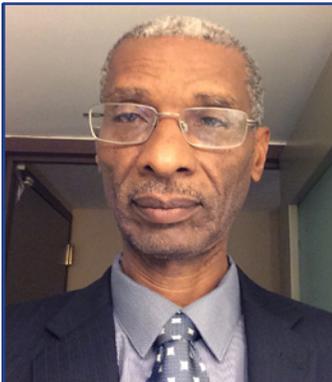


DRBF Forum

Volume 19 Issue 3 December 2015



Celebrating 40 Years of Dispute Board Excellence: Eisenhower Memorial Tunnel



Michael Gay, Sr. P.E.

“The job was the first to use a formal DRB as part of the original contract documents, and I am convinced that this initial positive experience is the root of the eventual adoption of the DRB as a standard in the industry on most major civil construction contracts.”

Editor’s Note: *Michael Gay, Sr. P.E. delivered a special presentation at the Al Mathews Award dinner in San Francisco about the Eisenhower Memorial Tunnel project and the first DRB. This article is a brief summary of the project that laid the foundation for the Dispute Board process and the DRBF, although it is missing his colorful anecdotes.*

The Project

The Eisenhower Memorial Tunnels located approximately 60 miles west of Denver in Colorado are two vehicular tunnels designed to carry four lanes of Interstate 70 traffic under the continental divide at an elevation of 11,000 feet. The four lanes are carried through twin bores each approximately 1.7 miles long and in a 46-foot horseshoe shape. The owner was the Colorado Department of Highways, now the Colorado Department of Transportation.

From November 1967 to March 1973, a joint venture group called “Strait Creek Constructors” drove bore one, the North Tunnel. The job was bid at \$49.6 million

and had a projected construction time of four years. It ended up costing \$109 million and took almost six years to complete.

Dispute Review Board Introduced

The second bore of the Eisenhower Tunnel was bid on August 8, 1975 and was based on a carefully conceived design laying out in detail the sequence and methods of construction required. The successful bidder was a joint venture of Peter Kiewit Sons Inc. and Brown & Root, Inc. The bid was \$102.8 million with the second bidder only \$189,000 higher. The contract included a DRB, and Al Mathews, Palmer King and Charles McGraw were appointed.

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President's Page



Doug Holen
President
DRBF Executive
Board of Directors

Dear Members, Supporters and Friends of the DRBF,

I want to take this opportunity to thank Joe Keating and his committee together with the Region 1 Board, Ann McGough, and Lori Krutzsch for all their efforts in making the 19th Annual Meeting and Conference in San Francisco this past October such a success. The conference was interesting and informative, the view of the Golden Gate and San Francisco Bay Bridges from the deck of the Hornblower was impressive, and it was an honor to present the Al Matthews Award to Graham Easton for his service to the Foundation.

In the final months of 2015, the Executive Board, under the guidance of our Secretary/Treasurer Tom Peterson, will be developing a budget to support our plans and programs for 2016 within the funds we anticipate will be available. It is an important task given the number of initiatives we have planned.

Paul Taggart spoke about some of these initiatives in his most recent columns. They include a drive to complete a rough draft of the DRBF Practices and Procedures Manual to hand off to the editor the DRBF has hired, and a concerted effort to support the website development firm we recently hired so that we all begin to see tangible improvements. These are exciting initiatives and I sincerely hope that we will be a long ways toward the completion of both when my term ends in Washington, DC next fall.

Graham Easton has agreed to remain on to shepherd the Manual update. He has parceled out the writing assignments for most of the chapters and appendices and has developed a schedule for their completion. I know Graham has tapped many of you on the shoulder to contribute. We thank you in advance for your efforts.

Ann McGough will carve out time in her already busy schedule to guide the website development.

We are also expanding the DRBF professional staff with a Finance Administrator to assist the Secretary/Treasurer and administrative support in Regions 2 and 3. I am sure Ann McGough will provide introductions for these personnel as they come on board. These positions are intended to provide much needed support for DRBF activities as we continue to grow and offer additional conferences and programs for training and or certification.

As many of you are aware, Region 2 just hosted a successful Regional Conference in Istanbul in November 2015, and has another scheduled in Livingstone, Zambia in February 2016. And, of course, we are looking forward to our International Conference in Santiago, Chile May 11-13, 2016.

Hope to see you there!

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The Forum is published quarterly by the Dispute Resolution Board Foundation (DRBF). Any opinions expressed are those of the authors and do not necessarily represent the opinions of the DRBF.

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

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Dispute Resolution
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A conversation with... Bob Rubin



Bob Rubin
 Recipient of the
 Al Mathews Award
 for Dispute Board
 Excellence (2010),
 and Former
 President of the
 DRBF Board of
 Directors (2004–
 2005)

Q How did you first get involved with DRBs?

A In 1991, I joined the ASCE Technical Committee on Contracting Practices of the Underground Technology Research Council, chaired by Joe Sperry. The Committee was tasked with preparing an updated and revised edition of *Avoiding and Resolving Disputes in Underground Construction* (1989), the forerunner of the DRBF's current *Practices and Procedures Manual for Dispute Review Boards, Dispute Resolution Boards and Dispute Adjudication Boards*.

Q What stands out in your mind as the defining feature of DRBs as compared with traditional court litigation of construction disputes?

A As I sat in my first ASCE Committee meeting, I experienced an epiphany of sorts. I had just come off a two-week long series of depositions in a large, complex, underground construction case. What struck me was that in typical traditional construction cases conducted under court rules, roughly 75% of the cost and time is consumed in the discovery phase, at a time and place far removed from the construction, itself – all in an effort to sort out the facts and circumstances underlying the dispute. In contrast, the DRB process is “real time” disputes resolution. The DRB members are available virtually on the spot to more readily sort out the facts and circumstances underlying the dispute, at considerably less cost and time. At that ASCE Committee meeting, I formed the belief that DRBs had the potential of revolutionizing the construction process. Now, some 25 years later, I have witnessed DRBs well along the way to-

wards realizing that potential.

Q What have you found most satisfying about your DRB work?

A Having spent the better part of my 50-year career as a litigator of construction disputes, DRBs now give me an opportunity to play a more constructive role in the construction process, as opposed to the after-the-fact role of just cleaning up messes created by problematic projects. DRBs have been, and continue to be, the most satisfying part of my career. My work with DRBs has enabled me to play a part in improving the overall construction process, instead of merely profiting from a distressed process.

Q What have you found most frustrating about your DRB work?

A “DRB” means different things to different people. This often creates problems and frustrations.

Because court litigation and arbitration have been around a long time, there is a relatively well-established understanding of what these processes are and how they work. This understanding is supported and reinforced by laws and rules. By contrast, the DRB process is relatively new; it is not supported by laws and rules; it is purely a creature of contract – and contracts most often differ from one to the next.

For example, in current practice DRB decisions can be final and binding; or non-binding and serving only as recommendations; or something in between. DRBs can be established at the start of the project; or only after a dispute has arisen; or at some time in between. Lawyers can



be permitted to fully participate in DRB hearings; or not permitted to participate at all; or something in between.

In the relatively short history of DRBs, the vast majority have been highly successful; some have been abysmal failures; others have been somewhere in between. But experience has shown that there is a strong positive correlation between DRB success and the extent to which the DRBF Model Rules and Procedures have been followed. In most instances of failed DRBs, the DRBF Model Rules and Procedures have been significantly altered.

