

DRBF Forum

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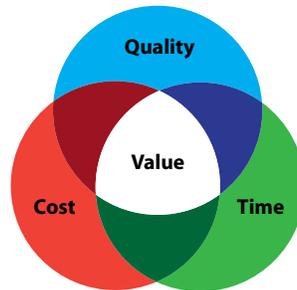


The Benefit/Cost Equation for Dispute Boards - Australian Experience

By Graeme Peck, M.Eng, FIE Aust, AIMA

Contracting Party Objectives

From an owner's perspective, the most commonly stated objective is "value for money". This is usually measured in terms of the time/cost/quality imperatives, often depicted by the diagram below.



From a contractor's perspective, similar measures apply. The Australian Constructors Association included the following amongst its stated objectives at the launch of the Dispute Resolution Board Australasia in 2003:

- Improve contract outcomes
- Run projects within budget for time and cost
- Manage issues during the currency of project

- Eliminate carry-over issues to post completion

Thus from all parties' perspectives, the simplest measures of a successful project is that it is on time, within the budget of the particular contract party, meets the quality and/or performance objectives expected of the finished product and any issues are resolved when, or very soon after, the project is operational.

Factors Influencing Construction Project Outcomes

The Construction Environment

Perfection of individuals is a rarity. A score of 10/10 on any task or assignment does not often happen. This applies whether one is setting up the contract documentation, producing the design, or planning and undertaking the construction of that design. Imperfection and/or uncertainty are a reality of construction projects and the likelihood of imperfection increases non-linearly with size and/or complexity of the project and the time pressures often imposed on major infrastructure projects.

(continued on page 10)

"Disputes are a factor in all major projects. Prevention is undoubtedly better than cure and it is vital that project participants agree in advance clear dispute avoidance and resolution mechanisms."

Editor's note:

This article is an abbreviated version of a paper presented at the DRBF 14th Annual International Conference in Singapore on May 17, 2014.

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President's Page



Graham Easton
 President
 DRBF Executive
 Board of Directors

Members, Supporters and Friends of the DRBF,

One's company, three's a crowd!

One of the many recent developments in the Dispute Board (DB) world is a surge in the numbers of one-person DBs being utilised by owners and contractors. The DRBF's most recent statistics indicate that one-person DBs are rapidly becoming an accepted model for smaller-value projects (say, less than US\$ 100 million) across the infrastructure sector.

The concept of using a single, independent adjudicator to resolve disputes in a quick and cost-effective manner has been with us for a very long time. It has been given a new lease of life recently with the introduction of statutory adjudication procedures for construction disputes in the UK, Australia, Singapore, Malaysia and several other countries. Nevertheless, the role of the adjudicator is very limited, with little or no opportunity to positively influence the project outcome. In contrast, a one-person DB has a much more pro-active and significant role in the performance of the project, from start to finish.

The rise of the one-person DB reflects the obvious advantages of cost and flexibility on smaller projects. However, it is the growing importance and recognition of a DB's role in dispute avoidance and management which is the catalyst for the increasing adoption of DBs generally and the one-person DB model in particular. There are, of course, some significant disadvantages with a one-person DB. Most of all, it is not easy to find individuals with the necessary governance, commercial, technical and dispute resolution skills, who are available and willing to serve as a lone DB.

The DRBF is committed to leading the way in promoting 'best-practice' in the use and operation of one-person DBs. The DRBF has developed standard contractual documentation and procedural rules for one-person DBs, which are available for utilisation by members (see page 22 for more details). We have structured our DRBF training programs to address this specific aspect of DB practice and we are able to identify DRBF members in many countries who have the necessary skills, training and experience to serve on one-person Boards.

DRBF publications and conference papers now regularly feature articles on one-person DBs and a special session will be devoted to this subject during the forthcoming Annual Meeting and Conference in Toronto, Canada on 23-25 October 2014 (see page 9 for more details).

I urge you all to get on board (sorry!) with one-person Boards.

A handwritten signature in black ink that reads "Graham Easton".

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Executive Board of Directors Meeting Schedule

July 28
September 15

Meeting notes
from the
Executive Board
meetings are
available to all
members.

The Board of
Directors for
each region
meet on a
regular basis.

Questions or
ideas for the
Boards should be
submitted to the
Board President
directly or to
Ann McGough at
amcgough@drb.org.

A Conversation with... Romano Allione



Romano Allione
Past President,
DRBF Executive
Board of Direc-
tors, and re-
cipient of the Al
Mathews Award
for Dispute
Board Excellence
(2008)

Q How and when did you first hear about Dispute Boards?

A I met Al Mathews in 1981¹ when I was the contractor representative on a double curvature concrete dam construction in Honduras, the El Cajon project. Al was on the project's Board of Consultants to the employer, and suggested they introduce a DRB to help resolve the serious contractual problems that were affecting the project. The contractor accepted the employer's proposal and the first DRB outside the USA was implemented. Chaired by Carlos Ospina from Colombia, the three members of the DRB gave a substantial contribution in resolving problems throughout the project construction. The project was completed in 1985 on time and within budget.

Q How and when did you get your first DB appointment?

A In the year 2000, on retirement from the n 1 contractor in Italy after 33 years, I started consulting on project management (mainly on contractual matters). I also applied to FIDIC to be accepted for the FIDIC President's List of Approved Adjudicators and passed the related exams. In 2004, I was appointed Chairman of some eight DRBs for the project to rebuild the Maputo-Beira road in Mozambique, on proposal by the parties' appointed members. Also in 2004, I was chosen as member in DABs for projects in Romania by contractors to whom I was known for my activity in the industry and/or in promoting DRBF.

As to how to be appointed, it is essential to be experienced and qualified in project construction, and to be known and appreciated by colleagues, employers and contractors for impartiality, fairness and commitment. The participation in DRBF activities is of course very useful both to learn, to meet people, and for networking.

Q What is the most difficult situation you have ever had to deal with on a DB?

A In a project, which I would not name, one

of the parties had decided not to have a determination issued by the Board on a difficult issue. Since the beginning, lawyers had been denying the Board's jurisdiction and strongly suggested that the Board could only decide that the matter was "for Arbitration". When this attempt failed, they even choose to challenge the Chairman (me) applying to the Appointing Authority. The Board issued the decision in a timely manner and the Authority rejected the challenge to the Chairman, however in the process the Party-Board Chairman relations had been damaged and probably would have negatively affected the DB contribution to the project, hence I decided to resign hoping that with a new start (new Chairman) the Board could properly perform its activities.

Q What is the most satisfying DB you have served on and why?

A Several DBs have given me satisfaction. Whenever I could feel that the DB efforts were helping the parties understand the problems and resolve differenda (differences) both on technical and contractual grounds, it confirmed the benefits of the DB. Sometimes (often), the Board did contribute by simply asking pointed questions causing in the parties to "see the light" and reconsider their positions. Positively contributing to a successful human undertaking is of course a source of satisfaction.

Q Should the DRBF recommend (max. and min.) age limits for DB members?

A No, the age limit depends on each individual, and conditions may vary considerably. The Board job require good physical and mental conditions, so each practitioner has to evaluate in fairness his overall conditions and be sure to be able to fulfil the commitments to the project. I am certainly not too far from the limit age and the matter is very present to me any time I consider a possible appointment.

Q How many DBs can a member properly serve on at any one time?



A Again no gold rules; however a member shall always consider the commitments to the project and have ample time available to review the monthly documents, prepare the site visit, be ready to go to site at short notice and so on. To be blunt, one's revenue and interests should not be the guiding rule; the benefit to the project(s) should be paramount even if this requires one to refuse other appointments or possibly to timely resign in some cases.

Q What is your greatest regret with respect to the DBs on which you have served?

A As mentioned above, I had to resign from a DB; in another case the Three-Party Agreement had a clause permitting the change of the Board Member after one year and a party decided to change the Board. In both cases I felt that I could still have positively contributed to the projects; note that being an E & M graduate Engineer I could help in resolving disputes arising in the E & M Plant erection phase, supporting the other members, who were civil engineers or lawyers.

Q If you could change one aspect of the procedures under which DBs usually operate, what would it be?

A The DRBF suggested procedures do not need changes, the DRBF recommendations need to be timely and properly implemented. The DB shall be appointed at the very beginning of the project, the Member shall comply with the requirements including direct construction experience, impartiality, fairness, availability, and commitment to the project.

