



Forum

VOLUME 10, ISSUE 4

NOVEMBER 2006

“END OF THE CONTRACT” CLAIMS: TIPS FOR HANDLING COMPLEX CLAIMS BEFORE DRBs



By Kurt Dettman

In these claims the stakes are higher, the parties are more polarized in their positions, and the DRB’s case management and decisional challenges are more difficult.

DRBs generally are set up to handle “typical” construction disputes that arise during the course of a project. Less typically, DRBs are asked to decide complex “end of the contract” delay, impact and

inefficiency claims. In these claims the stakes are higher, the parties are more polarized in their positions, and the DRB’s case management and decisional challenges are more difficult. This article explores some of the considerations that DRBs need to take into account in handling these complex claims.

Complex Claims

DRBs are established for, and are well-equipped to handle, stand alone construction disputes over discrete issues or claims. These “typical” claims include whether certain work is an extra, whether a particular delay event is the responsibility of the owner or the contractor, and whether particular directed work fully compensates the contractor. Sometimes, however, contractors bring claims at the end of the contract involving literally hundreds of claims

and issues, hundreds of delay days, and tens of millions of dollars in claimed cost overruns. Such claims usually include all of the following elements:

- delay (extended field and general conditions)
- constructive acceleration
- impact/inefficiency
- material (vs. incidental) owner directed work
- design related issues
- cardinal change claims

Contractors may claim, for example, that the cumulative impact of small changes (the “death by a thousand cuts” claim) delayed the work or made the contractor less efficient than planned. Such claims often involve hundreds of issues and events that give rise to an overall impact claim. Contractors also may claim delays arising from multiple critical and subcritical paths that shifted numerous times during the course of the project. Finally, there may be significant (and equally complex) subcontractor claims that are embedded in a contractor’s overall claim.

(continued on page 11)

In this issue of the Forum	
TIPS FOR HANDLING COMPLEX CLAIMS BEFORE DRBs	1
ANNUAL MEETING AND CONFERENCE REPORT	4
SPOTLIGHT ON THE DRBF’S REPRESENTATIVE IN ROMANIA: ALINA OPREA	8
DISPUTE BOARD MEMBER PUPILAGE	14
THE DUTCH DRB RULES	17
DRBF TOUR OF SOUTH EAST ASIA	19



President's Page

As I assume the role of President of the DRBF I am excited about the opportunities that stand before us in this our 10th Anniversary year of the Foundation. I found, however, that I could not easily dismiss the constant smile on the face of our departing President, Hal McKittrick, as he handed over the reins at our Annual Meeting in Orlando. Hal successfully handled numerous issues with boundless energy and seemingly effortless demeanor over the past year and we owe him a great expression of thanks. I will try to fill his shoes as best I can.

I also want to express our appreciation for the time and effort expended by our departing Board members Armando Araujo, Bill Edgerton and Gordon Jaynes over the past several years. Their contributions were key to the successes we have enjoyed and I trust that they will continue to be active in the DRBF in the years to come. Following up on that, I commend Jack Woolf and his nominating committee for the fine individuals that they convinced to give of their time and energy as new Officers and Directors. The slate of candidates was voted on by the general membership via e-mail and all were elected, bringing us Gwyn Owen as the new President-Elect and new Directors: James Brady, Roger Brown, Volker Jurowich, Kerry Lawrence and John Madden.

The 2006 Annual Meeting was a huge success with over 100 attendees, reflecting a positive reaction to the outward looking focus of the conference on topics that may be of particular value to the users and members of DRBs. One of the topics addressed by many of the speakers is the distinct advantage that DRBs provide in dispute avoidance over all other ADR (Alternate Dispute Resolution) methods. No other process enables the resolution body to stay abreast of project developments on a contemporaneous basis, to build rapport and confidence between the parties and the Board members, nor the opportunity to explore possible solutions to disagreements with experienced, knowledgeable and unbiased individuals before those disagreements become full blown disputes. Even our name, Dispute Resolution Board Foundation, fails to identify this service that has been recognized by users as so invaluable. I hope that in the coming years we will find a way to evaluate and emphasize this benefit to potential users.

Another issue that is becoming increasingly important and was raised in several of the conference discussions and presentations is the need for greater numbers of qualified Board members, throughout the US and abroad, and a means for training and identifying such individuals. In the coming months the DRBF will take several steps to assist in addressing this need including: the identification and training of volunteer regional co-trainers to assist our executive director with DRBF workshops; pursue a mentoring program that would allow interested and qualified individuals to sit in on DRB meetings on existing projects; and develop publications of individual DRBF member condensed resumes (no endorsement by the DRBF) that would be available (for a fee) to potential DRB users. In the same vein, Bernard Becq (World Bank Executive and DRBF Director) and I agreed that the DRBF would provide an appropriate training workshop for World Bank managing representatives throughout the world when those individuals travel to Washington, DC next October or November for their bi-annual meeting.