DRBs have been utilized in US construction with increasing frequency. But I believe one reason that DRBs have not enjoyed even wider utilization is the adverse publicity given the relatively few failed DRBs. In an ideal world I believe it should be mandated that the name “DRB” may only be applied to those entities that operate under the DRBF Model Rules and Procedures. By doing so, I believe the incidence of failed DRBs would be materially reduced, leading to an even greater utilization of the DRB process. Realistically, though, this is not an ideal world, and the possibility of such a mandate being adopted is highly unlikely.

That is what I have found and continue to find most frustrating about my DRB work.

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

A The most difficult situation I have dealt with is one in which the relationship between the parties deteriorated to

such an extent that I was unable to get the parties’ respective project managers even to meet informally over breakfast. Let me explain.

I was appointed the Chair of a DRB that was first impaneled over a year after the project had started. By that time there was a backlog of some \$50 million in unresolved disputes. As I walked into the room at the first DRB meeting, I sensed a peculiar atmosphere; something was not right. The meeting turned out to be the most contentious DRB meeting I have ever attended. The relationship between the parties had soured to such a point under the weight of the longstanding unresolved disputes, that the parties were unable to agree on anything. Their arguments were endless.

Over lunch that day, the other two DRB members and I shared the observation that we had never experienced so much disharmony and ill-will at a DRB meeting. Following the formal DRB meeting we decided to meet privately with the two project managers to formulate a plan of action to improve the situation. We strongly recommended that the two project managers meet periodically on an informal basis, perhaps weekly over breakfast, in an effort to forge a more cordial working relationship.

Our DRB functioned with the project for another year. We heard and issued recommendations on several disputes, somewhat reducing the backlog of unresolved disputes. However, the acrimony between the parties continued unabated. At one point, the parties each terminated its appointee to the DRB, without nominating a successor. Whereupon, I resigned as the Chair. As of the date of

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my resignation, the two project managers still had not yet met informally with one another.

Q What do you see as the future for DRBs?

A I see a bright future for DRBs, but there are several factors at play which I am afraid will continue to hamper the DRB process from realizing its full potential:

- Some owners, out of fear and/or insecurity, will not be able to abide the creation of a “level playing field.” They will insist on a DRB process that to some extent preserves their “home court advantage.” That will result in contractors’ lack of confidence, distrust, questioning fairness of the process and disinclination to support or participate in the DRB process.
- Some owners will never even agree to the establishment of any form of DRB, out of concern that the mere presence of a DRB would somehow diminish their traditional control over ongoing projects, and create the risk of embarrassment if an impartial third party were to judge their action to be incorrect.

- Some attorneys representing owners, whether through hubris, ignorance, or inexperience, will not be able to resist the temptation to tinker with the tried and tested DRBF Model Rules and Procedures and thereby increase the risk of creating an unsuccessful DRB.

Q What do you do for recreation?

A For many years I was a long distance runner. I ran through Prospect Park near my home in Brooklyn, a distance of about 5 Km., with a small group of friends and neighbors, year round, daily at about 6:00 a.m. We even ran together in several New York Marathons.

Now I’m still out in the park regularly at 6:00 a.m., but the number of days we skip is increased, the size of the group is diminished, the distance has shrunk; we walk “briskly” instead of running; and we are merely spectators of the New York Marathon, rather than participants.

But we still enjoy ourselves.

Bob Rubin is Special Counsel at McCarter & English. He can be reached by email at rrubin@mccarter.com.

Forum Newsletter Editorial Deadline

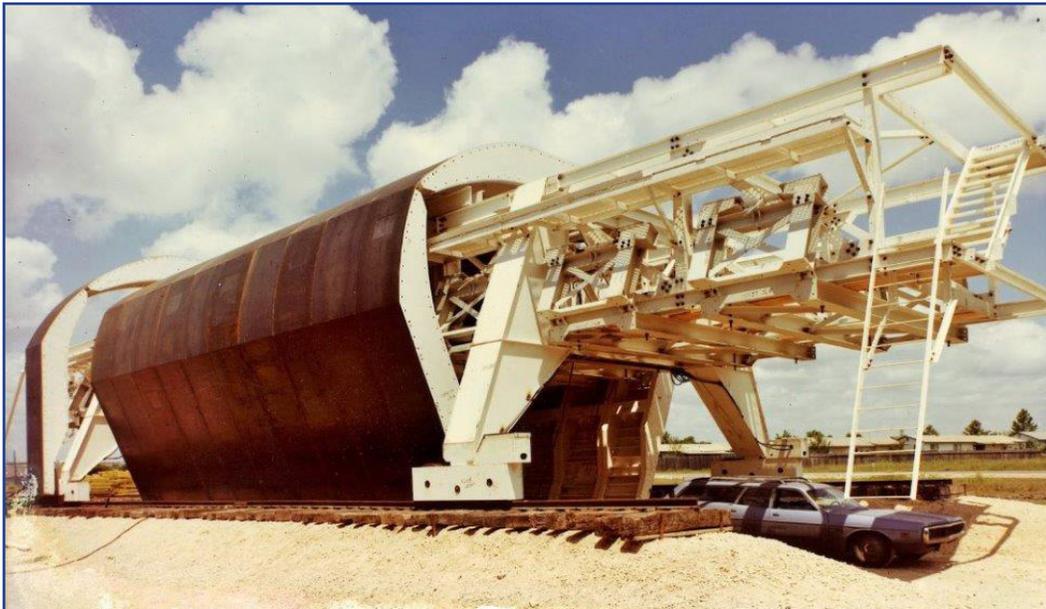
Our readers love to hear Dispute Board success stories and challenges, and the latest industry news and events.

If you have new information about Dispute Boards, DRBF members, or an article to share, please let us know!

Contact Forum Editor Ann McGough at amcgough@drb.org

Deadline for the next issue:

February 1, 2016



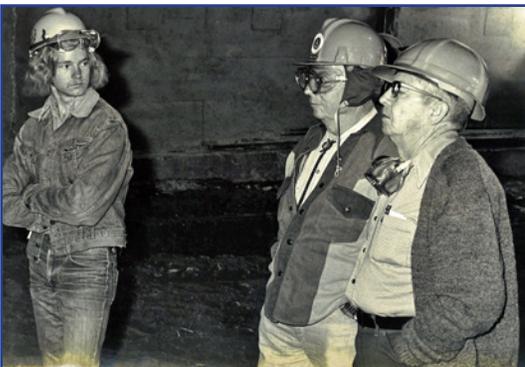
Final lining form and jumbo, with 1970s car for perspective.

(continued from page 1)

The design and construction of the second bore of the Eisenhower Tunnel was based on information obtained from the difficult experience of the first bore. In essence the tunnel included three well-defined and distinct zones:

1. A two and three drift tunnel support to be used on the east side (3266 ft.)
2. A multiple drifts support system in the middle (503 ft.)
3. A steel-supported horseshoe shape tunnel on the west side (4155 ft.)

The construction of the second bore of the Eisenhower Tunnel was a success



DRB Members Palmer King and Charles McGraw meet with a geologist.

in every sense of the word. The owner and contractor practiced partnering before it became fashionable. The DRB heard three disputes, owner-contractor relations were cordial throughout construction, and all parties were pleased at the end of the project. The final cost of the project, including many owner requested change orders, was approximately \$108 million.

The job was the first to use a formal DRB as part of the original contract documents, and I am convinced that this initial positive experience is the root of the eventual adoption of the DRB as a standard in the industry on most major civil construction contracts.

I was fortunate enough to be associated with the construction of the second bore of the Eisenhower Tunnel throughout its entire four-year duration. I joined the project as the Office Engineer and for the final two years had the privilege of being the Project Engineer.

Author Michael Gay, Sr. P.E. can be reached by email at michaelgsr@aol.com.