Q What advice would you give to younger members keen to obtain their first DB appointment?

A No need to say that it is difficult to obtain the first appointment. It is essential to comply with the basic requirements for experience, knowledge and attitude; so "younger", but still with ample technical, contractual & managerial experiences, as well as communication skills. Knowing the industry and

being known and trusted is essential; participating in workshops, conferences and so on is very important, and I guess some luck would help. The DRBF has been considering how to promote the appointment of new practitioners in addition to participation in workshops and conferences without finding a real way to recommend Board members. This is not surprising in view of the responsibilities the parties have in delegating to the Boards and the possible negative consequences of a wrong appointment.

To help in introducing new individuals, I would recommend getting acceptance by the parties to let the Board members decide who will chair the Board. The parties would generally be reluctant to appoint somebody without direct DB experience; two experienced practitioners would not and could not propose as Chairman somebody new (when this has happened the results have not been positive). With the parties' agreement, a new practitioner, properly qualified, would be acceptable as member while an experienced practitioner would be the Chairman.

Q How do you keep fit and healthy and what is your preferred relaxation away from DBs? Mental and physical exercises are important, so I keep participating at conferences and in school (September 14 I will take a law school program in Cambridge, albeit late at my age...). I have been playing tennis, now I am playing more often golf and cycling.

Q Outside your own country, where would you most like to live and why?

A We, myself and wife Gabriella, have been living in different countries; believe it or not, we fondly recall our seven years in Pakistan!! We still would like to visit the world and meet people, however we plan to complete our lives in Italy, possibly at our seaside house in Camogli, which you may visit when coming to Genoa for the 2015 DRBF International Conference.

Romano Allione can be reached at romano.allione@tiscali.it.

Forum Editor:
Ann McGough

Contact:
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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Ethics in Today's World of DRBs:



Jim Phillips Ph.D.
Chair
DRBF Ethics
Committee

Contractor's engineer emails the DRB Chair and requests a formal hearing the next day, after a project's quarterly meeting on several contested issues contained in the correspondence the Dispute Board had previously reviewed, which both parties had indicated were not disputes during the quarterly meeting.

The question posed at the end of the last ethics column was how should a Dispute Board respond to a contractor's request for a formal hearing the day after a regular project meeting at which both parties claimed there were no disputes despite correspondence to the contrary that the Board had reviewed.

Allen Thompson in Florida wrote in and commented that the Board should proceed according to the procedures established when the Board was formally seated, and at some point, turn it into a teachable moment. Thanks for your comment Allen!

I agree with Allen's view. The Board should go ahead and schedule a hearing. This is the purpose of the DRB, obviously. Just because the parties choose not to discuss issues that rise to the level of a dispute at a regular meeting should not cause the Board not to hold the hearing. The fact that the request came the next day after the regularly scheduled meeting and the parties failed to discuss the issues, despite the project correspondence, gives rise to Allen's second comment that the DRB might use this sequence as a teachable moment.

The majority of projects that have a contract specification that authorizes the formation of a DRB also contains language that requires regular, often quarterly,

meetings to be held on the project site. This schedule of meetings accomplishes several purposes: it allows the parties to view the work in process and, if there are discussions about issues during the course of the meetings, the Board can adjourn and take a site tour to view the work in progress and be shown what the issue is about, usually with explanations from both parties.

This is an invaluable opportunity, one that does not occur during a claims or administrative process, and certainly not during litigation. One of the purposes of the regular meetings is to have discussions on issues where the Board can offer feedback and suggestions, and on some occasions, provide an informal recommendation. The idea here is for the Dispute Board to be preventative and head off issues that are percolating before they become disputes.

In the question posed in the previous *Forum*, the Dispute Board had read correspondence wherein the parties were discussing disagreements about the prosecution of the work. There is a view that one of the Board's responsibilities is to elicit discussions that lead to possible solutions of issues in the work before they evolve into disputes. The practice of providing the Board correspondence of major events, notices to file a claim, change orders, requests for informa-



tion, or even weekly reports, is designed to have the Board up-to-speed when it walks in the door for the regular meetings. In my opinion, if the Board is not up-to-date with the correspondence when it comes in for a regular meeting, then it is missing opportunities to assist the parties. Others would argue if that is the case, that the Dispute Board is not fulfilling its contractual responsibilities.

Canon V of the DRBF Code of Ethics provides that the DB shall consider impartially all of the disputes referred to it. In this case, the Board Chair should proceed and schedule a formal hearing on the disputes as requested. Moreover, as Allen Thompson suggests, the Dispute Board might take the opportunity, possibly at the beginning of the hearing, to remind the parties that the Board might have been of assistance in resolving those issues without a hearing if the parties had been willing to discuss them at the regular meeting.

ETHICS: FOR NEXT TIME

Assume you are sitting on a DRB at a Formal Hearing at which both of the parties are represented by counsel. Assume that the owner, a state department of transportation, is represented by a well-spoken Assistant Attorney General. Assume the contractor is represented by an attorney who is not well-spoken and for whom English is a second language. The contractor's attorney is having a very difficult time being understood by the DRB and by the owner and their attorney. During a recess one of the members asks the Chair if it would be possible to "level the playing field" and somehow try to assist the contractor's attorney to make it fairer to everyone.

What would you do as the chair and how should the Board respond?

Ethics Commentary or Question?

Please contact:

Jim Phillips, Chair, DRBF Ethics Committee
P: +1-804-289-8192 E: jphillip@richmond.edu

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 next issue:

September 1, 2014

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In Memoriam: Jack Norton 1931-2014

Jack Norton of Tampa, Florida passed away on May 22, 2014 at the age of exactly 82-½ to the day. At age 19 Jack joined the US Navy Submarine Service, cruised the world beneath the sea's surface and returned to meet and marry his dream girl, Martha Sue Stephens. He soon attended Iowa State University where he graduated with a BS degree in Civil Engineering. Jack obtained his Professional Engineer License for Pennsylvania and Florida and began a very successful career.

Working for Dravo Corporation, Jack built monumental construction projects throughout the United States. Projects included bridges over the Ohio and Mississippi Rivers, river locks and hydroelectric dams. With Dravo, Jack was the lead man and Project Manager of the Archives Subway Station in Washington DC. Moving to Tampa in 1977, Jack became the Vice President of Tampa-based Hardaway Constructors, and is responsible for many notable Florida projects. His local notoriety will carry you straight to the Sunshine Skyway Bridge where Jack led the efforts to remove the old Skyway structure and build the main pier foundations for the new and existing Skyway Bridge.

Jack started his own consulting firm in 1984 and worked until his untimely death. Jack was an avid sportsman, hunter, fisherman, marksman, and scuba diver and traveled throughout North America and the Bahamas to practice his sport.

Jack joined the DRBF in 1997 and was an active member of the Florida Chapter. He served on the DRBF Executive Board of Directors from 2005 to 2011, and as President in 2010.

Jack will be missed by many DRBF members, who fondly remembered him for his support and leadership in the development of DRBs, as well as his many hunting and fishing stories. The messages of support and remembrance submitted to the DRBF were forwarded to his family. Memorials in Jack's memory can be made in the form of donations to one of the two organizations that Jack supported:



Tampa Ducks Unlimited
3902 Henderson Blvd., Suite 100
Tampa, Florida 33629 USA

Community United Methodist Church
207 East Buckingham Ave.
Oldsmar, Florida 34677 USA



DRBF 18th Annual Meeting & Conference

Dispute Boards on Complex Projects:

The Power of Dispute Avoidance & Real-Time Resolution

October 23-25, 2014

Sheraton Centre Hotel - Toronto

Join the Dispute Resolution Board Foundation in Toronto for the 18th Annual Meeting & Conference. Proficient Dispute Board users and practitioners as well as those new to the process will gather to share their experience with an emphasis on best practices, ethical considerations, and future prospects for expanding the process into new markets.

- **October 23 Dispute Board Workshops** - A half-day Administration & Practice introductory workshop in the morning followed by a half-day Advanced/Chairing workshop in the afternoon. Register for both and save!
- **October 24 & 25 Annual Meeting & Conference** - Presentations and panel discussions on the latest developments in Dispute Board application.
- **October 24 Al Mathews Awards Dinner** - Enjoy socializing with conference delegates, speakers and guests at the popular Al Mathews Awards Dinner. Enjoy breathtaking views from the top of Toronto's iconic CN Tower, featuring a private cocktail reception followed by a 3-course dinner in the revolving restaurant. Not to be missed!