The Board of Directors recently accepted a vision for directing the DRBF's growth over the next ten years. The overall goal is to enable the Foundation to be flexible and proactive in serving the needs of DRB practitioners on a local, regional, national and international basis. I also had numerous discussions with our incoming President Elect, Gwyn Owen, which confirmed our mutual desire, objectives and steps forward in advancing the DRBF organization on a world wide basis in general agreement with the newly adopted plan.

Finally, in accordance with the 10 year plan, it was agreed that the DRBF Executive Committee will manage the regular affairs of the DRBF through monthly conference calls, backed by quarterly meetings of the entire Board of Directors (2 conference calls and 2 face to face meetings). I look forward to working with the Board of Directors, DRBF Committees and the general membership in implementing our new efforts and objectives in advancing the DRB process and the Foundation this coming year. As a truly volunteer organization, we need the assistance of the general membership in accomplishing these objectives and I urge you to contact me with your comments, suggestions and desire to participate.

Sincerely,

DRBF Board of Directors

**THE DISPUTE
RESOLUTION BOARD
FOUNDATION**

OFFICERS

Peter M. Douglass
President

Gwyn Owen
President Elect

Harold V. McKittrick, P.E.
Past President

William B. Baker P.E.
Secretary

James P. Donaldson
Treasurer

DIRECTORS

Romano Allione
Arese, Italy

Bernard Becq
Washington, DC

James J. Brady
Charleston, SC

Roger Brown
Portland, OR

J.L. (Jack) Feller
Grass Valley, California

Volker Jurowich
Stuttgart, Germany

Kerry C. Lawrence
Bellevue, WA

John P. Madden
New York, NY and
Dublin, Ireland

John C. Norton, P.E.
Tampa, Florida

Marianne C. Ramey
Fairfax Station, Virginia

Robert Smith, P.E., Esq.
Madison, Wisconsin

Peter H.J. Chapman
Surrey, United Kingdom

Daniel F. Meyer
Lake Forest, Illinois

Jack J. Woolf
Charlotte, North Carolina

The DRBF Board of Directors met by conference call on August 11 and September 8, 2006, and on October 6, 2006 in Orlando. A complete review of the discussions and actions taken can be found on the DRBF web site. Following is a brief overview of the actions taken:

- A Ten Year Plan has been proposed and approved by the Board. The plan covers restructuring to allow for anticipated changes as the DRBF expands globally.
- Revisions to the DRBF *Practices and Procedures Manual* will be uploaded to the web site on January 1. There will be a summary of the notable changes included.
- A print version of the Member Resume Database will be created and made available to DRB users for a fee.
- Co-trainers have been trained in some regions, and the Education and Training Committee is identifying and training additional support throughout the U.S.

All DRBF members are encouraged to read the summary minutes and submit any comments or suggestions to the president of the Board, Pete Douglass. The Board's meeting schedule can be found on the Calendar of Events on the DRBF web site.

How to Access the Board of Directors Meeting Minutes Summary:

- Go to www.drb.org
- Login using the **Member Login** button
- Click on **DRBF Board of Directors**

WELCOME TO NEW DRBF MEMBERS

Mohammed I. Chaudhry, P.E.
Volkert Construction Service
Orlando, FL USA

Marcio Jaha Chede
Sao Paulo, SP BRAZIL

David J. Clarke
County of San Mateo
Redwood City, CA USA

A. van Dam
Van Dam Mediation Consultant
Bilthoven, NETHERLANDS

David W. Earle, LPC
Baton Rouge, LA USA

Edward Gaughan
Duesseldorf, GERMANY

Donald E. Hambidge, P.E.
City of Treasure Island
Treasure Island, FL USA

Maher Hazine
City of Peoria
Peoria, AZ USA

Jan E. Hellings
Headley, Berkshire UK

Moneer Khalaf
CCC
Cairo, EGYPT

Edward M. Macias
Alamo, CA USA

Jason P. Matechak
Reed Smith
Washington, DC USA

Jeffrey McCammon
Louis Berger
Toronto, ONT CANADA

J. Lynn McDonald
Conflict Resolution Services
Humble, TX USA

Joseph C. Melino
San Jose, CA USA

Robert G. Morphonios
Weston, FL USA

Yong Mu
Kunming Water Supply Project
Kunming, Yunnan CHINA

Gerald William Murphy
Murphy Consulting LLC
Phoenix, AZ USA

Alina Valentina Oprea
RNCNMR
Bucharest, ROMANIA

Bogdan Oprea
Louis Berger
Bucharest, ROMANIA

Sagar Pandey
S2 Engineering, Inc.
Rancho Cucamonga, CA USA

Aristide Poggio
Craiova, ROMANIA

Marco Ravelli
AM Engineering
Craiova, ROMANIA

Kenneth A. Reed
Ogden, UT USA

Thomas J. Roy, PE
The Metropolitan District
Hartford, CT USA

Ines de San Martin
Buenos Aires, ARGENTINA

George W. Seel, P.E.
Winter Park, FL USA

Robert Simmons
Singapore, SINGAPORE

Timothy Stark
Stark Consultants, Inc.
Urbana, IL USA

Srdjan Topalovic
Belgrade, SERBIA

Hongwei Zhao
Zhengzhou, Henan CHINA

2006 Annual Meeting & Conference

By Jack Norton

The annual meeting started off on Friday morning for 21 people who boarded a bus, destination: Kennedy Space Center. The "NASA Up Close Tour" began with the older area where the Mercury and Gemini manned space craft were launched. The whole Kennedy complex is a Federal wild-life preserve and we were treated to sightings of American Bald Eagles, their nests, and numerous alligators as the tour bus traveled within the complex.