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Ethics in Today's World of DRBs

Request to DB from Financial Institution Holding Notes on Various Vehicles and Equipment Utilized on the Project



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Ethics Commentary or Question?

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The question posed at the end of the column in the previous volume of the Forum involves a request from a financial institution holding a note from the contractor on various equipment and vehicles being utilized on the project. The question assumes that the contractor has had previous serious financial difficulties with meeting its financial obligations, including meeting its payroll. The request from the president of the bank asks the Dispute Board (DB) for updates on the project schedule, DB hearings, and recommendations from the DB that additional money be paid to the contractor above the contract amounts.

This question came up in a discussion between a panel member and yours truly several years ago during the formulation of an Ethics Forum at a DRBF Annual Meeting & Conference. At the center of the issue is whether there are confidential or privacy issues, or expectation of same, with respect to the operations of a DB on a construction project. This question assumes that the project is a public – private one, so therefore there is an element of the project records being considered public and accessible under a freedom of information or “sunshine” law, as they are commonly called in the U.S. For purposes of this discussion, I will assume that those types of laws do apply here, but that the majority of this type of data will not be available until the end of the job, when all documentation and expenditures have concluded.

The Dispute Resolution Board Foundation’s Code of Ethics generally addresses the requirement of members’ impartiality and neutrality with respect to the parties to the contract, and the pronouncement to avoid the appearance of any impartiality or bias. These dictates are designed to ensure the credibility of the Dispute Board and its duty and ability to evaluate the actions of all parties from a completely neutral viewpoint. These Canons of Ethics also require full and ongoing disclosure of any relationship or interest that a member has or develops that might be viewed to jeopardize this neutrality. (Note: The DRBF’s Canons of Ethics are currently undergoing revision and will be the topic of examination and discussion in a future ethics column. All members are encouraged to comment on these revisions as the process draws to completion, and there will be more information forthcoming about this process.)

Regarding the question under discussion, Canon 3 offers some guidance, stating “[b]oard members shall not use information acquired during DRB activities ... or divulge any confidential information to others unless approved by the parties.” On its face, this language suggests that providing information as requested by the bank would controvert the meaning and the spirit of Canon 3. However, the question really turns on whether this type of information is or should be considered confidential.

Having mentioned earlier that the proj-



ect under discussion is a public one, the argument can be made that since this a public project, there is no expectation of privacy with respect to equipment, project schedule progress and milestones, or DB recommendations for payment. However, the potential insolvency of a contractor, in my view, is confidential in nature.

In essence, what the president of the bank is requesting from the DB is information that might impact the contractor's ability to pay on its note. Some might argue that this is public information and that the release of the information could be required under freedom of information statutes, there is no harm in doing so.

In my opinion if the DB releases this information, it enters the slippery slope of the role of a type of credit reporting agency. This is way beyond the scope of the DB's role as defined in the Three-Party Agreement and the project documents. The DB role is to serve as a neutral sounding board in real time during the life of the project, and to listen to the parties' presentations during hearings, and provide a thoughtful, informed recommendation as to the merits of the dispute in the effort to avoid large claims activity and process or litigation.

Moreover, it opens the door to further inquiry from similar institutions regarding the possibilities of future disputes, future payments and future progress reports. This is not the role of the DB, and in my opinion could only bring about negative consequences. For example, how neutral would the Board appear to the contractor if it advised the bank as to the questions posed? I would think that this might have a chilling effect on the contractor's

willingness to participate in DB activity.

Canon 3 states that confidential information might be divulged if approved by the parties. For the reasons cited above, my best advice to the DB in this case is politely decline to comment. Whatever information the bank wants from the contractor, should be provided by the contractor.

Please feel free to write in or call me if you have a different view. This column is intended to provide a discussion platform for members to discuss the issues that they face. If you have a question for discussion, please send it in and I will include it in a future column.

ETHICS: FOR NEXT TIME

Assume a Dispute Board is selected at the outset of a project and convenes to draft Operating Procedures. These include a description of the types of documents the DB wished to receive on a regular basis to keep apprised of job progress, issues and potential disputes. Assume that these Operating Procedures are approved by both parties. At the first regular DB meeting, the owner questions the volume of documents listed in the Operating Procedures and that the DB has requested. The owner has several objections including the DB may create problems where none existed and take the job documents out of context. From these and other comments, it is clear to the Board that the owner does not want a proactive DB that will engage in disputes avoidance.

What should the Dispute Board do?

19th Annual Meeting & Conference San Francisco, California

The DRBF's 19th Annual Meeting & Conference took place in San Francisco, California October 1-3, 2015. The event kicked off with educational workshops on Thursday for introductory and advanced level Dispute Board enthusiasts, followed by socializing and networking at a Welcome Reception on the 43rd floor of the hotel, offering spectacular views of the city.

The conference was opened by a keynote speech by Karla Sutliff, Chief Engineer and Deputy Director, Project Delivery for California Department of Transportation (Caltrans).

Session 1 dove into the owner's perspective, with a look at "Real-Time Avoidance and Resolution of Disputes." Led by Joe Gildner of Sound Transit, speakers from the transportation, university, and energy sectors shared their views on the Dispute Board process.

Bill Edgerton of McMillen Jacobs Associates led the discussion among four representatives from construction firms on their view of DRB operations.

After lunch, delegates split into two groups to explore "How to Write a Recommendation" tips for DRB practitioners, or "Nomination and Appointment of DRB Members" to explore best practice in appointment techniques.

DRBF Region 1 Past President Kurt Dettman chaired a session on the use of DRBs for Projects Using Alternative Delivery Methods such as CMGC, Design Build, and Public Private Partnerships. The first day ended with a look at the dispute avoidance process under FIDIC contracts, used in many countries around the world.

Many delegates participated in the optional Al Mathews Award dinner, filling the deck of the Hornblower Dinner Cruise (see p. 11). Guests were entertained not only by

the award presentation, but also by a special guest, Michael Gay, Sr. P.E., who shared stories from the first project to have a DRB, the Eisenhower Memorial Tunnel (see p. 1).

Saturday sessions covered diverse topics such as an overview of international projects led by Region 2 Past President Chris Miers, a panel discussion among transportation owners moderated by Region 1 President Eric Kerness, and a candid discussion about the DRB specification process chaired by Joe Keating (look for an article about this important topic in the next issue of the *Forum* newsletter). In addition, John Funghi and Michael Cash gave an overview of the San Francisco Metropolitan Transit Authority's Central Subway project, which some conference attendees had the opportunity to tour on Thursday prior to the conference.

Interested readers may access the presentations at the website:

www.drbfconferences.org

The DRBF is grateful to the conference planning committee members, including Joe Keating (chair), Bill Edgerton, Joe Gildner, Elizabeth Tippin, and Dennis O'Malley, with support from Region 1 Board members Kurt Dettman and Eric Kerness. In addition, the conference could not happen without the generous support of our sponsors: Corman Construction, Flatiron, Jacobs Associates, J.F. Shea Co, Inc., Kiewit, McDonough Bolyard Peck, Peckar & Abramson, Pegasus Global Holdings, Property Development Systems Australia, Revay and Associates, Salini Impregilo/S.A. Healy, Traylor Bros., and GcilA/P.S. Consulting/Watt, Tieder, Hoffar & Fitzgerald.

Graham Easton Receives AI Mathews Award of Excellence

Each year, the Dispute Resolution Board Foundation presents the prestigious AI Mathews Award to one or more DRBF members who have given exemplary service in advancing the use of the Dispute Resolution Board concepts and the DRBF. Nominations are solicited from DRBF membership and by the president of the Executive Board of Directors. The award is presented at the Gala Dinner hosted in conjunction with the DRBF Annual Meeting and Conference, held this year on the Hornblower Dinner Cruise in San Francisco, California.