Keynote Speaker

BOB RAE

Senior Partner, Olthuis Kler Townshend LLP
 Legal Counsel to First Nations
 Former Premier of the Ontario Legislature (1978-2013)

Visit www.drb.org for details

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(continued from page 1) Change during the course of a complex project is an almost inevitable outcome of that reality. Differences of opinion as to responsibility for unclear, “unexpected” or “unknown” issues frequently arise. These translate into “issues” or “conflicts” between the respective project teams. If differences of opinion harden or are allowed to fester, disputes are likely to develop.

Performance Outcomes from Traditional Contracting Practices

A study was initiated in Australia in October 2005 as a collaborative effort between the prominent legal firm Blake Dawson Waldron (now Ashurst) and the Australian Constructors Association to research the root causes of project pressure points. An industry-wide survey of projects was undertaken, covering projects over the previous three years. Responses covered 183 projects encompassing all delivery modes and with an aggregate value exceeding A\$20 bn. Project values ranged from \$A 20m to > \$A 500m. The median value was about A\$170m.

The views expressed in the survey responses were tested by follow-up interviews with selected survey respondents and key industry players from both public and private sector groups. The first report was published in 2006¹, and notes in the forward:

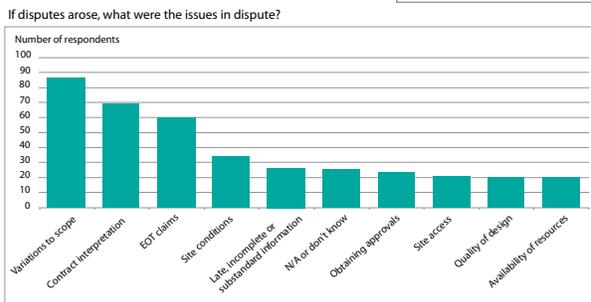
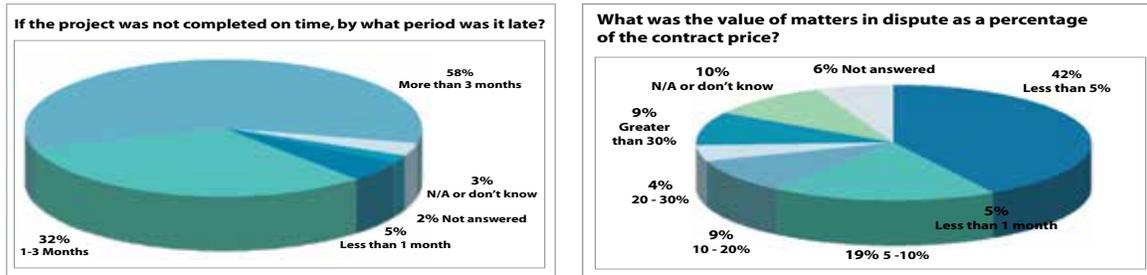
Disputes are a factor in all major projects. Prevention is undoubtedly better than cure and it is vital that project participants agree in advance clear dispute avoidance and resolution mechanisms.

Time and cost overruns were revealed as the two biggest causes of disputes in construction and infrastructure projects.

The initial report has been followed by further reports in 2008 and 2011 (which are available on the same website) which focus on specific causation issues identified in the 2006 report. The initial statistics remain the most relevant available that the author is aware of as “the industry norm for non-DB projects”.

Summary of Survey Findings Relevant to Contract Party Objectives

The survey findings are summarised in the pie charts following.



¹ “Scope for Improvement: A survey of pressure points in Australian construction and infrastructure projects”; http://www.blakedawson.com/Templates/Publications/x_publication_content_page.aspx?id=54519.



The survey findings are summarized following:

Factor	Industry Norm Performance
Time Performance	<ul style="list-style-type: none"> On average, 44% ran late, after taking into account granted Extensions of Time. 26% were more than three months late The greater the project value, the less likely it is the project will finish on time
Frequency and quantum of disputes	<ul style="list-style-type: none"> < 40% of all projects had no disputes weighted average of cost claimed in disputes ≈9.5% of contract value (the actual cost recovered from claims is not known)
Close out time for resolution of disputes after PC	<ul style="list-style-type: none"> 41% of disputes took up to 3 months to resolve 9% took more than one year to resolve In some cases, several years elapsed before resolution was achieved.

Thus each of the three primary objectives of the contracting parties fall well short of both parties' objective.

Influence of DRBs on the 2006 Report Statistics

DRBs were just beginning to make an appearance on the Australian construction scene. Thus very few of the survey respondents had been exposed to DRBs during the 2003-2005 period of projects covered by the survey.

The section of the BDW/ACA 2006 report dealing with recommendations for improvement includes the following:

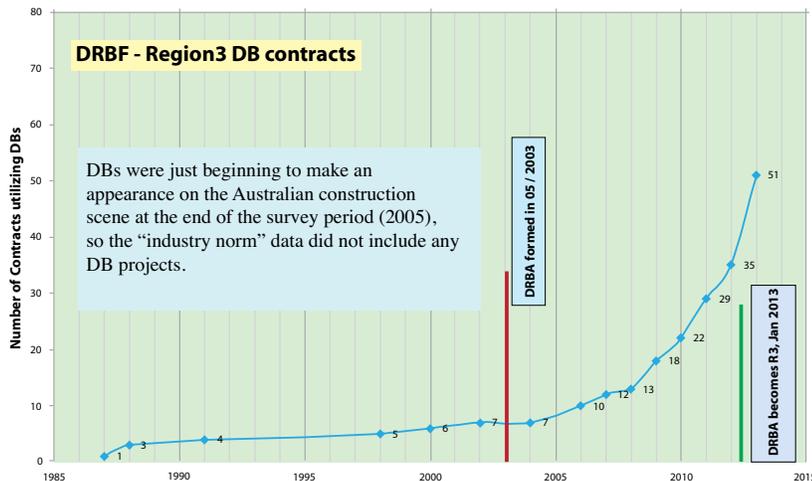
- Traditionally, insufficient attention has been given to dispute resolution clauses prior to contract signing.
- Consider alternative approaches to dispute resolution which are **proactive**, such as appointing a neutral and independent specialist from the industry to act as a sounding board for the benefit of the project as a whole... (emphasis added). Thus, notwithstanding the limited exposure of the industry to DRB concepts at that time, the second of the BDW/ACA report findings quoted above comes very close to describing the concept underlying the DRB process.

An effective issue management process focused on interparty relationships is therefore a primary requirement for successful delivery of any construction project.

The Actual Growth of DBs Within Australia

The first use of a DB in Australia was on the Sydney Ocean Outfalls contract commencing in 1987, because of the influence of the US consulting engineers who were prominent in those projects, and preceded the formation of the DRBF in 1996.

The graph to the right shows the growth of DB usage by number of contracts since 1987.





With active local support and the excellent track record that both sides of the industry quickly recognised, the growth in the use of DBs within Australia has become almost exponential. By April 2014, the value of DB contracts completed or in progress (again, actual unescalated values) was \$A17,630m. Of this total, \$A11,360m represent 34 completed or substantially completed contracts, and \$A6,270m represents 17 in-progress contracts. The contracts which have successfully utilised DBs (in any of their various forms) within Australian and New Zealand industries encompass virtually the full range of contract types.

Following is an overview of the benefits available from well-structured DBs and a discussion of the actual performance of completed² projects which have utilised DBs, since the first serious efforts to introduce the concepts and procedures commenced post-2005.

The DB Difference - Proactive Processes for Avoidance of Disputes

The following summarised extracts from the 1996 *Dispute Review Board Manual*³ reflect many of the concepts identified in the Australian research studies already referred to above.

- Disputes result in a substantial dilution of effort, delays, and diversion of capital.
- Inefficient contracting practices can constitute a serious barrier to the application of new technology and to the containment of rapidly escalating construction costs and contract disputes.
- Many of the specific recommendations... are aimed at mitigating the deleterious effect of claims, disputes, and litigation upon the efficiency of the construction process.
- DRBs have been found to be applicable in all sectors of the construction industry.
- Project partnering... involves building a mutual understanding of goals and objectives among key people on the job, and .. achieves its most dramatic success when both contract parties are committed and a problem resolution hierarchy is established that extends to the upper levels of management.
- The positive (as opposed to adversarial) attitudes fostered by partnering are fully compatible with the non-adversarial resolution of disputes facilitated by DRBs.

