastian, FL USA

James G. Weeks
Crestview, FL USA

DRBF Membership Renewals Now Due

Don't let your membership lapse! If you haven't already done so, please be sure to submit your renewal form for 2012 membership. Renewals can be submitted directly to the DRBF office by mail, or online through our secure server.

To renew online, visit www.drb.org and select 'Membership' from the DRB Foundation tab. In the last paragraph you will find a link to access the online application. If you are already logged in as a member, the contact fields will populate with your information, saving time and avoiding errors.

Questions? Call the DRBF office at (206) 878-3336 or email home@drb.org

Andy Griffiths Takes the Reins as DRBF Country Representative Coordinator



I am pleased to introduce myself as the new DRBF Country Representative Coordinator. I do so with some trepidation at building on the foundation so ably laid by Paul Taggart.

I have been a member of the DRBF for over 15 years, and the South Africa Country Rep for the past 8 or so years. I participate in the monthly DRBF Region 2 Board conference calls as an invited observer/participant. I first became involved with Dispute Boards in the mid-1990's, where I had the privilege of witnessing 2 DRBs in action. Those DRBs included some of the doyens of the DRBF, and I was immediately taken with the concept and considered the DRBF's mission statement of "fostering common-sense dispute resolution world-wide" to be most apt. Since then I have been involved in many large contracts that have included either DRBs or DABs as its preferred method of dispute resolution prior to Arbitration. In so doing I have been involved in over 50 dispute hearings, either as the Engineer, DB member or DB chairman.

I am committed to promoting the DB concept and have made numerous presentations to industry bodies in Southern Africa to introduce them to the DRBF and the DB concept. Wherever possible I encourage my clients to include DB provisions in their contract documents. I have attended all but one of the DRBF International Conferences since the Dubai Conference in 2005 and was the local member of the organizing committee for the Cape Town Conference in 2008. I have also served as a tutor at DRBF International Conferences.

As a long serving Country Rep, I believe I can bring a greater appreciation of the needs of the Country Reps, particularly those in the developing world, and be an effective liaison with the Region 2 Board of Directors.

Country Reps play a vital role in the success of the DRBF; they are at the forefront of promoting the concept in their regions, training and workshopping with local practitioners, and generally increasing the DRBF membership base and global influence of the DRBF as an organisation that stands for promoting best practice in Dispute Resolution.

In my experience there is still a lack of knowledge amongst the main client and contractor organisations about the DB concept – as well as considerable suspicion. Furthermore there is generally a shortage of qualified and experienced DB members' resident either within a particular country or in a neighbouring country, coupled with an understandable reluctance to engage DB members from Europe due to the expense.

My primary goal will therefore be to improve the support provided to the Country Reps in promoting the concept and as well as in training. I believe it is essential to not only offer introductory training sessions, but also to develop high quality "advanced level" workshops to train potential DB members and generally show the true benefits of the DB concept, particularly the dispute avoidance benefits. A secondary goal will be re-establish the DRBF database of projects that are or have used DBs worldwide.

I trust I can rely on all the Country Reps for their support and co-operation. I look forward to working with you all.

Andy Griffiths
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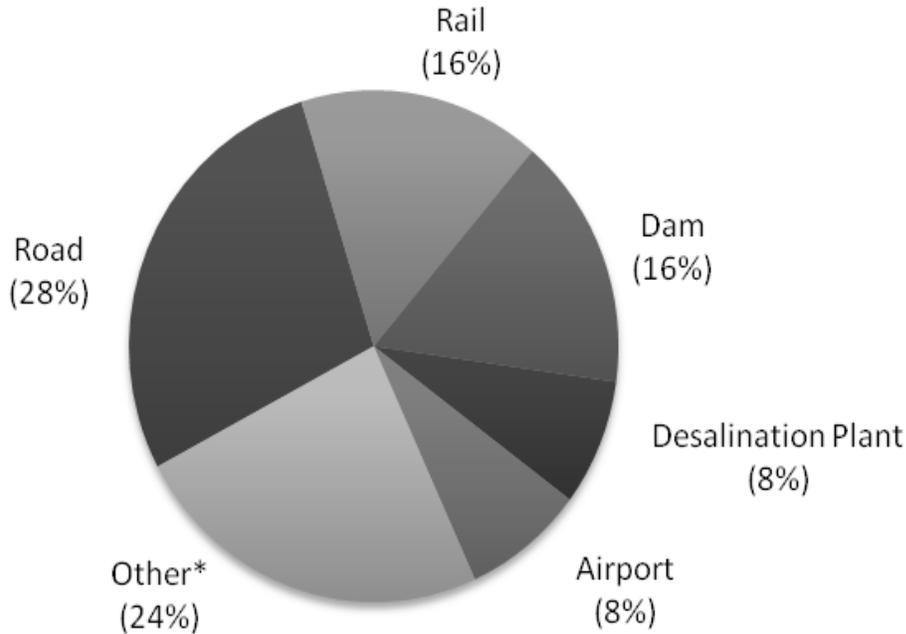
Murray Armes

Contact details are available on the DRBF website: www.drbf.org

Interested in becoming a Country Representative?
Contact Coordinator Andy Griffiths at andyg@goba.co.za

(continued from page 1)

Figure 1: Australian DRB projects by category²



* Other DRB projects include: a port upgrade, sewerage and energy infrastructure, the construction of a mall, and the construction of a fertilizer plant.

WHY HAS AUSTRALIA BEEN SLOW TO FOLLOW THE GLOBAL DRB TREND?