Congratulations to this year's recipient, Graham Easton.

Graham Easton began his career in Australia as a construction engineer. He has lectured and published papers on many topics in construction engineering, contract administration, project management, construction claims and dispute resolution, and was co-author of "Civil Engineering Construction" published by McGraw-Hill in 1988.

Since 1984, Graham has specialised in the resolution of commercial disputes. Following completion of legal studies, he has practiced as an arbitrator, court-appointed referee and mediator/conciliator. He currently works as an arbitrator throughout Australia and internationally in Europe, Asia and the Pacific and has been appointed as the chairman of several ICC tribunals.

Graham has substantial experience as a Dispute Board Member on major infrastructure projects, and has a strong belief in the benefits of Dispute Boards for reducing conflict and improving outcomes for all parties.

Graham recently served as President of the DRBF Executive Board. Whilst President, he tirelessly travelled the world on behalf of the DRBF and attended numerous conferences, workshops and promotional events to advance the concept and best practice implementation of Dispute Boards. He has also been at the forefront of updating the DRBF Practice and Procedures Manual to current best practices and has guided development of many internal procedures to improve efficiency and elevate the DRBF's delivery of professional services.

The DRBF is grateful for Graham's contribution to the continuing development of the Dispute Board concept and through this award recognizes his contribution to the DRBF as an organization and the construction industry as a whole.



Graham Easton receives the AI Mathews Award from Doug Holen, President of the DRBF Executive Board of Directors.

Construction Contracts in Ukraine

By Roger Ribeiro and Yaryna Bakhovska

Author's Note: *There is a special need to improve the infrastructure throughout Ukraine. Based on recent experiences on five projects in the country, the Ukrainian construction industry is suffering and improvements in the understanding of contractual issues should be emphasized. The purpose of this article is to provide an insight into the current situation and the different types of claims and disputes in Ukraine.*

Due to the sensitive situation in the Eastern part of Ukraine, political matters will not be discussed in this article. However, an overview is included in order to show where most of the construction claims and disputes found their origin. Due to confidentiality, project information cannot be disclosed.



THE SITUATION IN UKRAINE

WAR CONFLICT

In November 2013, Ukraine was expected to sign an association agreement with the European Union. When ex-President Viktor Yanukovich stopped preparations for signing, it caused mass protests, known as the “Euromaidan” which later turned into “Revolution of dignity” demanding the resignation of the President, crucial reforms and signing of the association agreement. After four months of protests, which ended in the shooting of protesters, Yanukovich fled to Russia.

When the capital, Kiev, was still recovering, the epicenter of tension transferred to Crimea, where fully armed Russian soldiers took over the Supreme Council of Crimea and captured strategic sites across the peninsula.

Following the annexation of Crimea, demonstrations by pro-Russian groups began in the Donetsk and Luhansk regions of Ukraine escalating into an armed conflict between the Russian-backed separatist forces and the Ukrainian forces. Secretary General of Amnesty International Salil Shetty said that “satellite images, coupled with reports of Russian troops captured inside Ukraine and eyewitness accounts of Russian troops and

military vehicles rolling across the border leave no doubt that this is now an international armed conflict”¹. The conflict has also been classified as a “hybrid war” waged by Russia against Ukraine². Two years of armed conflict took more than 5.800 lives, according to the United Nations³.

BANKS

Since the beginning of 2014, 45 banks in Ukraine have gone bankrupt, according to the Deposit Guarantee Fund of Ukraine⁴. The annexation of Crimea was the first painful blow. Ukraine’s regulator has forbidden the country’s banks to operate on the peninsula and they were forced to remove some of its Crimean assets and sell the rest.

The Deposit Guarantee Fund argues that a massive insolvency of banks during 2014-2015 provoked light-fingered owners and managers of financial institutions, the lack of exports, falling domestic consumption, and higher productions cost in Ukraine.

Economists see other causes of mass “bank fall”. Independent expert Anatoly Drobizko believes that one of the reasons is a ban for banks to create reserves in foreign currency against foreign exchange assets. “That means that the loans are in foreign currency and reserves - in UAH, contrary to all international rules of accounting,” he writes in his blog for *Forbes* magazine.



CURRENCY

Protecting the currency after the global crisis of 2008 drained the central bank of Ukraine’s reserves, which tumbled from a high of \$40 billion in 2011 to about \$12 billion today⁵.

Beginning in 2014, the devaluation of Ukrainian Hryvnia was dramatic. On 7 February 2014, following political instability in Ukraine, the National Bank of Ukraine changed the hryvnia into a fluctuating/floating currency in an attempt to meet IMF requirements and to try to enforce a stable price for the currency in the Forex market⁶.

Figure 1

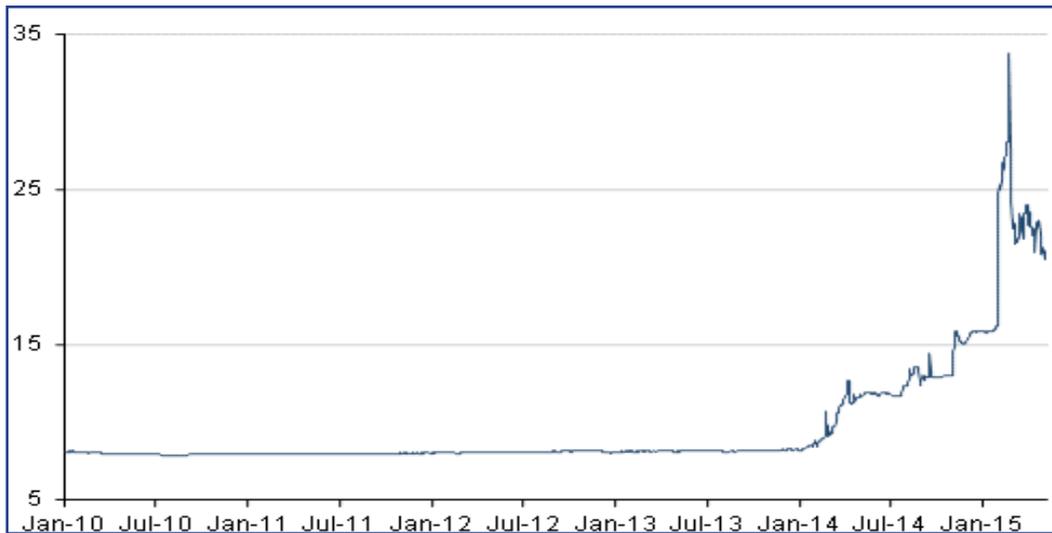


Figure 1 shows the exchange rate of Ukrainian hryvnia against US dollar. Note: Daily spot exchange rate of Ukrainian hryvnia (UAH) against U.S. dollar (USD).

Source: Thomson Reuters⁷.

Taking into account very difficult negotiations on the external debt restructuring, commitments to the International Monetary Fund (IMF), and hard economic conditions, the private equity firm Sigmableyzer forecasts the exchange rate to be around UAH 25/\$1 in the second half of the year unchanged⁸.

INFLATION

The inflation rate in Ukraine was recorded at 58.40% in May 2015. Inflation Rate in Ukraine previously averaged 36.37% from 1995 until 2015, reaching an all-time high of 530.30% in September 1995 and a record low of -1.20% in June 2012 as reported by the State Statistics Service of Ukraine. This increase in inflation was caused principally by a large increase in

Figure 2



Figure 2: <http://www.tradingeconomics.com/ukraine/inflation-cpi>



natural gas tariffs for households as agreed with the IMF. Inflation by the end of 2015 is now expected to reach 45%⁸.