The objectives of the DB concept as set out above reflect basic common sense, viz:

- Encourage the parties to articulate issues as they arise
- Promote discussion and resolution of issues by the parties while the work is in progress
- Establish a pre-agreed panel of experts with continuous knowledge of the project and exposure to any issues while the work is in progress to provide a sounding board for difficult issues as they arise, and a quick and simple method of resolving issues that the parties are unable to resolve by discussion.

Comparative Performance: DB Contracts vs Industry Norm Non-DB Contracts

As already noted, Australian experience with DBs commenced in 1987. Seven contracts were completed between 1987 and 2005 with a value of A\$632m (un-escalated). While it is known that no issues went beyond the DB on any of those seven contracts, they are not included in this analysis because the relevant data is not available.

The following table summarises the available data since 2005:

STATUS OF DB CONTRACTS IN AUSTRALIA SINCE 2005	
No. of contracts	Gross Value at Award
44	A\$15,924m
Range in contract value	A\$31m to A\$1,960 m
Average value at Award (\$M)	A\$ 362



Seventeen of the 44 projects above are currently in various stages of construction below the substantial completion cut-off limit used for the data of this analysis. The value of this in-progress segment is slightly over A\$6,000 m. [Note that almost without exception, the performance trend of the in-progress projects to date mirrors that of the completed ones].

The performance of the other 27 completed DB contracts is compared with the industry norm non-DB projects (covered by the BDW survey reported above) in the following paragraphs. The DB sample relates to projects with a value range between \$31m and \$1,957m and an average value of \$357m. 123 of the 183 of the industry norm non-DB projects fall in a directly comparable range.

DB CONTRACTS COMPLETED SINCE 2005

No. of Contracts complete or substantially complete	27
Value at Award for 'complete' projects	A\$9,652m
Average value at Award	A\$357

Comparative Out-turn Cost Performance – DB Contracts vs Industry Norm Non-DB Contracts

The DB records allow the actual increase related to normal scope growth to be separated from the award price, whereas the BDW survey report does not separately identify the ‘normal’ scope growth component. However, the relevant comparison in the table below relates to contractual claims. The comparison is 1.9 % actual for DB contracts compared to the 9.5% -average figure of claims for industry norm non-DB contracts.

Comparative Out-turn Cost Performance

DB CONTRACTS COMPLETED SINCE 2005			DB contracts	"Industry norm" Non-DB contracts performance
1	Value at Award for 'complete' projects	\$9,652m	base figure	A\$ 20bn, (award + agreed scope changes)
2	Gross value of Agreed scope changes (% of 1)	\$881m	9.1%	(split not available)
3	Gross value of Claims settled in addition to Agreed Scope Changes (% of 1+2)	\$196m	1.9%	Actual recovery unknown 9.5% claimed,

While the actual recovery against the industry norm non-DB amount claimed is unknown, the author’s personal experience over many years suggests that **the most probable outcome for the industry norm data is likely to be well above the actual DB figure for settled claims of 1.9%.**

Comparative Time Performance – DB Contracts vs Industry Norm Non-DB Contracts

Meeting the required contract performance time is rated by both principals/owners and contractors as one of the two most important requirements for project outcomes. Both the “industry norm” data established by the 2003-2005 survey data and the DB records for Australian projects provide a comprehensive break-up of the results from each project group.

² The analysis of project statistics which follows includes three projects in excess of 95% complete and one above 90%.

³ *Dispute Review Board Manual*, McGraw-Hill 1996; Matyas, Mathews, Smith, Sperry.



COMPARATIVE COMPLETION TIME PERFORMANCE

	DB Contracts performance	" Industry norm" non-DB contract Performance
On time or ahead	81%	56%
Late	19%	44%
> 3 months late	4%	26%

The ‘time’ performance of the DB contracts is substantially better than the industry norm sample. In absolute terms, the data suggests that:

- The chance of an industry norm project **running late** is 2.3 times greater than that for a DB project
- The chance of an industry norm project **running more than 3 months late** is 6.5 times greater than that for a DB project

Comparative Commercial Closure Time – DB Contracts vs Industry Norm Non-DB Contracts

There are several fundamental differences in the dispute management process of DB contracts compared to non-DB contracts.

- The DB generally becomes aware of the issue(s) from an early stage of their development, and is able to guide the parties in the appropriate direction towards resolution. e.g., it can encourage them to agree costs and facts on a “without prejudice” basis as the work proceeds, pending resolution of liability questions.
- Progressive agreement of costs and facts frequently leads to a commercial settlement between the parties.
- If the matter becomes a formal referral, the DB is in a much better position to agree ‘liability only’ questions with the parties than an external party appointed to hear the matter under any of the ‘after-the-event’ conventional processes (formal or ADR).

The following statistics demonstrate these benefits of the DB processes:

FREQUENCY OF DISPUTES AND NATURE OF DECISION REQUIREMENTS

	DB projects	"Industry norm" projects
% of Completed DB projects with zero disputes requiring DB determinations	78%	
% of "Industry norm" projects that have not required external dispute mechanisms invoked		<40%
% of Completed DB projects that have required DB determinations	22%	
% of "Industry norm" projects that have required external dispute mechanisms for resolution		>60%
average no. of disputes per 'dispute project'.	1.2	unknown
Number of disputes requiring determination of both Liability & Quantum	0	unknown, but based on experience, "MOST"
Quantum of all DB determinations to date has been settled between the parties following Liability determination		Table #2, p.14

Period after actual PC for settlement of all contract claims

Timing	DB Contracts completed since 2005	"Industry norm" non-DB contracts performance
At or before PC	81%	Uncertain, but strong suggestion that significantly less than 50% in this category.
< 3 mths after PC	15%	41%
3 mths to 1 year after PC	4% (1 contract, 4 mths)	9.40%
> 1 year after PC	None	"some"



The possible criticism of the comparisons above lies in the disparity of sample size. The value of contracts in the DB sample is about 50% of that for the industry norm sample, which is reasonable. However, the number of contracts in the ‘similar value’ range is 27 vs 120, so the data is certainly open to criticism when considering statistical comparisons. For that reason, it is useful to consider reported data from much larger DB data samples in the US.

Some Comparative US Data

The DRBF website⁴ includes a database of projects with a substantial record of projects around the world, but with the majority within North America. Some selected examples are reproduced following.

North American record thru 2010:

- Number of completed projects: over 2,200
- Total construction value: over US\$200 billion
- 60% of projects with DRBs had no disputes
- 98.4% of projects with DRB recommendations had no subsequent arbitration or litigation

The percentage of projects with disputes in the above tabulation (i.e., referrals to the DRB) appears to be distorted by a few early and very large projects which had some difficulties.

Anecdotal evidence⁵ is that *early in the process it was experimental, and many issues were brought to the DRBs that should never have reached the stage of a hearing. The level of referrals has reduced significantly as contractors come to realise that the DRB is not there to remove from them the responsibility for adopting a realistic and sensible approach to claim submissions, and DRB members have gained experience and adopted a much more proactive approach. It was reported that current practitioners expect that between 70% and 80% of DRB contracts will have no referrals.* (emphasis added).

Florida Department of Transportation (FDOT) experience:

The Florida Department of Transportation has been a DRB user since 1994. More than 469 DRB contracts had been completed by the end of 2009. Records provided by FDOT have been used for several research studies into the cost/benefit of DRBs vs non-DRBs⁶ published in 2013.

A second presentation by the co-author of the above paper (Associate Professor Ellis of the University of Florida⁷) included the following report by the Florida Inspector General of Audit of a 2002 audit of the FDOT DRB program.

Contracts Lasting Longer Than 1 Year	No. of Contracts	% Time Overrun	% Cost Overrun
DRB Contracts	15	1.84%	12.12%
Non DRB Contracts	60	19.10%	17.89%

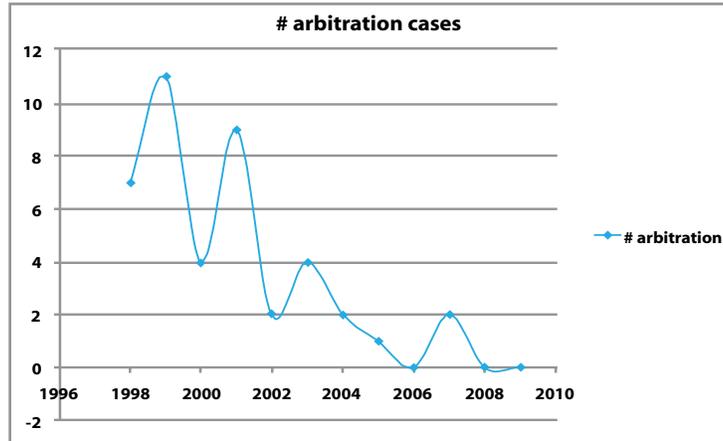
Apart from the reduction in cost overruns and the much improved time performance, their experience with arbitration cases over the period of DRB usage was particularly dramatic.