The authors have identified four factors that appear to be behind Australia’s initial slow uptake of DRBs, namely:³

1. Australia’s lack of familiarity with DRBs;
2. Australia’s perception that DRBs are only suitable for large-scale projects;
3. the absence of clauses relating to DRBs in any Australian standard form contract; and
4. Australia’s love affair with project alliances.

Each of these is analysed below.

1. Lack of Familiarity

A survey conducted in 1998 of dispute resolution practitioners in the Australian construction industry found that only 29% of respondents had any “familiarity” with DRBs and only 9% had any “experience” with the concept. This can be contrasted to the 78% of respondents who were familiar with expert determination, and the 92% of respondents who were familiar with mediation and arbitration.⁴

Although this survey is now over a decade old, there is anecdotal evidence that there is still a very low level of awareness of the concept in Australia. For example, the authors have firsthand experience of presenting papers on DRBs at construction law conferences, only to discover that none, or hardly any, of the conference delegates have any knowledge or experience of this DAP model.

² Compiled using data from the Dispute Resolution Board Australasia.

³ For a more nuanced analysis of these factors, see, Gerber P and Ong B, ‘DAPs: When will Australia Jump on Board?’ (2011) 27(1) *Building and Construction Law* 4.

⁴ Trainer P, ‘Dispute avoidance and resolution in the Australian construction industry – part 1’ (1998) 17(1) *Arbitrator* 39.

Despite the success of Australian projects that have utilised DRBs, they have attracted only limited publicity. It is therefore not surprising that there are still relatively low levels of knowledge or understanding of DRBs among Australian construction industry participants. Indeed, readily available information about Australian DRBs remains scarce, as very few of these projects have been the subject of extensive research or evaluation.

2. Perception that DRBs are only suitable for large-scale projects

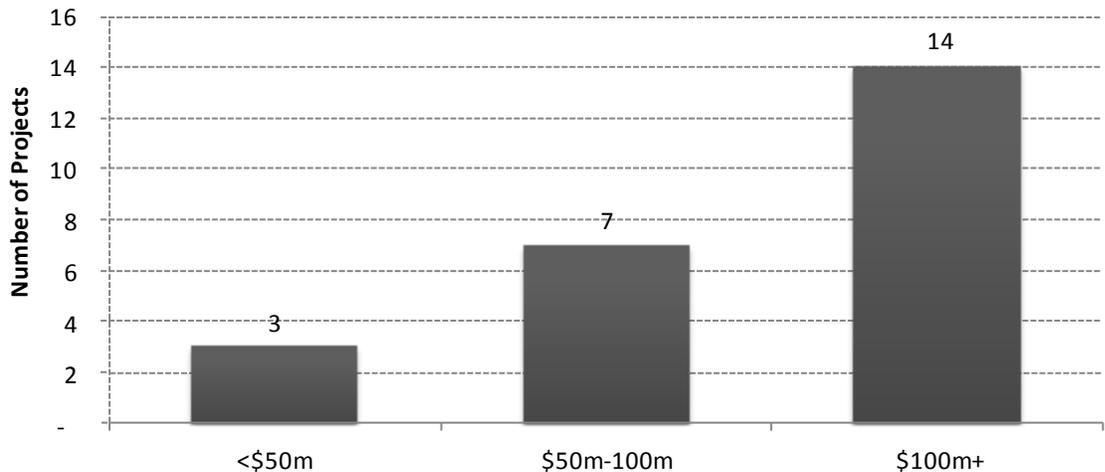
Figure 2 below illustrates that within Australia, DRBs are being favoured for use on projects valued at over US\$50 million. This reflects the wisdom that DRBs are “more suited to large projects, say in excess of \$50 million”.⁵ This wisdom, however, seems to be misguided given that global experiences show an increasing trend for DRBs to be used on small/mid-scale projects valued at less than US\$50 million.

For example, in the 2001-2006 period, close to 80% of global DRB usage was for projects valued at less than US\$40 million, and over 50% for projects valued less than US\$20 million.⁷ This is not surprising given that many US state highway departments, particularly the California Department of Transport (Caltrans) and the Florida Department of Transport (FDOT), both of whom are prominent users of DRBs, encourage the use of DRBs for almost all their projects. For example, FDOT mandates the use of DRBs for any project valued over US\$15 million, while Caltrans mandates that DRBs should be used for any contract valued over US\$10 million. This is compelling evidence that DRBs are suitable for small/mid-scale projects.

3. Absence of Clauses Relating to DRBs in Australian Standard Form Contracts

Despite a concerted effort by Dispute Resolution Board Australasia (DRBA), there are still no Australian standard form contracts that include a DRB provision, although the

Figure 2: No. of Australian DRB projects by contract value (nearest \$10m)⁶



Note: There are only 24 projects accounted for by the chart as WA's Burrup Fertilisers Liquid Anhydrous Ammonia Production Plant Project's contract value is undisclosed.

⁵ Charrett D, 'Dispute Resolution Boards and Construction Contracts' (2010) 132 *Australian Construction Law Newsletter* 18 at 25. See also, Reich N, 'Launch of Australasian Chapter in Sydney, Brisbane and Melbourne' (2003) 7(3) *The Dispute Resolution Board Foundation Forum* 4-5.

⁶ Compiled using data from the DRBA.

⁷ See, The Dispute Resolution Board Foundation (DRBF), *DRBF Database* (2007) <www.drb.org/manual / Database_2005.xls> at 13 April 2011.

Queensland Department of Transport and Main Roads does include a DRB in its contracts. Standard form contracts serve multiple purposes, including making it more convenient for parties undertaking a construction project to prepare a contract, and increasing awareness of the common provisions in construction contracts. Thus, mediation became far more familiar to the Australian construction industry when standard form contracts started to mandate this form of ADR as a pre-cursor to a party initiating arbitration of litigation.