FORMS OF CONSTRUCTION CONTRACTS

The Euro 2012 football championships offered a great opportunity for Ukraine to improve roads, stadiums, hotels, airports, and related infrastructure. Of particular interest is how construction contracts are moving forward despite the current situation in Ukraine described previously.

FIDIC Forms of Contracts (Red, Yellow and Pink books) are already in place for several construction projects. However, some concepts such as lump sums, the role of the engineer, and the Dispute Adjudication Board (DAB) are not well understood by some employers and project implementation units (PIU). It is an opportune time to implement training sessions for all construction projects financed by the development banks prior to the start of the works.

European Bank for Reconstruction & Development (EBRD) contracts for works projects and for supply and installation projects also have their place in Ukraine. Their consultants defined a strategy during the procurement process based on the Ukrainian procurement rules and the Procurement Policies and Rules for projects financed by the EBRD. Obviously, there is not a fundamental contradiction between the two procurement systems.

The very first Output- and Performance-based Road Contract (OPRC) was signed in 2013 and terminated in 2014. Due to the ongoing arbitration procedure, it is impossible to give more details as the parties chose this resolution forum for confidentiality reasons. A new contractor has been selected and the works are ongoing.

World Bank works contracts have been signed in roads, water supply and sewage

treatment of solid waste, and district heating. The choice of the different contracts that is given to the employers is definitely very large. However, this choice may be done by asking a few basic questions such as: What is the allocation of functions? Allocation of risks? Evaluation and payment structure? Dispute resolution mechanism?

It may happen that employers use the Standard Tender Documents and form of contract decided by the funding institution. However, the banks are not a party to the contract, and generally they do not accept legal responsibility for the adequacy of the contract forms.

Independent of the contract form, I have advised Ukrainian employers during tendering stage on the following:

- to ensure that the contract conditions are suitable and complete in respect of any particular contract and in accordance with the applicable law
- not to shift abusively their risks to the contractors nor to delete contractor's protection.

CONSTRUCTION DISPUTES

The author is involved in the following five projects in Ukraine, explained here to give insight on construction claims and disputes in the country.

1. Modernization of traction substations

The EBRD supply and installation contract has been concluded between the employer and the contractor to perform the modernization of 19 traction substations for the power supply of the electrical transport network as prescribed by the contract. The contract agreement was signed in September 2011, with the completion of the facilities to be attained within 18 months. To date, the contractor supplied and delivered on site around 65% of the equipment.

The advance payment, according to the contract agreement "Appendix 1 - Terms and Procedures of Payment", is for 20% of



the contract price for equipment and 20% of the contract price for installation works. For reasons related to the non-fulfillment of some conditions of the loan agreement by the employer and financing from the city budget, the employer could not receive the necessary funds to pay the advance payment.

Due to the financial situation, the beginning of contract implementation was delayed and pending until the advance payment was finally paid to the contractor in mid-2013, with the delay of 21 months (from October 2011 when advance payment guarantee was presented by the contractor). Despite this delay and normal increase in costs over almost two years, the contractor has agreed without delay to extend the validity of the advance payment security and start the execution of contract in good faith.

During the execution of the contract, due to the general situation in the country, the economic conditions of the contract significantly deteriorated, with rapid inflation and major economic and financial crisis in the country. The situation worsened when the Ukrainian bank, where the EBRD funds for the very contract were located, announced bankruptcy.

In October 2014, an increase of the contract price by more than 10% was discussed by both parties, but a few months later it was no longer within the time frame allowed for when the parties have to agree upon the conditions for an addendum to the contract.

In March 2015, the contractor proposed to introduce the price adjustment clause in the contract that would foresee the regular revision of the contract price based on currency exchange rate. The employer did not agree with this proposal and suggested agreeing upon a single adjustment of the contract price considering the significant and unforeseen change in economic conditions of the contract that happened mainly due to the delayed payments by the employer.

In April 2015, the contractor claimed for an increase of the contract of around 35%. After long discussions, the parties succeeded to reach an agreement. In the beginning of July 2015, the dispute was resolved by intensive negotiation and the parties agreed to one increase of the contract of around 30%. To date, the works on site are going slowly but it is expected that the works will be finalized by end of 2015.

It is worth noting that the EBRD staff has been providing support and advice to me during all the processes regarding increases of the contract price.

2. Rehabilitation of a tram depot

A FIDIC Red Book contract has been concluded between the employer and the contractor to perform the execution and completion of works related to rehabilitation of the tram depot. The works on site have commenced, but the contractor has not substantially performed all the works.

The nature of the case is: delays, change to the scope of the works, payment issues and termination of the contract.

Pursuant to Clause 20 of the particular conditions, the mechanism for disputes resolution is through a DAB and arbitration. Mediation has been undertaken by the parties' own initiative, to terminate the contract. Both parties (employer and contractor) decided that the disputes should not be settled by a DAB or an international arbitration. It is worth noting that only the FIDIC White Book form of contract has mediation provisions.

Pursuant to my recommendation as mediator, the parties agreed to amicably terminate the contract and sign one addendum which modified all the terms of the contract, including Clause 20.6 (Arbitration). In the presence of the parties' respective lawyers, I fulfilled my tasks in line with the parties' requests to act neutrally and impartially.



The Contractor and the Employer do not have to carry out their contractual obligations and duties under the contract anymore. The contractor has ceased to be liable for the care of the works performed and not performed from the date of the signature of the addendum. As of this date, the responsibility passed to the employer who has to launch a new tender based on existing site conditions.

The bank did not object to the termination of this contract and recognized that the parties found agreement in just a few days.

3. Construction of 3 tram lines

A FIDIC Red Book contract has been concluded between the Employer and the Contractor to perform the execution and completion of works related to the construction of a tram line. The works on site are going almost as per the latest revised contractor's programme. However, delays have been recorded due to differing site conditions, a change to the sequence of works, payment issues and design issues.

To date, 10 addendums to the contract and 4 variations orders have been agreed and signed by both parties.

The delays on the design are more than ever the most worrying ones, especially since the designer is lacking reactivity. It seems that the Engineer has informed the employer about those risks in order to promote their mitigation. The contractor has submitted its claims but the parties would negotiate and try to find one agreement.

If the parties will not settle the disputes, those disputes will be presented to a DAB, which is a good mechanism to resolve the case.

However, Clause 20.1 of the contract clearly states that the claims are submitted first to the engineer and he has 42 days to uphold or reject the claim, providing a full detailed justification for his decision. If the claim is

rejected by the engineer and the contractor insists to have a determination, it becomes a dispute and therefore it should be submitted to the DAB.

In Ukraine, there was a reluctance to use this form of dispute resolution, but the mechanism is simple and presents some advantages (see Figure 3 on page 17). The first step is the formation of the Board according to Clauses 20.2 and 20.3. The parties have to enter in a contract called "DAA" in order to fix the warranties, obligations, form and payment of DAB Members.

Under Clause 20.4, the DAB has 84 days to rule on a dispute, but it may propose a different deadline for the parties' approval if the referral or case is complex to analyze. The decision of the Board is binding and the parties (employer and contractor) are required to comply with it promptly, unless it is modified through a conciliation procedure or by an arbitration award. A party has 28 days to reject the decision by notifying the other party. If the parties agreed on the decision, it becomes final. The engineer may have to include the sums agreed on the Interim Payment Certificate or Final Payment Certificate as per Clause 14.