⁴ DRBF website: www.drb.org.

⁵ Private communication, J Norton, DRBF Executive Board, April 2011.

⁶ *Analysis of Construction Dispute Review Boards*, D Azdas & R D Ellis, *DRBF Forum*, V 17, No. 3, Sep 2013; [reproduced with permission from *ASCE Journal of Legal Affairs and Dispute Resolution in Engineering and Construction* Aug 2013, Vol. 5, No. 3, pp. 122-127].

⁷ “Success of DRBs in Florida,” Ralph Ellis, presentation to DRBF Florida Chapter.



DRB Influence on FDOT Arbitration Cases

The FDOT experience over more than 10 years with DRBs was summarised as follows:

- Spend approximately 0.1 %
- Save approximately 5 % in direct project cost
- Litigation has been reduced to a rarity
- One significant litigation would cost more than the total yearly investment in DRBs

Washington Metropolitan Area Transit Authority:

The following extracts from a paper by James R. Haggins, former Assistant General Manager for the Washington Metropolitan Area Transit Authority⁸, speak for themselves:

- Nearly two decades since DRB and Partnering, began:.. there have been only six DRB traditional hearings and one informal hearing. The Board of Contract Appeals was discontinued within five years of including DRB and Partnering provisions in major construction contracts.
- ...NONE of the contracts that embraced the principles of the DRB have resulted in litigation.
- we experienced better cost control, reduction in schedule growth, a significant reduction in paperwork, and successful attainment of our valued engineering objectives.
-other positive by-products .. – no late deliveries, no fatal accidents, a significant reduction in worker injuries and lost work day cases, improved quality work and a reduction in the amount of punch list work.
- I do not think these results are coincidental. I firmly believe that this success is directly attributable to the use of the principles of the Dispute Resolution Board, nonbinding recommendations and the Partnering process.

In the author’s view, the US experience firmly validates the Australian experience. The recorded data reveals very similar history to the experience we have found over the past eight years in Australia.

The Cost of a DB – A Disincentive or a Sensible Insurance Premium?

Potential DB benefits

One of the most common factors raised against the use of Dispute Boards is the fixed cost of having one. The argument is usually expressed along the following lines:

“why should I pay for something that I may never need? I am better off to wait and see how I go, and call in the lawyers if and when I get into trouble”.

⁸ “DRBs Using Non-binding Recommendations in the Public Sector,” James R. Haggins, *DRBF Forum*, V 13, Aug 2009.



The answer to this question should be self-evident from the statistics set out in the previous sections of this paper. Considering the joint contract party objectives set out above:

Potential time saving:

- The chance of an industry norm project running late is 2.3 times greater than that for a DB project
- The chance of an industry norm project running more than 3 months late is 6.5 times greater than that for a DB project

Potential cost saving:

- Of the order of 3-5% of overall price

Dispute avoidance potential:

- The likelihood of contract disputes arising is about three times greater on industry-norm projects than on equivalent DB projects.

Contract closure time:

- There is a greater than 90% probability that closure of DB contracts will be achieved at or shortly after PC, compared to less than half that probability for industry-norm projects.
- There is a very low probability that DB contract closure will not be achieved by four months after PC, compared to a 10% probability that closure of industry-norm projects will drag on for one or more years.

The FDOT reference experience noted above is a significant understatement of the benefits of DB projects compared to industry norm projects.

The Insurance Premium

Insurance of many risks is common place on all construction contracts. Contract Works Insurance (CWI) is a universal requirement (sometimes by owner, sometimes by contractor with owner as a named beneficiary). CWI premiums vary with project type but in the author's experience, are typically in the range of 0.6% to 1% of the contract sum. This is but one of several other insurance policies commonly taken out by both parties on major contracts. Insurance companies must make a profit, so on average the amount collected from risks insured by these policies must be significantly less than the amount paid out in premiums. Policies generally include a significant excess which the insured party must pay before the insurance cuts in. Clearly the parties accept that the "value for money" option is to pay the premium to guard against the risk occurring.

It is not practical to insure with an insurance company against time over-runs or contractual claims. However, self-insurance is practical!

Considering the benefits of DB contracts compared to industry-norm contracts, it is far more logical to class the cost of a DB as an insurance premium against the likelihood that a project will run late, or experience substantial cost overruns due to contractual issues, or remain with an uncertain financial outcome for one or more years after its physical completion, or all of these factors. There can be no upfront premium "quote". The question then is what is the likely premium, and is it justified when compared to the risk?

It is relatively simple for a principal or contractor to make a reasonable estimate of the probable cost of routine DB meetings (usually about three monthly intervals) and monthly retainers for the DB's review of site meeting minutes, monthly reports and generally keeping up-to-date with progress reports. [DB fee structures in Australia are generally comprised of a monthly retainer (usually equivalent to a fee of approximately one day), a fixed fee for routine meetings,



travel expenses at cost, and an hourly rate for time spent on Referrals].

While these costs are usually considered as shared 50:50, the reality is the principal pays for the routine DB meeting fees and expenses. The contractor will simply include an estimate of his 50% share in his quoted price. Hence *it is the totality of the “routine meeting fees and expenses plus retainers” that represents the insurance premium.*

DB time spent on Referrals (Dispute Determinations) is usually dealt with on an hourly rate basis and fees are always split 50:50 between the parties. This cost component cannot be estimated in advance, but several things are certain:

- A determination of a dispute Referral by a DB will cost a small multiple of that by any other ‘conventional’ dispute resolution process.
- Only about 20% of DB contracts ever experience a Referral.
- Given the above, the budgetary impact on both parties will be very much less than that of other ‘conventional’ dispute resolution process.

Typical Cost Ranges for DBs in Australia

The available cost records for the projects completed or underway have been used to assess the routine DB fees as a percentage of contract sum at award. In some cases, actual DB costs are known. In others, fees and expense estimates have been based on confidential advice of individual Board members with knowledge of the schedule of fees included in the DB Agreements, their own fees and expenses and the frequency of meetings. In all cases, the fee estimates for routine services are believed to be within about 10% and cover the total of fees paid by both owner/principal and contractor.

Projects have been grouped according to the values below and whether 1-person or 3-person DBs. One-person DBs are generally associated with smaller value projects, although project complexity is also a factor in the lower range capital values. Because DB meeting schedules are generally similar, fees and expenses for larger-value projects tend to be a lower percentage of contract value. However, the larger value projects tend to involve more experienced DB members, hence higher fee rates.

Distribution of DBs by Contract value

	\$30m-\$100m	>\$100m- \$300m	>\$300m - \$600m	>\$600m	
3-person Board	16%	20%	23%	16%	
1- person Board	14%	11%	0%	0%	
% of total sample in value range	30%	32%	23%	16%	100%

DB Fee Ranges as Percentage of Contract Value:

DB member costs for any specific project include travel time and expenses. These can have a significant impact on the DB costs for remote area projects. DB member location relative to any project also has an impact, although this is generally less significant than project location. Thus there is always a reasonably wide spread in the fee percentage of costs for similar-value DBs. Australia has rarely used a one-person DB on projects above \$150m capital value.



Routine DB fees & Expenses as % of Contract value				
value range	\$30m-\$100m	>\$100m- \$300m	>\$300m - \$600m	>\$600m
3- person DB	0.129%	0.149%	0.085%	0.063%
DB cost range	0.065% - 0.228%	0.036% - 0.248%	0.057% - 0.117%	0.038% - 0.089%
1-person DB	0.090%	0.071%	na	na
DB cost range	0.049% - 0.181%	0.056% - 0.186% (2 only)	na	na

The data of the table above indicates the average insurance premium that a principal can expect to pay for a DB contract within Australia. The upper limit is likely to be about 0.25% of the capital value at award. Using the average values, a figure of about 0.15% would be a realistic advance estimate of the probable cost of a three-person DB, and about 0.1% for a one-person DB in the “less than \$100m” project range.