The absence of a DRB provision in any ‘off-the-shelf’ construction contract means that it is not as convenient as it might be for parties to incorporate a DRB on their project (although standard clauses for incorporating DRBs are readily available from the DRBA website), and that the construction sector is not learning about DRBs through using standard form contracts.

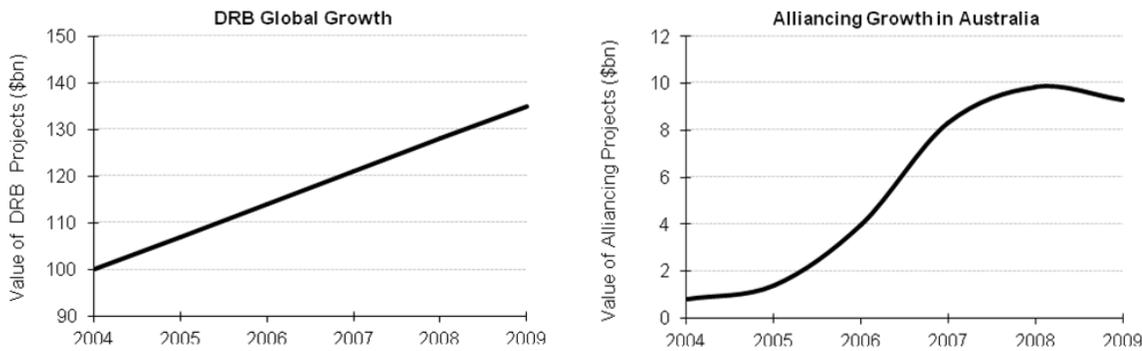
Australia would do well to follow the United States’ lead and adopt a suite of standard form contracts along the lines of ConsensusDOCS, which includes clauses relating to a DRB.⁸

4. Australia’s Love Affair with Project Alliances

As shown in Figure 3, the past decade has seen the use of Project Alliances in Australia grow at much the same rate as DRBs have grown around the globe. A project alliance is a type of ‘relationship contracting’ model that has been embraced with strong fervour by the Australian construction industry, so much so, that it has become the procurement model of choice for the delivery of major Australian construction projects. Indeed, there is evidence of Alliances being selected, by default, for the delivery of public projects, in the absence of careful and rigorous consideration as to their suitability.⁹

Relationship Contracting and Alliances have been explored in greater detail at several DRBF events in the past year. Papers on those subjects are available online for download from the DRBF library:
www.drb.org

Figure 3: Growth of DRBs (globally) and alliances (in Australia)



Interestingly, countries that have embraced DRBs (such as the United States) have remained largely unfamiliar with project alliances, while those promoting and using alliances (such as Australia) have had very limited experiences with DRBs. This is likely to be due, in part, to the differing philosophical approaches that alliances and DRBs take towards dispute avoidance. The Project alliance model has no 3rd party involvement in disputes, requiring the contracting parties to develop

their own solutions, while DRBs are all about *embracing* the involvement of 3rd party experts in order to assist the parties to avoid and manage disputes. Given that DRBs and project alliances are in many ways incompatible, there is little room for both models to be used in the same construction project, and this to some degree explains why Australia’s love affair with project alliances has come at the expense of DRBs.

That said, the use of Project alliances in Australia may be on the decline. A recent five-year study of 14 Australian alliance projects found that the actual outturn cost of an alliance project exceeded the business case cost estimate by an average of 50%. Given that traditional delivery methods exceed the estimate by only 20%, justifying the use of an alliance on a high value public sector project will now be more difficult. Thus, the time is ripe for increased promotion of DRBs in Australia.

THE WAY FORWARD

As John F. Kennedy famously said, in “times of turbulence and change, it is more true than ever that knowledge is power”. The Australian construction industry does not yet have adequate knowledge of the DRB process, and as a result it is in many ways powerless to combat the adversarial culture within the construction industry that is the cause of many disputes. The time is right for a concerted campaign to increase awareness of DRBs Down Under and to overcome the obstacles to increased use of this DAPs model in Australia. The hosting of the 2012 DRBF conference in Sydney, in May 2012, presents a unique opportunity to raise the profile of DRBs in Australia. It looks like the next couple of years will be an exciting time for DRBs Down Under.

Finally, when looking forward, we should not forget our responsibility to ensure that the next generation of construction industry professionals and construction lawyers are as familiar with DRBs as they are with ADR. Part of the slow uptake of DRBs in Australia is the fact that, despite concerted

awareness raising efforts by the DRBA, it is still an unknown concept to many of the people leading projects that might be suitable for a DRB. We can facilitate the next generation becoming excited about DRBs, and all the possibilities they present, by working hard to ensure that DAPs generally, and DRBs in particular, are part of the education that future engineers, contractors and lawyers receive at university, and by encouraging the active participation of students and young professionals within the DRBF and DRBA.

About the Authors:

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⁸ See, for example, ConsensusDOCS, *200 Standard Agreement (LS)* [lump sum], cl 12.3. Also available in ConsensusDOCS, *300 Tri-Party Agreement* for collaborative project delivery; ConsensusDOCS, *410 Design-Build Agreement (GMP)* [guaranteed maximum price].

⁹ Department of Treasury and Finance Victoria, *In Pursuit of Additional Value, A benchmarking study into alliancing in the Australian Public Sector* (2009) <www.dtf.vic.gov.au/project-alliancing> at 13 April 2011.

¹⁰ Project alliances are similar to the Integrated Project Delivery system which has seen limited usage in the United States.

¹¹ Department of Treasury and Finance Victoria, n 9.