If a party does not accept the DAB's decision, the parties should attempt to resolve the issue amicably under Clause 20.6. If that fails, the dispute should then be resolved by arbitration which is conducted under the rules of arbitration of the International Chamber of Commerce (ICC) by a panel of one or three arbitrators in the language determined by the parties.

4. Construction of a Metro tunnel

The FIDIC Design Build Yellow Form of Contract is now in use on two Ukrainian major projects, the Beskyd tunnel and the Chernobyl new safe confinement. In addition, there is a two-stage tender for a large-scale contract with works scheduled to start in 2016.

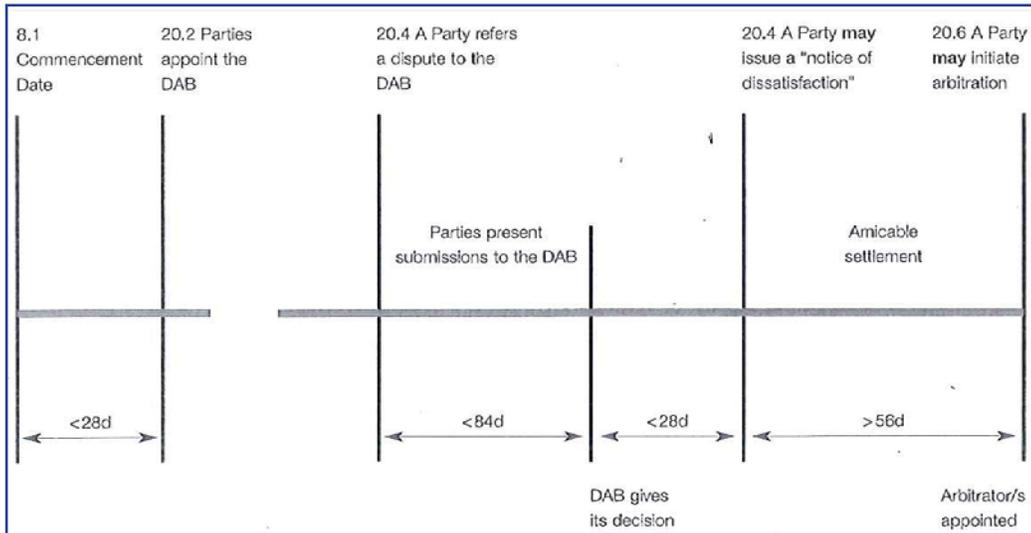


Figure 3: Typical sequence of clause 20 under FIDIC Red book edition 1999⁹

First, the lump sum approach has not been clearly understood by the employer and the PIU. The main point of the discussion was that the measurement of quantities performed by the contractor will be done according to Bill of Quantities (BOQ) which are quantities and unit rates provided by the contractor further to his design.

If the quantities performed by the contractor increase or decrease for any item of BOQ, he should be paid within the limit of the total amount of the BOQ for such items (unless there are exceptions such as variations, conditions that could not have been foreseen at the stage of working drawings, etc.)

Secondly, the employer flatly refused the use of a DAB arguing the costs and for reasons that show a misunderstanding of the role and obligations of a DAB.

The author spent hours explaining the following:

- The nature, rights and obligations of a DAB
- The limitations of a DAB's power and jurisdiction
- The method of initiating and processing a DAB

The employer found it opportune to give power to the engineer to have the role and obligations of the DAB. For obvious rea-

sons of independence and impartiality, this could not be accepted.

A "solution" was finally found to include the name of a DAB in the Appendix to Tender and Particular Conditions of Contract, and insert his CV in the tender document. The bank supports this idea to include the name of one independent expert and partially finance the DAB's costs. Lately a provision has been included giving rights for the tenderer to propose another candidate to act as a sole member DAB, should he reject the candidate proposed by the employer.

In light with the above, it is expected that a DAB will be recognized by the contractor; otherwise, it will be necessary for the parties to appoint another DAB.

5. Replacement of transmission lines in a district heating project

The FIDIC Pink Form of Contract 2010 with particular conditions has been used for this project, and works were planned to start in September 2015.

As stated on the EBRD web page, clients should use the Standard Tender Documents (STD) and form of contract appropriate to the objectives and circumstances of the project. The bank is not a party to the contract and does not accept legal responsibility for the adequacy of the contract forms contained



in these documents. Clients are therefore advised to ensure that the contract conditions are suitable and complete in respect of any particular contract.

Also, the EBRD supports the use of the General Conditions of the MDB Pink Book 2010. They are not mandatory and other internationally recognized forms of contracts may also be used.

Clause 20.6 which is related to Arbitration of General Conditions of MDB Pink Book 2010 can be the subject of misunderstanding and needs revision. It is not clear why the clause of the FIDIC Gold Book published two years earlier has not been used during the elaboration of this form of contract.

Under this clause, arbitration shall be conducted as follows:

- (a) if the contract is with foreign contractors,
- (b) if the contract is with domestic contractors, arbitration with proceedings conducted in accordance with the laws of the employer's country.

In Ukraine, there is a need for foreign companies doing business to be registered. The statutory time limits for registration of the representative office in Ukraine is 60 working days from the date of submission of required documents (Regulations: Law of Ukraine 959-12 'On foreign economic activity', Ministry of Economy 'Instruction on registration of representative offices of the foreign economic activity agents in Ukraine'). Moreover, statutory time limits for license from the State Architectural Construction Inspection is 27 working days from the date of submission of required documents. The procedures must follow one another and the overall time can be of at least 88 working days (or at least 124 calendar days).

Once companies are able to present the evidence of the registered representation and obtained license together with the signed contract agreement within the time speci-

fied, it is unclear if the companies have to be considered as "Foreign" or "Domestic" regarding Clause 20.6 (Arbitration).

FUTURE CHALLENGES

First, future confidence will be improved if strong reforms are introduced in Ukraine. War conflict in the east can both be seen as a tremendous obstacle or simply 'tough conditions', in any case it cannot be an excuse for postponing reforms. "Exogenous shocks undermined the efforts of authorities to stabilize the economy and jumpstart growth in 2014," said Qimiao Fan, World Bank Country Director for Belarus, Moldova and Ukraine. "Faster and deeper reforms are the best antidote to these exogenous shocks confronting Ukraine."¹⁰

Ukrainian Laws are under revision and talks with the European Union are ongoing. Ukrainians definitely expect a positive impact on currency, inflation and the stability of banks.

Construction projects are affected by the current situation and a few large European contractors have already declined to participate in tenders, while Chinese companies are still interested in the Ukrainian construction market.

CONCLUSION

Ukrainians and politicians have a challenge to reform their country in order to stabilize the economy and reassure investors, foreign companies and financial institutions. There is a special need to improve infrastructure (roads, motorways, railway, tram lines, and ports), and water supply, sewage treatment of solid waste, and district heating in numerous cities. Despite the current situation in Greece, financial institutions and banks are not reluctant to support this eastern European country.

In light of the above five projects, it is my opinion that various forms for dispute res-



olution can be used. The DAB is a good mechanism, and mediation presents a great future worldwide. DAB practitioners and mediators should play a better role in training and informing institutions, employers and PIU on their respective duties, obligations and authority.

In my opinion, the banks should not finance projects if the employer and contractor fails to appoint the DAB. The DAB in an Ad Hoc form as per the Design & Build FIDIC Yellow Form of Contract should definitely be part of the past and replaced with the standing DAB.

Moreover, it has become obvious that the arbitration clause of the FIDIC Pink Book 2010 should be amended, in particular the

conditions in order to avoid misleading problems with foreign and domestic contractors.