Conclusion

The ultimate decision for adoption of a DB lies with the principals and their legal advisors.

The reality of experience in Australia mirrors quite closely that reported by a number of long-term users of the concept, particularly that of the US. In summary:

Potential Time Saving:

- The chance of an industry norm non-DB project running late is 2.3 times greater than that for a DB project.
- The chance of an industry norm non-DB project running more than three months late is 6.5 times greater than that for a DB project.

Potential Cost Saving:

- The potential out-turn cost of a DB contract is 3-5% lower than the same contract completed under industry norm non-DB conditions. [This cost saving is after inclusion of the DB costs as part of the total project cost.]

Dispute Avoidance Potential:

- The likelihood of contract disputes arising is about three times greater on industry norm projects than on equivalent DB projects.

Contract Closure Time:

- There is a greater than 90% probability that closure of DB contracts will be achieved at or shortly after PC, compared to less than half that probability for industry norm projects.
- There is a very low probability that DB contract closure will not be achieved by four months after PC, compared to a 10% probability that closure of industry norm projects will drag on for one or more years.

The “insurance premium” to have the benefit of the potential gains above is in the order of 0.1% to 0.25% of the construction cost of the project.

The author firmly believes this is a commercial opportunity that should be very seriously considered by those responsible for design and construction of major capital works.

Graeme Peck is a member of the DRBF Region 3 Board of Directors. He can be reached at gmp@gmpeck.com.au.

New DRBF Country Representatives



Dr. Götz-Sebastian Hök, DRBF Country Representative for Germany

The DRBF is pleased to welcome the following newly appointed DRBF Country Representatives:

Germany: Dr. Götz-Sebastian Hök has 24 years of experience as a lawyer in the construction field. He graduated in Law from Göttingen University and is a German solicitor registered at the Berlin Bar. He earned a PhD in Law in 1993. He has extensive international project and commercial experience gained while living and working in Europe, the Middle East, Africa and Asia. For 24 years he has been partner and senior partner of Dr. Hök, Stieglmeier & Kollegen. He acts as arbitrator, adjudicator and legal counsel in construction disputes and is also a fully accredited FIDIC trainer. He is a lecturer at Berlin University on applied science for construction contract management law. Since 2009, he is a FIDIC listed Adjudicator (FIDIC President's List). Since 2011 he serves as the Chair of the FIDIC Trainer Assessment Panel. Dr. Hök has written various books and articles in French, English and German on FIDIC forms of contract and dispute resolution. He is a co-author of the book *FIDIC for Practitioners* and is a member of the German Dispute Adjudication Assessment Panel and former past Chairman of Eurojuris Commission International Litigation. In 2010-2012 he was a member of the JICA Study Team for the implementation of Dispute Boards. Since 2011 he has served as a FIDIC legal adviser and in 2012 he became a member of the Editorial Advisory Board of the *International Construction Law Review*. He has served as DAB member on projects in Armenia, Bosnia, Germany, Mali, Mexico, Palestine and Tanzania, and served as Chair on a major offshore project in the German Northern Sea.

Dr. Hök has been a DRBF member since 2010. His task will be to facilitate the social contacts of German DRBF members, to strengthen the German chapter of the DRBF, and to promote best alternative dispute resolution practice for domestic and international projects. Moreover he will look at capacity building in respect of construction contract management and related dispute resolution activities on a practical and educational level.

Country Profile: Germany is the most populous member state in the European Union with strong economic and political powers. It has the world's fourth-largest economy by nominal GDP and the fifth-largest by purchasing power parity. As a global leader in several industrial and technological sectors, it is the second-largest exporter and third-largest importer of goods. Against the backdrop of climate change, the German construction industry is increasingly focusing on environmental research. Therefore, the country is currently going through a construction boom in green energy and particularly offshore wind plants, some involving DABs. Optimising the energy efficiency of buildings and constructing in a manner that is energy-efficient and sustainable is a major focus in research and development. The German construction industry includes the main construction trades and the finishing trades including international activities. About 73,000 companies, most of them small or medium-sized, are active in the main construction trades, offering shell construction and civil engineering services. In the finishing trades, 44,000 companies mainly provide finishings, interior fittings and renovation services. With a total of 2.2 million workers, this industry is one of the largest employers. In terms

of construction litigation the stakeholders are typically relying on the traditional route to the state courts. Alternative dispute resolution activities are less developed than in the common law jurisdictions. The German KfW (Development Bank) is financing projects worldwide based on FIDIC contracts.

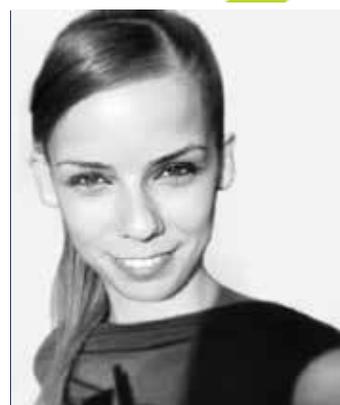
Turkey: Yasemin Çetinel is a lawyer specialized in international investment and commercial arbitration, with a specific focus on settlement of construction disputes. She holds a postgraduate degree in international commercial arbitration from the Queen Mary and Westfield College, University of London.

After practicing in major firms in Turkey, she founded her own firm in the beginning of 2011. She has been involved in numerous ICSID arbitrations, including representation of Turkish contractors against the Republic of Kyrgyzstan, the Hashemite Kingdom of Jordan, the Republic of Georgia and the Republic of Turkmenistan. She also represents contractors of various nationalities against state entities and private entities at settlement of commercial arbitration disputes. She has extensive experience at execution of FIDIC-based contracts as well as public procurement contracts under the Turkish procurement legislation.

As Turkey is a fairly new user of the international type of contracts and dispute settlement mechanisms, the primary step to be taken will be the provision of availability of information and training in Turkish of the Dispute Board concept and subsequently promotion thereof vis-à-vis the relevant associations and state entities.

Country Profile: According to the Organization for Economic Cooperation and Development (OECD), Turkey is anticipated to be the fastest-growing economy among member countries over the period of 2013-2017. In addition to such growth, the country has plans to become the 10th-fastest-growing economy in the world by 2023 which is supported by investments in construction and in infrastructure. The government recently unveiled the tender for the world's largest airport in Istanbul, at a cost of US\$5.6 billion which is expected, when operational, to have an annual capacity of 90 million. Turkey's strategic geographic location between Europe and Asia has also contributed to substantial investments in infrastructure, as the need to improve rail and road systems remains a priority to facilitate better connectivity with neighboring countries and to promote trade and business. Lastly, according to the *Engineering News Record* journal, Turkey, with 38 contractors in the list, ranked as the second country after China with the most contractors in the list of top 250 international contractors of 2013.

With the growth in investment in construction and infrastructure, significantly funded by international funds, the European Union and the state itself; Turkey has been recently introduced to the frequent usage of international construction contract types as well as the use of the Dispute Boards as opposed to traditional public procurement contracts. Accordingly, the market is in considerable need of information, training and qualified people in such newly introduced contractual system and dispute settlement mechanism(s).



Yasemin Çetinel,
DRBF Country
Representative
for Turkey

DRBF Initiates Dispute Resolution Advisor Documents and Recommendations

Invitation for Comments from DRBF Membership

By Warren Bullock and Kurt Dellman

Editor's Note: In 2013, some members of the DRBF were tasked with drafting DRA documents that could be included in the upcoming update to the DRBF Practices and Procedures Manual to ensure that current best practices are addressed. User agencies were contacted for feedback on their current practices. The topic was also explored in a panel discussion at the DRBF Northwest Regional Conference held in Seattle, WA in May 2014.

This article summarizes the draft of the DRA documents that have been submitted to the DRBF Manual Committee, together with some practice issues that the authors expect will be addressed in the updated DRBF Manual. The authors note that the draft DRA documents prepared to date are considered to be applicable to construction contracting in the U.S. and Canada. The final documents included in the DRBF Manual are intended to be applicable across multiple jurisdictions.

The term "Dispute Resolution Advisor" is also used to refer to the process adopted on several Hong Kong projects. This article focuses on the DRA model used in the US and Canada. For more information on the Hong Kong model, see Peter Caldwell and Kurt Dettman, "Hong Kong Dispute Resolution Advisor: An Alternative to Conventional Dispute Review Boards?" *DRBF Forum* Vol. 15, Issue 4 (November 2011).