12th Annual INTERNATIONAL CONFERENCE

3 - 5 May 2012 | Sydney - Australia



THE BENEFITS OF DISPUTE BOARDS TO MAJOR PROJECTS Proactive Dispute Avoidance

The Dispute Resolution Board Foundation and its Australian Chapter, the Dispute Resolution Board Australasia (DRBA) invite you to the 12th DRBF International Annual Conference in Sydney from 3 – 5 May 2012.

In the last two decades, the DB process has emerged as a highly effective means of avoiding and resolving disputes in major construction and commercial projects, as well as improving outcomes in terms of delivery time and out-turn cost. The value of Australian and New Zealand DB projects, completed or underway is now approaching \$10 billion.

Hosted for the first time in Australia, the conference will focus on the innovation of DBs and the experience and lessons learnt by practitioners operating across a number of different cultures and legal systems from around the world, bringing together speakers and delegates from Australia, New Zealand, Europe, North and South America, Asia, the Middle East and Africa. An optional one day training workshop preceding the conference will introduce those interested in becoming involved with DBs (including owners, contract drafters and potential DB panel members) to industry best methods and practice.

The conference will be held at the **Dockside Conference Centre**, a stunning, modern venue affording panoramic views of Cockle Bay Wharf and Darling Harbour. Located just minutes from Sydney's Central Business District, the area is one of the world's great waterfront destinations and one of Australia's major attractions.

Discount arrangements for delegates' accommodation have been negotiated with the award-winning international hotel, **Four Points by Sheraton**. Overlooking Darling Harbour, Australia's largest hotel is a short walk from the conference venue and Sydney's major entertainment and shopping districts including Pitt Street Mall, Queen Victoria Building and Chinatown. To obtain the benefit of the discount rates, reservations must be made at www.starwoodmeeting.com/Book/drbf1.

A number of social functions have been organized including a **Welcome Cocktail Reception** at the Star Room in Darling Harbour and a **Networking Drinks Reception** at Clayton Utz's stunning, new premises in Sydney's first high rise six-star Green Star office building. The **Gala Dinner** will be held at one of Australia's leading cultural institutions, the Art Gallery of New South Wales.

After the Sydney conference, delegates can attend the Society of Construction Law Australia conference in Melbourne from 6 - 8 May 2012. Details at www.constructionlaw2012.com.

For registration and details of the conference program, speakers and sponsorship opportunities visit: www.drba.com.au/conference/.

Our Sponsors: Australian Contractors Association; Holding Redlich, Evans & Peck, Clayton Utz, Sydney Ports, Merrill Corporation, Leach Group, NSW Transport Construction Authority, Everything Infrastructure, Corrs Chambers Westgarth

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**Early Bird
Deadline:
March 3**

PRELIMINARY PROGRAM

Thursday 3 May 2012

Pre-Conference DB Advanced Training Workshop 0830 – 1700

Sessions include: Establishment of a DB, Routine DB Operations, 'Informal' and 'Formal' Referral Processes & Lessons Learned – How to Do Better?



Conference

Welcome Cocktail Reception

Friday 4 May 2012 0830 – 2030

Registration and Morning Refreshments
Welcome Addresses and Official Opening
Keynote Address

Principal Sponsor Address

Session 1: Dispute Board Concepts
Internationally - Divergence or Convergence?
Morning Tea

Session 2: Dispute Avoidance- What does a Dispute Board offer?
Networking Lunch

Session 3: Owners' Perspectives on Dispute Boards
Afternoon Tea

Session 4: Future Opportunities for Dispute Boards
Close of day

Networking Cocktail Reception at Clayton Utz

Saturday 5 May 0900– 2230

Session 5: FIDIC's Experiences with Dispute Boards (Keynote Address)

Session 6: Key Legal Issues for Dispute Boards (International Panel session)
Morning Tea

Session 7: Recent Experiences with Dispute Boards
Networking Lunch

Session 8: Future of Dispute Boards in the Pacific Region (International Panel session)
Afternoon Tea
Closing Address

Gala Dinner at the Art Gallery of NSW

SPEAKERS

Introduction: **Professor Doug Jones AM** DRBA President, Partner & Head of National Construction and Major Projects Group, Clayton Utz (Australia)

Welcome Address: **Volker Jurowich** DRBF President (Germany)

Keynote Address Day 1: **The Hon Nick Greiner AC** Chairman of Infrastructure NSW and Premier & Treasurer of NSW 1988 – 1992 (Australia)

Keynote Address Day 2: **Geoff French** President of FIDIC, Vice President of ICE & Managing Director of URS Scott Wilson (UK)

Principal Sponsor Address: **Peter Brecht**, Managing Director, Infrastructure Lend Lease & President, Australian Constructors Association (Australia)

Official Address & After Dinner Address: **TBA**

Confirmed Chairpersons and Panelists (as of 19 January 2012)