In conclusion, the financial support from the European Union, EBRD, EIB, and World Bank for all these works has been important, and without them it would be difficult to achieve actual results to such important challenges.

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References:

- 1 <https://www.amnesty.org/en/press-releases/2014/09/ukraine-mounting-evidence-war-crimes-and-russian-involvement/>
- 2 http://www.japantimes.co.jp/opinion/2015/03/03/commentary/world-commentary/hybrid-war-the-real-reason-fighting-stopped-in-ukraine/#.VXbRKs_tmko
- 3 <http://ua.krymr.com/archive/news-uk/20150201/16928/16928.html?id=26865598>
- 4 <http://www.pravda.com.ua/inozmi/deutsche-welle/2015/04/2/7063450/>
- 5 <http://www.economist.com/blogs/freeexchange/2014/03/ukraine-and-russia>
- 6 http://www.bank.gov.ua/control/uk/publish/article?art_id=5454079&cat_id=55838
- 7 <http://www.focus-economics.com/news/ukraine/exchange-rate/ukrainian-hryvnia-gains-some-lost-ground-may-shows-signs-stabilization>
- 8 <http://www.kyivpost.com/content/business/sigmableyzer-report-on-ukraines-macroeconomic-situation-in-may-390333.html>
- 9 Extract from Fidic Red book edition 1999
- 10 <http://www.worldbank.org/en/news/press-release/2015/04/29/reforms-are-the-best-antidote-to-exogenous-shocks-confronting-ukraine-says-world-bank>



DRBF Signs Cooperation Agreement with the Association for the Advancement of Cost Engineers International

The DRBF signed a cooperation agreement with the Association for the Advancement of Cost Engineers International (AACE) on 29 September 2015 in San Francisco. AACE is a nonprofit organization dedicated to improving professional skills in cost management and scheduling. With over 9,000 members worldwide, approximately half its membership are international and like the DRBF its growth is being driven by the international markets. Through its Technical Committee the AACE is a leading producer of practical papers and Recommended Practices documents, which are likely to be familiar to many DB professionals including the RP 29R-03 on Forensic Scheduling Analysis. AACE offers a range of professional certifications in cost engineering, estimating and scheduling skills at junior and senior levels, plus certifications in risk management earned value management, and, finally of the most interest for DRBF members, a certificate in forensic claims analysis, which covers damages calculations, forensic scheduling analysis and legal and contractual knowledge.

Dick Appuhn, President-Elect of the DRBF Executive Board of Directors, and Julie Owen, President of the AACE, recognized the potential for synergy between the two organizations during the signing ceremony in San Francisco. Two areas of cooperation are evident. The skills which the AACE promotes are obviously key tools for any Dispute Board member and the educational materials published by the AACE are often cited in Dispute Board proceedings. From the AACE side, many of their senior members have built careers in contract

management and are potential new Dispute Board members and promoters for the DB concept. In other words, greater cross membership and cross pollination of skills can help the DRBF grow, and our members input into the publications of the AACE can help improve their knowledge base. Two such projects will be studied by the DRBF and AACE next year. The first will be consultation with the AACE with a view to better integrating international practices into AACE's Certified Forensic Claims Consultant Certificate program. The second possible collaboration will be the development of a "Recommended Practice" for the use of Dispute Boards. Through AACE's extensive membership base, both of these projects have the potential of raising awareness of Dispute Boards in a broad range of industries, which brings us to the second area of cooperation – joint events and leveraging of our mutual international structures.

The idea for a cooperation agreement with the AACE was in fact born out of a successful joint event held in Sao Paulo in August 2014. Through the initiative of DRBF and AACE member Aldo Mattos, DRBF Country Representative for Brazil Gilberto Vaz, and Region 2 Director Julio Bueno, the DRBF was invited to be an affiliate in the 1st International Seminar on Dispute Boards organized jointly by the Camara de Mediacao e Arbitragem (Sao Paulo), the Camara de Arbitragem Empresarial - Brazil and AACE. This event drew over 150 delegates and spawned the DRBF's Rio Olympics initiative to implement DBs and train potential members, led by DRBF member Jerry Brodsky and DRBF Region 2 Past-



President Chris Miers. The two organizations are planning to take advantage of synergies in other parts of the world as our geographic reach is complementary. The AACE has a greater presence in India than the DRBF's, for example, whereas the DRBF's organization in Australia is deeper. Possible opportunities exist to leverage our organizations in Africa and China also. Finally, opportunities for the DRBF to reach long targeted sectors such as the Oil & Gas industry may be possible with the help of the AACE, who have a strong foothold in Oil & Gas both in the US and abroad, especially in the Middle East. Despite the current depression in oil prices and the slashing of capital expenditure, the downturn may in fact



present an opportunity of the DRBF as oil firms are starting to show interest in the DB process as a way of controlling costs.

We welcome the AACE to the DRBF family and expect to see more AACE members attending our conferences in 2016. Likewise, for those of you unfamiliar with their work, we encourage you to visit the AACE website at www.aacei.org. We are sure you will find many interesting papers and AACE's conferences are highly instructive.



AACE President Julie Owen and DRBF President-Elect Dick Appuhn sign the cooperation agreement in San Francisco.

Country Representative Report: Indonesia

On September 22, 2015 there was a national seminar offered in Indonesia: “Dispute Resolution Through Arbitration.” The intention was to disseminate the use of non-litigation dispute resolution and show how Alternative Dispute Resolution can be a proven and effective solution in dispute resolution. Over 300 attended, representing contractors, consultants, employers, government officials, academics and lawyers.

Speakers included:

- Dr. Ir. Sarwono Hardjomuljadi, MT, MH (DRBF Country Representative for Indonesia),
- Gerlando Butera (DRBF Country Representative for Singapore),
- Arsul Sani, SH, M.Si (3rd Commision, Indonesian People’s Representative Council),
- Prof. Hikmahanto Juwana, SH, LLM, PhD (International Law Expert)
- Abdul Rahman Saleh, SH, MH (Former Prosecutor General of Indonesia)
- Prof. Dr. Hadiman, SpKO, SH, MBA, Msc (Police Inspector General, retired)
- Ir. Agus Rahardjo, MSM (Candidate of head of The Corruption Eradication Commission - KPK).

The seminar was opened by H.E. Dr. Ir. Mochamad Basoeki Hadimoeljono, MSc, the Minister of Public Works and Public Housing, Republic of Indonesia, and a speech from Dr. H. Mohammad Saleh, SH, MH, Vice Chief Justice of Supreme Court of Republic of Indonesia.



Left to right: Abdul Rahman Saleh, Sarwono Hardjomuljadi, Firman Wijaya, Gerlando Butera, and Arsul Sani.

On October 9, 2015 another national seminar was held, titled “Alternative Dispute Resolution.” The seminar intended to disseminate the use of Dispute Boards as a proven and effective solution in Dispute Resolution cases.

It was attended by over 200 construction, government, and academic representatives. Speakers included:



- Dr. Ir. Sarwono Hardjomuljadi, MT, MH (DRBF Country Representative for Indonesia),
- Geoff Smith (DRBF Bank Liaison Committee Chair and member of a Dispute Board for MRT Indonesia)
- Volker Jurowich (Past President of DRBF and member of the Dispute Board for MRT Indonesia)

The seminar was opened by Ministry of Public Works and Public Housing, Director General for Construction Development Agency: Ir. Panani Kesai, MSc.



Left to right: Panani Kesai, Firman Wijaya, Volker Jurowich, Geoff Smith, and Sarwono Hardjomuljadi.