Introduction

Over the past several years, Dispute Review Board (DRB) user agencies in the U.S. have begun implementing Dispute Resolution Advisors (DRAs), sometimes referred to as "single-person DRBs." More user agencies have started including the use of DRAs as an alternative to DRBs on small to medium-sized contracts of relatively short duration where the time to establish and the costs of a DRB cannot be justified. For example, the California Department of Transportation (Caltrans) uses DRAs on its projects up to \$10 million in contract value and contract time less than 100 working days.

DRA Specification¹

The DRA Specification begins in Section 1 with some general principles, including that the DRA is intended to assist the parties in resolving disputes; that the parties are to cooperate with the DRA in resolving disputes; that the DRA process does not change the underlying contractual process to bring and resolve disputes; and that work should continue during any dispute resolution process. Section 2 provides definitions, most particularly those dealing with definitions that are later used in the Conflict of Interest Provision (see Section 2.6, "Financial Ties" or "Financial Interest"; Section 2.7, "Direct Involvement"; and Section 2.8, "Indirect Involvement"). Section 3 covers DRA Qualifications and Requirements for appointment, and deals with both qualifications and neutrality. As to qualifications, the DRA is required to:

- Provide evidence of training from the DRBF.
- Have experience in the interpretation and application of construction contracting documents; and experience in construction management and dispute resolution relevant to the contract work.

The remaining subsections deal with neutrality, summarized as follows:

- The DRA must represent to the parties that he/she will be impartial and independent and has no conflicts of interest; and the DRA shall abide by the DRBF Canons of Ethics.
- The DRA may not be a direct current employee of any parties directly or indirectly involved in the project; and any prior direct employment must be disclosed and written consent obtained from the parties. The DRA may not have a consulting agreement with, financial ties with, or close professional or personal ties with, any directly involved parties. The DRA may have a consulting agreement or financial ties with indirectly involved parties, but only with written permission of the parties; prior consulting agreements or financial ties, personal/professional relationships with, and prior service as a DRA or DRB member with any directly or indirectly involved parties must be disclosed. The DRA may not have had any prior involvement in the project and during the appointment may not discuss any other or future professional arrangements with the parties (except for DRA or DRB services).

Section 4 deals with DRA appointment. As soon as practicable after contract award the parties meet to discuss DRA establishment and selection options. Within 15 days of notice to proceed, the parties should propose and exchange three nominees and pertinent information and disclosures about them. The parties select one of the six nominees; if they cannot agree they each choose one from the other's list and use a coin toss to finalize the selection. Within 30 days of notice to proceed the DRA Agreement is to be signed, unless the parties agree to sign it at

¹ The DRA Specification is intentionally quite detailed as it is written for potential users that may not be familiar with the process. Therefore all salient points are addressed. For the more experienced DRA user agencies, the specification could be simplified, with some of the details moved to the Operating Procedures.



the first DRA meeting.

Section 5 addresses general procedures. The DRA meets with the parties at the start of the project to establish mutually agreeable Operating Procedures. Subsequent DRA meetings will be held periodically: for projects less than six months, at the half-way point or to hear disputes, and for projects more than six months, not less than three times per year, or to hear disputes. The DRA shall refrain from expressing opinions on matters under dispute or potential disputes except with party agreement; shall not to discuss contract issues with individual parties; and shall not do any independent investigations as to any dispute or potential dispute except with party agreement.

Section 6 covers the referral of disputes to the DRA. The parties are required to have had good faith negotiations prior to referral of a dispute. Either party may send a dispute notice to the DRA that defines the nature and specifics of the dispute or the recommendation scope requested. The contractor's dispute must relate to items presented to and denied by the owner and be actionable against the owner; the owner may refer any dispute to the DRA after negotiations have failed. The referring party may seek a recommendation on entitlement only, or on entitlement together with quantum guidelines.

Section 7 sets out the procedures for dispute meetings. After receipt of the dispute referral, the DRA communicates with the parties to establish the time and location of the Dispute Meeting (also known as a Hearing), with the proviso that it be held no more than 25 days after Dispute Notice receipt by the DRA unless the parties agree otherwise. Both parties exchange position papers and supporting exhibits at least 10 days prior, or such other date established by the DRA. The parties shall furnish and exchange any other information the DRA determines is needed; if information is not provided, the DRA shall decide whether to proceed with the information furnished or defer the Dispute Meeting to allow it to be provided. The location of

the Dispute Meeting shall be the job site, but another site can be established by agreement. Seven days before the Dispute Meeting the parties submit and exchange attendee lists, with any disagreement determined by the DRA. Attorneys shall not participate but may be permitted to attend as observers with prior written approval of the other party and the DRA. For pass-through claims, the contractor shall have an authorized representative of the subcontractor or supplier present who has actual knowledge of the facts underlying the claims. The DRA, with party approval, may obtain expert technical services needed to adequately review the dispute. Costs for such experts are shared equally by the parties. The Dispute Meeting shall not be recorded, and there is no testimony under oath or cross-examination. The order of presentation is generally the claimant, followed by the respondent, with rebuttals as needed. The DRA takes an active role in questioning and seeking information, and controls party-questioning. The DRA controls the introduction of arguments, exhibits, etc., and may request additional meetings or information. If a party fails to appear, the DRA may proceed with the Dispute Meeting as presented by the party in attendance.

Section 8 also addresses additional procedures for formal Dispute Meetings. The DRA may request and receive additional information within certain time frames after the Dispute Meeting. The DRA shall issue non-binding recommendations within 15 days after the Dispute Meeting or within five days of receipt of additional requested information, whichever is later. The recommendations, containing the DRA's reasoning, shall be based on the terms of the contract, applicable laws and regulations, and the facts and circumstances presented. Within 10 days following receipt of the recommendations, the parties may request clarification or reconsideration (under certain circumstances), to which the DRA must respond within 10 days. Within 10 days of receipt of the recommendations or receipt of a response to requests for clarification and/or reconsid-

VIEW THE DOCUMENTS

The draft DRA documents are available for download from the Members' section of the DRBF website, or by request from the DRBF office.

Readers are invited to submit comments that the Manual Committee can take into account in producing the updated DRBF Manual.

Submit comments care of DRBF General Manager Ann McGough by email at amcgough@drb.org.

eration, the parties shall submit a notice of acceptance or rejection; failure to respond timely shall be deemed acceptance. If the parties are able to settle the dispute as to entitlement, they shall promptly engage in settlement negotiations; if they cannot reach agreement on quantum within 30 days, they may request the DRA to make a compensation recommendation.

Section 9 deals with procedures for informal Dispute Meetings. If both parties and the DRA agree on an informal Dispute Meeting, the DRA shall implement an accelerated procedure that includes submission of a short position paper and limited exhibits at least three days before the informal Dispute Meeting. At the informal Dispute Meeting the parties present their positions and answer the DRA's questions. The DRA then deliberates and provides an oral advisory opinion that day; the parties may seek clarification and request a written summary. The DRA shall not be bound by its informal advisory opinion if the dispute is the subject of a later formal Dispute Meeting as subsequent events may have altered the original facts and circumstances.

Section 10 addresses subsequent proceedings. If the DRA process does not result in a resolution, the parties shall follow the contract dispute resolution procedures, with the proviso that the DRA recommendations may be admissible in evidence. The DRA may not be called as an arbitrator (if the contract has arbitration) or as a witness in any subsequent proceedings.

Section 11 covers compensation. DRA fees and expenses are shared equally by the parties. The contractor pays the DRA and then seeks reimbursement of 50% from the owner. If the contractor does not pay the invoice, the owner may pay it and deduct the cost from any amount due the contractor.

Dispute Resolution Advisor Agreement

The DRA Agreement is entered into by the DRA, the owner and the contractor. The DRA agrees to be bound by and follow the

DRA Specification. The DRA sets the billing rate that is all-inclusive of overhead and the like. The billing rate is applied to travel time, study/consultation time, meeting and hearing time, and preparation of recommendations. Other expenses are reimbursable, such as pre-approved travel expenses and reproduction/postage costs. The DRA must submit detailed monthly invoices to the contractor. The DRA shall not divulge any information acquired in performing DRA services, unless approved in writing by the parties. The DRA shall maintain cost records for a period of three years following termination of the agreement. The DRA shall not start work until authorized to do so and shall continue services until the earlier of final payment under the contract or termination by the parties. The DRA may resign on 15 days' notice, and may be terminated by agreement of the parties on 15 days' notice; if there is a resignation or termination, the DRA shall be replaced within four weeks using the same process as the original appointment. The DRA acts as an independent agent and is released from any liability arising out of the DRA's recommendations, except for fraud or willful misconduct.