- **Richard Appuhn** Consulting Engineer, DRBF Region 2 President (Italy/USA)
- **Romano Allione** Engineer & Project Management Consultant & Member of DRBF Board of Directors (Italy)
- **Roger Brown** Managing Partner, R Brown Consulting Group LLC & President Elect, DRBF Executive Board of Directors (USA)
- **Ian Briggs** Partner & Head of National Construction Engineering & Infrastructure, Minter Ellison (Australia)
- **Peter H J Chapman** Chartered Arbitrator, Chartered Civil Engineer and Barrister-at-Law (UK)
- **Amanda Davidson** Partner & Head of Construction & Infrastructure (Sydney), Holding Redlich (Australia)
- **Graham Easton** Engineer, Lawyer, Chartered Arbitrator & Mediator (Australia)
- **Ron Finlay** Lawyer and CEO, Finlay Consulting (Australia)
- **Dr Paula Gerber** Associate Professor Monash University Law School (Australia)
- **George H Golvan QC** Queen's Counsel, Victorian Bar (Australia)
- **Gordon L Jaynes** Attorney at Law, Consultant to World Bank & Chair, DRBF MDB Liaison Committee (UK)
- **Richard A Kell AM** Consulting Engineer and Director of Cardno International Pty Ltd (Australia)
- **Kerry C Lawrence** Partner, Lawrence & Finkelstein PLLC (USA)
- **Chris Lock** Deputy Director General of the Transport Projects Division, Transport for NSW (Australia)
- **Alan McLennan** Relationship Contracting Consultant (Australia)
- **Deborah Mastin** Assistant Broward County Attorney in Ft Lauderdale & President Elect, DRBF Region 1 Board of Directors (USA)
- **Professor Dr Toshihiko Omoto** Construction Management Consultant & Professor at the Graduate School of Management (MBA), Kyoto University (Japan)
- **Graeme M Peck** Consulting Construction Engineer & Co-founder Evans & Peck (Australia)
- **Robert Regan** Partner & Head of Projects, Energy & Resources teams, Corrs Chambers Westgarth Lawyers (Australia)
- **John Sharkey AM** Consultant, Norton Rose (Australia)
- **Tim Sullivan** Director of Contract Administration Group P/L (Australia)
- **Colin J Wall** Chartered Arbitrator and Accredited Mediator (Hong Kong)
- **Michael Weatherall** Partner & Head of Construction Law Team, Simpson Grierson (New Zealand)

Dispute Review Boards and Dispute Adjudication Boards: Comparison and Commentary

Editor's Note: This paper was presented by the authors at the Introduction to International Adjudication Conference held at King's College, London, on June 29 and 30, 2011, an event co-presented by the DRBF. The paper is reprinted by permission of King's College, London.

By Kurt Dettman and Christopher Miers

Introduction

Although Dispute Review Boards (DRBs) and Dispute Adjudication Boards (DABs) share many common characteristics, they also differ in certain important respects. This article briefly summarizes the key features of each approach, explores differences between the two approaches, and offers commentary on the pros and cons of each approach.

What Are The Key Features Of A DRB?

The authors assume that most readers are familiar with how a DRB is established and implemented, so they summarize here only the key features of a DRB:

The three members of the DRB are appointed for their extensive expertise in the type of project on which the DRB is established.

The DRB members must not have conflicts of interest and must act as objective, neutral third parties under a Three Party Agreement with the Employer and Contractor.

The DRB is appointed at the beginning of the project, visits the project on a periodic basis depending on the pace of construction, and is kept apprised of the project's progress between site visits.

At the periodic site visits the DRB explores with the parties all open issues and urges the parties to resolve disputes that may otherwise eventually become formal claims. The DRB can also be asked to give non-binding, very informal "advisory opinions" on issues that have not become formal claims under the contract.

The DRB hears claims as part of an informal hearing process where the parties themselves (as opposed to legal representatives) present their positions. The informal hearing process has none of the trappings of a

legal process, such as a formal record, swearing of witnesses, or cross-examination.

The DRB issues detailed non-binding findings and recommendations that analyze the parties' arguments, the contract documents, the project records, and the supporting information presented at the hearing.

Because the DRB's findings and recommendations are non-binding, the parties are free to accept them, reject them, or keep negotiating based on the parties' respective risk exposure, taking into account the DRB's analysis.

The DRB's findings and recommendations (but not other records) usually are admissible in subsequent proceedings.

What Are The Key Features Of A DAB?

A DAB established under a FIDIC construction contract is the most common form of DAB in international projects and hence in this article we focus principally on this form of DAB, with occasional references to other DAB forms such as those operating under International Chamber of Commerce (ICC) or other Dispute Board Rules (e.g., World Bank).

The key features of a DAB established under a FIDIC construction contract are:

1. Under the terms of a tri-partite agreement among the Employer, Contactor and each DAB member, the DAB member confirms that he/she is experienced in the work which the Contactor is to carry out, is experienced in the interpretation of contract documentation and is fluent in the language of communications under the contact.
2. The DAB members must not have conflicts of interest and each member warrants under the tri-partite agreement that they will be impartial and independent of the Employer, Contactor and Engineer. Indeed, the FIDIC tri-partite agreement provides for severe finan-

cial sanctions for a DAB member who fails to act in accordance with the terms of the agreement.

3. The standard provision under the FIDIC Red Book, MDB Harmonised Edition and Gold Book is to have the DAB appointed at the beginning of the project (a “full term” or “standing” DAB), visit the project on a periodic basis, and be kept apprised of the project’s progress between site visits. Under FIDC Yellow and Silver Books (where the Contractor designs the works) by comparison, a DAB is appointed only when a dispute arises.

4. At the periodic site visits the DAB explores with the parties all matters of concern and urges the parties to resolve disputes that may otherwise become formal claims. Depending on the type of FIDIC contract, the DAB may have an express duty to assist the parties in avoiding disputes (FIDIC Gold Book and MDB Harmonised Edition). In the absence of such an express duty (FIDIC Red book) the DAB will still normally undertake this role in any event. (Under the ICC Dispute Board Rules, Article 16 makes express provision for the DB to provide “Informal Assistance” to help the parties to avoid disputes.)

5. The DAB may also provide an “opinion” on a matter referred to it by agreement of the parties. This provides an informal way of the parties establishing the DAB opinion on any issue. The opinion may be given orally or in writing.

6. In the event of a dispute which either the Contractor or Employer considers needs formal adjudication a party may refer it to the DAB for adjudication within an 84 day period. The DAB decides on the procedure and intermediate timetable of adjudication subject amongst other matters to comply with Paragraph 5(a) of the Procedural Rules Annex (requiring the DAB to give each party a reasonable opportunity of putting in its case and responding to the other party’s case).