Lastly, on October 15, 2015 Sarwono and other distinguished gentlemen representing consultant, contractor, government officials, academics and lawyers were invited by the President of Republic Indonesia Mr. Joko Widodo to give some input on how to create harmonization in Lex Specialis Construction Regulation, including the dispute resolution regulation, which has the Dispute Board as one of the main criterion.



Left to right: Sarwono Hardjomuljadi, Djoko Karmiadji, Bahtiar Ujung, Rendi Lamajido, HE Joko Widodo, Yusid Toyib, Tri Wijayanto, Darmatyanto, Saleh Husin, Poltak Situmorang, and Khrisna Pribadi

DRBF Representative for Indonesia Sarwono Hardjomuljadi can be reached by email at sarwonohm2@yahoo.co.id.



DRBF Regional Conference & Workshops Istanbul, Turkey

The DRBF held the first Regional Conference on Dispute Boards in Istanbul, Turkey on 29-30 November 2015. More than 110 delegates gathered, participating from many sectors within Turkey as well as the wider region, including Qatar, Georgia, Romania, Bulgaria, Kazakhstan and even further from continental Europe, UK, Africa and North America.

Delegates split into two groups on the first day, with the majority participating in a DB Administration & Practice Workshop led by DRBF Region 2 Director of Training Simon Fegen, Region 2 Board Member Mark Entwistle, and experienced trainer Malcolm Kelly with the support of Yasemin Çetinel, DRBF Country Representative for Turkey. During the first half of the day, history and background of Dispute Boards, selection and appointment of DB members, dispute avoidance and Dispute Board Agreements were discussed. The training continued with a Mock Presentation and Enforcement of Dispute Board decisions in the second half.

An Advanced Workshop was also offered for delegates who have already taken a DRBF Workshop and/or who are currently serving on Dispute Boards as a member or Chair. Within the scope of the Advanced Workshop, the delegates had a lively day covering the practicalities and the issues that often arise in the DB process. DRBF Region 2 President Andy Griffiths, DRBF Past President Paul Taggart and DRBF Region 2 Treasurer Murray Armes challenged delegates with interactive exercises and discussions.

Ömür Atılğan, Head of Foreign Investment and Services Directorate of Ministry of Economy delivered a keynote address to the conference on day two. “Legislative Developments and Overcoming Legal Challenges in the Region” was also discussed by panelists representing Qatar, Georgia, Turkey, Bulgaria and Romania.

Conference sessions explored diverse topics such as “Implementing Dispute Boards on Various Contract Models (EPC, PPP and Oil & Gas)” and “The New ICC Dispute Board Rules.” There was also a presentation on “The Owner’s Experience with Dispute Boards.” The day ended with a contractor’s panel that welcomed distinguished speakers from the construction sector. Delegates enjoyed a Cocktail Reception at the close of the conference.

The DRBF is grateful for the generous support of sponsors: Quantum Global Solutions, MC Modern Construction Consulting, Techno Engineering & Associates, Beale & Company, Gcila Global Construction and Infrastructure Legal Alliance, GIBB International, ICM Consulting, and Pinsent Masons. The conference was also supported by Arbitral Women, Istanbul Bilgi University, Istanbul Sehir University, Turkish Bulgarian Construction Chamber, CCI France - Turquie, Foreign Economic Relations Board, European International Contractors, ICC, FIEC, Milan Chamber of Arbitration, Turkish Contractors Association and Bulgarian Society of Construction Law.

The first DRBF Regional Conference & Workshops in Istanbul received many good comments of appreciation from conference delegates and enhanced knowledge of DBs for future projects in the region.

Interested readers may access the presentations at the website:

www.drbfconferences.org

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DRBF Region 1 Membership Committee Listens to Member Input on DRBF Services

To share your ideas and input with the DRBF Region 1 Membership Committee, contact any of the members:

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The Region 1 Membership Committee surveyed Region 1 members (U.S. and Canada) in mid-2015 in order to get feedback on what the membership felt was working well and what was not working well or could be added to DRBF membership services. A total of 74 responses were received, representing about one quarter of the Region 1 membership. Responses covered a broad range from “most useful” to “least useful,” and members provided suggested actions to take on several issues. Main findings from the survey are shared here, and potential options suggested to address concerns and ensure that the DRBF is doing all it can to maximize the benefits of DRBF membership.

The survey asked about specific services provided to members, with the following results:

Most Useful = Training Workshops

Above Average = Conferences

Average = Region 1 eNewsletter, the quarterly Forum newsletter, options to serve on DRBF committees, and the members section of the website

Not Applicable = Local members meetings

Comments to this question stressed the need for more DRBF training workshops on procedural and operational issues of the DRB process, and a focus on the formation of local Chapters. Feedback also showed that several members feel that the DRBF membership services are good and do not need changes (“if it ain’t broke, don’t fix it!”).

When asked about specific services that should be expanded, the response was:

60% Local Meetings

41% Workshops

40% Regional Conferences

19% Communications with members

Other ideas raised include expanding “best practice” training for DRB users, technical and procedural training for practitioners, improving the website, and finding ways to expand opportunities to serve on DRBs for new and experienced DRB practitioners.

Looking Ahead: Applying Feedback

It is clear from the responses and comments offered by the responders that members want more of what the DRBF provides, with the expansion of services primarily in the training and local meeting offerings, as well as outreach to users to expand opportunities to serve on DRBs.

Some future efforts could include:

1. Educate on best practice in the dispute avoidance and resolution field, as well as the technical requirements and performance demands on DRB practitioners.
2. Promote alternative Board member selection procedures.
3. Expand the website to include a library of resources and articles on Dispute Board practice, and enhance the functionality of the member resume database to make it more useful to party members seeking DRB practitioners. Educate members and users on these available resources.

The Region 1 Membership Committee’s message to our members is that “your voice has been heard.” In the upcoming year, the Region 1 Board will take steps to address your concerns and suggestions. Our goal is to have a vibrant and successful organization that accomplishes the mission of promoting the best use of DRBs, and also delivers value-added services to its members.



DRBF 16th Annual Meeting & Conference

May 11-13, 2016

Grand Hyatt Hotel Santiago, Chile

The DRBF 16th Annual International Conference attracts top Dispute Board practitioners working worldwide, including employers, funding institutions, contractors, legal professionals and consultants all active in alternative dispute resolution. In 2016, the conference will be hosted for the first time in Chile.

Day one offers full-day interactive training, with an introductory-level workshop for those new to the process, and an advanced-level workshop for experienced Dispute Board practitioners. The two-day conference features engaging presentations and lively panel discussions about the latest developments and issues facing the alternative dispute resolution community worldwide, with an emphasis on building trust and collaboration for effective projects. Simultaneous translation available (English - Spanish).

- May 11 **Dispute Board Workshops** - Full-day Administration & Practice workshop and an advanced level workshop for experienced users and practitioners. Earn continuing education credits!
- May 12 & 13 **Annual Conference** - Presentations and panel discussions on the latest developments in Dispute Board application.
- May 12 **Gala Dinner** - Enjoy socializing with conference delegates, speakers and guests at the popular Gala Dinner. Enjoy breathtaking views of the city from Vista Santiago on Cerro San Cristobal. Not to be missed!



DRBF Forum

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

Upcoming DRBF Events

February 25 - 26, 2016

DRBF Regional Conference & Workshops
Livingstone, Zambia

May 11 - 13, 2016

16th Annual DRBF International Conference
Santiago, Chile

June 3, 2016

DRBF Northwest Regional Conference
Seattle, Washington, USA

September 22 - 24, 2016

20th Annual Meeting & Conference
Washington, DC, USA

Complete details at www.drb.org