DRA Operations

General: One of the keys to the success in assisting the parties in the timely resolution of disputes is the "DRA Operating Procedures and Guidelines." Although not a contract document, the DRA Operating Procedures and Guidelines is a combination of the DRA specification and DRBF best practices.

The Operating Procedures and Guidelines are prepared by the DRA and then discussed and agreed upon with the parties at the initial DRA meeting. However, they remain a flexible document subject to change at any time by consensus of the parties and the DRA. Because they are based on the DRA specification and agreement, all of the details of the DRA operations are not repeated here, but summarized below are some of the key elements.



Regular DRA Meetings: Two of the most important DRA activities (besides Dispute Meetings) are the initial meeting with the parties at the project site and project update meetings held at the half-way point of contracts six months or less in duration and not less than three times per year on contracts greater than six months in duration.

It is most important that the DRA ensures that the parties fully understand the primary objective of the DRA as being to assist the parties in the timely resolution of disputes. To assist in reaching that objective the DRA-prepared Operating Procedures and Guidelines are discussed and agreed-upon with the parties prior to adoption.

The importance of project update meetings should never be underestimated, but often is. Indeed, some DRA specifications currently being utilized make provision for an initial introductory meeting between the DRA and the parties with further meetings held only in the event of a dispute brought to the DRA. Update meetings not only keep the DRA current with the contract work, but also enable the discussion of project status with the parties in a round-table atmosphere, to determine whether or not the parties have good communications with one another, and to be pro-active in assisting the parties to resolve issues before they become disputes.

Formal Dispute Meetings: The pre-hearing and hearing procedures are very similar to those typically used in the DRB process and are conducted in accordance with the DRA specification and DRBF best practices.

Informal Dispute Meetings: Whereas either party may refer a dispute to the DRA for a formal hearing, the informal process requires that both parties and the DRA must all agree that an informal advisory opinion is the appropriate method for a particular issue. Once agreed, the meeting is usually set for the next regular DRA meeting, or earlier if the matter is urgent.

Deliberations & Recommendation Reports:

The post-hearing deliberations and written recommendation reports by the DRA generally follow the procedures of the DRB process, but with one essential difference: the responsibility for determining the outcome of a dispute falls squarely on the shoulders of one person, the DRA. Like the DRB process where the selection of the DRB members is the primary factor in the success of the process, the selection of the DRA is likewise of utmost importance. A DRA cannot be a “DRB member-in-training” since the DRA has single point of responsibility for the entire process and its outcome. This strongly indicates that the DRA should be an experienced DRB member, well versed in managing the DRA process and in writing recommendation reports.

It has been suggested by some that if there is a complex claim that may test the capabilities of the DRA, there should be a DRA specification provision allowing the appointment of additional DRAs to form a three-person DRB. The lack of having two other opinions to rely upon during deliberations can be offset by the specification provision whereby the DRA, with the approval of the parties, may obtain expert technical services such as geotechnical, audit, schedule analysis, and other expert services, which are deemed necessary to adequately review the dispute. This provision should enable the DRA to handle the more complex issues and obviate the need for a three-person DRB.

Conclusion

As previously noted, the use of DRAs is becoming more prevalent as an alternative to three-person DRBs on small to medium sized contracts. Under the right circumstances, the choice of a DRA vs. a DRB should be encouraged. But, the use of the DRA process should be implemented as carefully and professionally as the conventional DRB process. The purpose of the DRA Documents is to achieve this goal by providing a model specification, DRA agreement, and operating procedures that reflect user experience and DRBF best practices.

About the Authors:
Warren Bullock is a long-standing DRBF member who has served as a DRB member or as DRA on 96 projects.

Kurt Dettman is the President-Elect of Region 1 and serves as the Region 1 Director of Training and Co-Chair of the DRBF Transportation Committee.

Welcome to New DRBF Members

Member Additions March - May 2014



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someone
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DRBF International Conference in Singapore

By Gerlando Butera, Chair,
Conference Organising Committee

The DRBF's 14th Annual International Conference was attended by 125 delegates, from 29 countries, at the majestic Fullerton Hotel in Singapore in May 2014.

The fact that this was the first time that the DRBF has staged an International Conference in Asia pays testament to the ever-increasing importance of this part of the world as an engine of growth and development. Construction and infrastructure projects make up a large proportion of the soaring economies of countries within the Asia region. However, the need for infrastructure development remains huge, and countries in the region have bold and ambitious plans for projects to meet those needs looking many years into the future. That, of course, means that there is also vast potential for growth in the use of Dispute Boards in the region.

By comparison with experience in the US, Australia, and other parts of the world, Dispute Boards are relatively uncommon in Asia. In Singapore itself, they are practically unknown. The major challenges on the way to extending the benefits of DBs more widely are the same as were faced in other parts of the world where Dispute Boards are now routinely accepted as a key part of the risk management armoury for major projects. With its unparalleled experience, the DRBF is uniquely placed to assist participants to overcome those challenges, and a key aim of the conference was that it should serve as a springboard for activity across the region.

Preceded by the now-customary training workshops, the conference theme was "Dispute Boards: Realising the Potential for Dispute Avoidance." Session topics included:

- Dispute Boards Internationally – Divergence or Convergence?
- Growth of Dispute Boards Around the World
- Perspective of International Financing Institutions
- Case Studies – Practical Application of Dispute Boards

- Dispute Boards - Cost/Benefit Analysis
- Status Reports on Institutional Developments
- Future of Dispute Boards in the Asean Region

The conference proceedings were given a tremendous start by an inspirational speech from our Guest of Honour and Keynote Speaker, His Honour Justice Quentin Loh of the Supreme Court of Singapore. Commenting on the fact that Dispute Boards have rarely been used in Singapore, Justice Loh hazarded the guess that a major reason for this is the lack of awareness of how exactly a DB works and the cost effectiveness of such a mechanism in large or even medium-sized infrastructure projects. The judge drew on his own vast experiences as a legal practitioner before he joined the bench, and in concluding he expressed the prediction that "The DRBF can look forward to nothing but enthusiastic support from Singapore to entrench this very cost-effective, efficient and desirable mechanism to either avoid disputes, or if that cannot be done, as is sometimes the case, then to contain them." His final exhortation was for the DRBF to "Plant your flag here and fly it high in Singapore."

Following the lead given by Justice Loh, the conference featured a superb line up of speakers and presentations. The contributions of those who are not otherwise directly involved in the DRBF's activities were especially appreciated: Mark Moseley and Elmas Arisoy from the World Bank; Shigeo Nakagawa from JICA; Edwin Glasgow QC from 39 Essex Street Chambers, recently appointed Chairman of the Singapore International Mediation Centre; Chow Kok Fong and Loong Seng Onn of the Singapore Mediation Centre; Rusli Bin Idrus from RBI Consultants in Malaysia; and Sylvia Tee from the ICC. Special mention is also due to Bob Smith, a co-founder of the DRBF, who delivered a masterful introduction to Dispute Boards and the US experience.

Conference papers and presentations are available at www.drbfconferences.org.

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DRBF 18th Annual Meeting & Conference

Dispute Boards on Complex Projects: The Power of Dispute Avoidance and Real-Time Resolution

October 23 - 25, 2014 • Toronto, Canada

The DRBF 18th Annual Meeting and Conference will integrate practical experience shared by users of the Dispute Board process with in-depth analysis of this evolving dispute resolution process. With an emphasis on the DB's unique role in dispute avoidance as well as resolution, conference delegates will explore ethical and legal issues, lessons learned from existing DRB programs, and future expansion of the process.

Event Details:

October 23: Training Workshops

- The DRBF offers two workshops integral for all Dispute Board practitioners: the introductory **DRB Administration & Practice Workshop** and the **Advanced/Chairing Workshop** for advanced practitioners.

October 24 & 25: Conference

- Best practice and lessons learned from around the world, plus new challenges and opportunities in the application of Dispute Boards.
- Optional events include a tunnel site visit and the popular **Al Mathews Awards Dinner** at Toronto's CN Tower.

**Visit www.drb.org for
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and registration.**