7. Typically the DAB hearing is less formal than an arbitration or court proceeding. However, a party may still choose to have its lawyer attend the hearing as its representative. It is a matter for the DAB to determine how the hearing will be conducted.

8. The DAB issues a formal decision on the dispute.

The FIDIC contracts provide that the parties shall promptly give effect to the decision (Sub Clause (SC) 20.4).¹

9. A party that is dissatisfied with the decision may serve a Notice of Dissatisfaction (SC 20.4) within 28 days of receiving the decision, and thereafter under the terms of the contract the parties undertake to attempt to settle the dispute amicably (SC 20.5). On occasion, both parties serve Notices of Dissatisfaction and then negotiate to achieve a settlement.

10. Ultimately (not less than 56 day after their service of Notice of Dissatisfaction) a party may refer the dispute to international commercial arbitration, administered by the ICC. Thus the arbitration may be commenced prior to or after completion of the works.²

11. The steps that a party can take to enforce a DAB decision is a current issue of debate. There is little legal authority on the matter, since the issue would normally be dealt with by arbitration. The ICC Case 10619 is referred to as an example of enforcement by an arbitrator’s award.³ However the recent Singapore High Court decision *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2010] SGHC 202 has highlighted the difference between the Red Book SC 20.7 and the Gold Book equivalent, SC 20.9. The Red Book provides for arbitration of the failure to comply with the DAB decision only where neither party has given a Notice of Dissatisfaction and hence the DAB decision has become final and binding. By comparison, the Gold Book provides for arbitration “in the event that a Party fails to comply with any decision of the DAB, whether binding or final and binding”. Some parties are therefore considering modifying the FIDIC standard contracts wording for enforcing a decision that is binding but not final and binding to that of the Gold Book SC 20.9.

Are There Fundamental Differences Between DRBs and DABs?

DRBs and DABs share much in common; there are more similarities than differences. However the authors believe it is important to consider the nuanced differences so that dispute system designers can take the pros and cons into account in deciding which fea-

¹ All Sub-Clause references refer to the FIDIC Red Book and MDB Harmonised Editions unless otherwise stated.

² The 2010 edition of the FIDIC MDB contract at SC 20.5 now states that the party giving a Notice of Dissatisfaction should “move to commence arbitration after the 56th day from the date of the Notice.”

³ See article by Christopher Seppala “Enforcement by an arbitral award of a binding but not final engineer’s or DAB’s Decision under the FIDIC Conditions” ICLR Volume 26, 2009 – Part 4.

tures of the DRB/DAB process they wish to implement on particular projects where they have the choice to do so.

Commentary

1. Do both systems assist the parties in avoiding disputes or resolving them before they become formal claims subject to the DRB/DAB?

A DRB, in practice, encourages the parties to try to resolve disputes before they become claims. Sometimes DRB specifications or operating procedures will mention this role, but there is no formal requirement for the DRB to facilitate resolution of a dispute or of a formal claim referred to the DRB. Many DRB specifications do, however, provide for what is commonly referred to as an “advisory opinion”, with the DRB serving as an informal “sounding board” for the parties before submission of a formal claim to the DRB.

The DAB approach contemplates more explicitly that the parties should negotiate and try to reach agreement before they refer the matter to the DAB. Indeed under FIDIC SC 3.5 the Engineer is obliged “to consult with each party in an endeavour to reach agreement” between them, before he issues his own determination, which normally are all stages that precede the referral to a DAB. It is also noteworthy to compare the Red Book with the MDB Harmonised edition (i.e., the Red Book as adapted to meet the requirements of the Multilateral Development Banks including The World Bank) where the MDBs introduced a supplementary sentence into the DAB’s procedures⁴ to give the DAB an express role in dispute avoidance.⁵ Moreover, the parties may still reach an amicable settlement before or after lodging an objection to the DAB decision.

The interesting point in FIDIC SC 3.5 is that in this clause the Engineer takes on a different duty – to act fairly (and, implicitly, impartially).⁶ In all other respects the Engineer acts for the Employer (SC 3.1). Although there has been much discussion about the Engineer’s duty to consult with each party in an endeavour to reach agreement often, in practice, this is overlooked. The authors suggest that there needs to be more focus on the need for Engineers to carry out this role in international contracts. That said, this role is

bound to be somewhat restricted since the Engineer is unlikely to broker an agreement that involves an acceptance of its own failure such as a design deficiency or delay in issuance of information.

Like the DRB, the DAB can also be asked jointly by the parties to provide an informal opinion before the Engineer issues a formal ruling – this gives the parties a good indication of which way the Board is likely to determine the issue if a formal claim is referred. So, both DRBs and DABs provide the parties multiple opportunities to avoid a formal claim, but the DAB contemplates a more active role for the Engineer, at least before a formal claim is referred to the DRB.

2. Do both systems assist the parties in resolving claims before they migrate to other, more formal, legal processes?

The DRB issues a non-binding recommendation that the parties can accept, reject or use as the basis for negotiations. An argument can be made that there is benefit to the parties in maintaining, at the project level, ultimate control over the outcome of the claim. This permits the parties to take into account commercial and other considerations and make a business judgment whether a resolution is in the best interests of the parties and the project. This also helps preserve relationships because the outcome is agreed to by the parties.

In contrast, a DAB issues a decision that the parties are bound to follow, subject to lodging an objection for a later “appeal” through arbitration (where agreed) or litigation. This could be said to be divisive since one party wins and one loses, but in practice it brings clarity and resolution to the dispute, since the dispute has been adjudicated on by a Board of experts whose opinion is respected. Even where a party has served a Notice of Dissatisfaction, the parties are obliged to try and settle the difference amicably – so there is indeed a further chance to reach a consensus. Indeed, it is not uncommon for both parties to serve such Notices and then agree to revised settlement terms.

It is also noteworthy that in the absence of a Notice of Dissatisfaction being served within 28 days of receipt of the decision, the DAB decision becomes final and

⁴ Procedural Rules Annex, paragraph 2.

⁵ ICC DB Rules expressly provide that a DAB may meet with only one party while providing Informal Assistance, with the agreement of both parties.

⁶ Also the Engineer has a duty to act fairly in the certification of payment.

binding. Where a Notice of Dissatisfaction is served the DAB decision is only temporarily binding – in that the parties have agreed to put the decision into effect unless other agreement is reached or it is overturned by an arbitral or court award.

3. Do the timetables for the DRB/DAB process assist or hinder the process?

The DRB process timeline may be spelled out in the DRB specifications and operating procedures, but generally the exact timing is set in consultation between the DRB and the parties. Typically, the practice is that, absent exigent circumstances, DRB hearings are conducted during or in conjunction with a regular site visit. This generally means that the DRB claim process start to finish is between 90 to 180 days, depending on the frequency of site visits.

In contrast, the FIDIC DAB process must be completed in 84 days start to finish⁷ unless otherwise agreed. The advantage to the parties and the project of a pre-set 84 day period is to achieve a decision on the dispute that is rapid and relatively low cost. A rapid decision is beneficial in allowing the parties to know their position under the contract; and a short duration of dispute resolution process tends to limit the scope for running up extensive costs. A disadvantage of having an 84 day period tends to be the difficulty of accommodating the availability of the parties and the DAB to convene for a hearing if necessary, at short notice.

4. How do DRBs and DABs assist in a local market where maintaining long-term relationships is considered to be important by both Employer and Contactor?

A DRB issues a recommendation only, so the parties themselves (not the Engineer) have to decide whether to implement it or to negotiate a different settlement. This typically results in an agreed resolution that helps maintain good working relationships. This suits very well a market such as in Florida or California⁸ where there is a pool of contractors wanting to maintain good relations with the road authority, and the road author-

ity wanting to continue to get keen tender prices and be seen as a good source of work and a good employer. A contractor may be prepared to take a hit on a project on the basis that over the next years they will have more projects from the same employer and will make it up and more.

In contrast, the international market is different in that while contractors are still keen to maintain relationships with national governments, they may only do one project in that country for that employer. Similarly the employer has an international pool of contactors from which to choose. So internationally there is less need to compromise and potentially more need for a DAB that determines the entitlement of the parties unequivocally. It must also be noted that in some countries, international companies want the comfort of knowing that disputes will be resolved one way or the other by outside, neutral experts, not by the employer governmental agency.

5. Do DRBs/DABs vary in discouraging or encouraging the participation of legal counsel in the process?

Historically, DRBs have discouraged the participation of legal counsel in the process, except in limited circumstances where there is a narrow legal issue in question, or where legal counsel’s observation of the process would be beneficial for later party review of the DRB’s findings and recommendations. Suffice it to say, however, it is very rare for legal counsel to take the lead in managing the DRB process or “orchestrating” the parties’ presentations as would be the case, for example, in an arbitration proceeding.⁹ The basic view of DRB practitioners is that it should remain a party-driven process that leaves ultimate control of the proceedings and the outcome in the hands of the parties’ business decision makers.

In contrast, because the DAB process results in a “temporarily binding” decision that the parties are bound to follow, there may be a greater need for legal counsel involvement in marshalling and presenting the case. In addition, on international construction projects, there may be more legal issues raised by the

⁷ The ICC DB procedure is similar at 90 days from the Date of Commencement

⁸ It should be noted, however, that even in the U.S. not all recommendations are followed. For example, Owners who are major users of DRBs on road contracts have stated that they follow approximately 75% of recommendations.

⁹ Note, however, that the admissibility of the DRB findings and recommendations in subsequent proceedings may cause parties to have more legal counsel involvement because of the potential “downstream” effect of the DRB process. See Kurt Dettman, “To Admit or Not to Admit: That is the Question” in DRBF Forum (November 2010).

nationality of parties and locus of the project, resulting in the potential application of both international and domestic law(s) to the matter in dispute. However, most DABs seek to have the parties themselves present the case, with legal advisers present only where necessary.

Conclusions

Both the U.S. DRB model and the FIDIC contract (full-term) DAB process provide for, mainly in sequence:

The presence of a DRB or DAB on a project encourages the parties and the Engineer to conduct the contract in a co-operative manner. Thus to achieve a ‘win-win’ outcome.

DRB: Periodic meetings to identify issues and encourage party-resolution. DAB: Periodic site visits to identify issues and encourage party-resolution; also an initial attempt by Engineer to reach an agreement between the parties: A ‘win-win’ objective.

DRB: Parties can request Advisory Opinions. DAB: Parties can ask the DAB to provide informal assistance to avoid a dispute; or can request an Advisory Opinion: Also a ‘win-win’ objective of the parties maintaining control of the resolution of their differences.

DRB: Provides non-binding, reasoned findings and recommendations. DAB: Provides a formal decision on the issue that parties

must follow: potentially ‘win-lose’ but provides resolution.

DRB: Parties can accept or reject the findings and recommendations or negotiate a resolution. DAB: An amicable settlement may be reached after the DAB decision: Maintains the potential of a ‘win-win’ settlement.

DRB: Non-binding findings and recommendations are admissible in later proceedings. DAB: Decision may be re-visited in arbitration or litigation: Potentially win-lose.

About the Authors:

Kurt Dettman is the principal of Constructive Dispute Resolutions, an ADR practice specializing in all aspects of dispute avoidance and resolution in the construction industry. He has written extensively about DRBs, conducts training on DRB practice and administration, and is on the Dispute Resolution Board Foundation’s President’s List. He can be contacted at kdettman@cadr.com.

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**Forum Newsletter
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 May issue is
April 1, 2012



By William Buyse, M.Sc. - DRBF Country Representative for Belgium

European Regional Conference

The DRBF European Regional Conference was held 17-18 November 2011 in Brussels. The focus of the conference was “The use of Dispute Boards on Large Construction Projects – Advantage of Successful Dispute Avoidance and Resolution.” There were no less than 92 registered delegates for the conference. They came from Belgium, the UK, France, Germany, The Netherlands, Italy, Spain, Switzerland, Portugal and Austria but also from Romania, Turkey, the US, Japan and Canada. Besides engineers and lawyer practitioners of Dispute Boards there were also representatives from sectors other than the traditional construction business. Unfortunately representatives of governments and employers did not show up which was regretful since the cost efficiency of Dispute Boards is sufficiently proven as demonstrated by the use of this method by The World Bank and other investment banks.

On the first day of the conference we had the pleasure to welcome the US ambassador, Mr. Howard Gutman, as keynote speaker. His remarks as a lawyer in regard to the resolution of disputes in a constructive way, be it between countries or between partners in commercial relations were much appreciated by all participants.

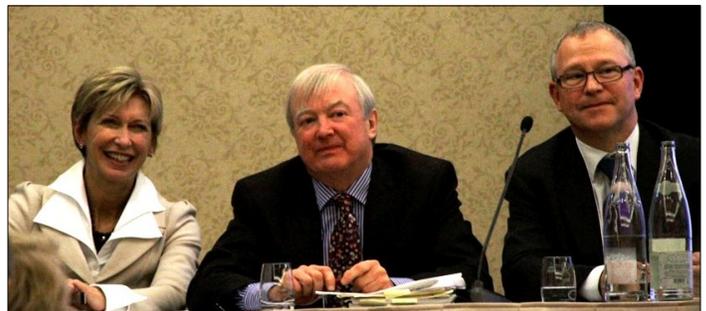
The morning sessions under the chairs of Peter Chapman and Levent Irmak gave a broad overview of the Dispute Board process. The concept, the standard form contracts and the standard procedural rules such as used by FIDIC and ICC were addressed, which formed the basic but necessary information for those learning of the process for the first time. In the second session the practical application of DBs were addressed in detail: the roles and duties, the process of site visit and decision making, the traditional and potential new areas of application like the chemical and petrochemical industry, and finally the influence of DBs on the behavior of the parties. The afternoon session on dispute avoidance under chair Murray Armes explained in detail the concept of avoidance of disputes as the first goal of a DB, followed by the experience in the UK, Scandinavia and in the US and finished with drawing the attention to the importance of teamwork and co-operation. The last session under the chair of James Perry took a look at the expectations from employers, contractors and engineers.

A dinner at the historically famous “La Manufacture” restaurant concluded the first day in a pleasant way, providing the delegates with the opportunity to network with

each other and exchange experiences and viewpoints.

The second day of the conference started with a session under chair Marco Padovan on the Investment and Development Banks where we welcomed the presence of Dr. Takashi Ito, Director from the Japan International Cooperation Agency (JICA) who explained their initiatives to convince employers to use DBs including the provision of training. The morning session was concluded under chair John Bellhouse with the title “Projects financed by the EU Commission”, where we received a video message from Mrs. McCarthy, member of the EU-Parliament on the Directive of the EU to avoid court cases for disputes. The session finished with details on the experience in Turkey, an overview of the EU-Commission requirements, and finally the contractor’s perceptions and the borrower’s perspective. Both sessions in the afternoon under the chair Lyda Bier concluded the conference with a close and in-depth look on the legal aspects of Dispute Boards and possible complications if the decision of a DB is not implemented voluntarily by one of the parties.

In my closing speech for the conference, I had the opportunity to thank all delegates who attended the conference and also the many speakers – not less than 32 – without whom this conference could not have been realized. I also emphasized that the Dispute Boards are a proven cost and time efficient methodology and that both employer and contractor can benefit from it. However there is still a long way to go to convince the concerned parties. The present economical circumstances and the necessary reduction of expenditures for governments as a direct result may perhaps become the key element to have Dispute Boards generally accepted and applied as a way to avoid lengthy and costly procedures at the end of projects. Furthermore, although problems may arise at the end of a project to implement DB decisions as discussed during the last sessions of the conference, it is worth to state further that this is only recorded in less than two percent of the DBs.



Panelists at the DRBF Regional Conference in Brussels



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Mark your calendar
and plan to join us
in the Big Apple!

**DRBF 16th Annual Meeting and Conference
Training Workshops on September 28, 2012
Conference on September 29-30, 2012
Sheraton Hotel & Towers ~ New York, New York**

Hosted for the first time New York City, the DRBF's 16th Annual Meeting and Conference will integrate practical experience shared by users of the DRB process with in-depth analysis of this evolving dispute resolution process. With an emphasis on the DRB's unique role in dispute avoidance as well as timely resolution, conference delegates will explore ethical and legal issues, lessons learned from existing DRB programs, and future expansion of the process. Participants will also engage in practical exercises that deepen understanding of the successful implementation and use of Dispute Boards.

Social functions include a welcome reception and the popular Al Mathews Awards Dinner, providing ample opportunity for interacting with conference participants, speakers and sponsors.

For more information, visit www.drb.org