The tour took us to within approximately a mile of the shuttle launch pad where Atlantis had been launched a couple of weeks earlier. No one is allowed within three miles of the shuttle launch pad during the firing of the rockets and solid fuel boosters because of the potential for severe damage if something goes wrong. This is about the same as for a small nuclear blast. We were shown the vertical assembly building, originally built to assemble the Saturn rockets that lifted all the Apollo missions, but now used to assemble the shuttle and mate it with the liquid fuel tank and the two solid fuel rockets. Another highlight was viewing the gigantic crawler transporters that move the shuttle out to the pad.

The final stop was the Apollo/Saturn V center, and for me personally this was the highlight of the trip. We saw two short movies, the second one ending with the launch of a Saturn V rocket and Apollo capsule mounted on top. At that point we moved into the huge building that houses a complete Saturn V rocket suspended overhead. None of the pictures or TV you have seen will ever prepare you for the actual size of the Saturn V rocket.

The Saturday program began with a presentation on how Florida is using the DRB process and the success that they have had with it from Ananth Prasad, chief engineer for the Florida Department of Transportation. The following presentation featured a distinguished panel of DOT representatives from around the country about their DRB

programs. Megan Blackford of Ohio DOT suggested that all her DRBs would be best served by having an attorney as the DRB Chair. This brought about a number of comments to her afterwards about the advisability of this idea, and she addressed those concerns and ODOT's perspective later in the day.

Next up on the program was a discussion of DRBs in California, Florida and Washington by a panel of distinguished DRB members, Jack Feller from California, John Duke from Florida and John Beyer from Washington. These three individuals have also had experience on DRB's in other states including Idaho, South Carolina, and Massachusetts to name a few.

Natalie Armstrong of Golden Media gave some great pointers on marketing, her main theme being that you need to make DRB users aware that you are out there ready to serve. Some suggestions were get a web site, visit potential users and sell them the DRB process, and don't be a shrinking violet when it comes to letting people know you would like to be on a DRB.

During lunch Dr. Tom Stipanowich gave the keynote address, a discussion of "Managing Conflict in Real Time." Following lunch we had a discussion of potential cost savings on projects with DRBs by Dr. Ralph Ellis of the University of Florida, Carol Menassa of the University of Illinois, Urbana campus, and Kathleen Harmon of Harmon/York & Associates. Ms. Menassa provided some very interesting information concerning the potential for cost savings on construction projects and which projects appeared to have the best record of settling disputes. Dr. Ellis showed how the University of Florida decided who was best suited for construction courses and gave information concerning the difference in additional time and money between projects with DRBs as compared to projects without DRBs gained from his study of a three year period during which Florida had both types of projects going concurrently. Dr. Harmon gave us information from her research into the DRBs she had and was still studying.

Next we had Mr. Larry Lowland (aka Rammy

Forum Editor: Ann McGough

Editorial and subscription address:
Dispute Resolution Board Foundation,
19550 International Blvd. So., Suite 314,
Seattle, WA 98188
Phone: 206-878-3336
Fax: 206-878-3338
Toll free (US only)
888-523-5208
E-mail: home@drb.org
Web site: www.drb.org

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.

All rights reserved. Any reproduction or utilization, except that which constitutes fair use under federal copyright law, is a violation of our copyrights. Written permission is needed to reprint more than 300 words.

Please send change of address with a copy of a recent mailing label six weeks in advance.

**Copyright © 2006
Dispute Resolution
Board Foundation**

Annual Meeting and Conference attendees and DRBF members are welcome to download copies of the presentations made at the event from the DRBF web site. Documents are located in the member's only section.

Cone) present his side of a second tier subcontractor's dispute to a DRB made up of Dr. Ralph Ellis, Don Henderson and Jack Norton. The presenter for the DOT in this mock dispute was Jimmy Lairsey. The mock hearing had not proceeded very far when it became obvious, after Larry Lowland tried to bribe the Board by paying their fee out of his pocket, that he would most likely lose the hearing, which he did by an almost 2 to 1 majority of the audience voting.

Larry Delmore moderated a panel on ethics in the DRB process. It was thought provoking and really made everyone think carefully concerning their answers. Ethics seems to be a topic on everyone's mind these days, including FDOT's.

Peter Chapman closed out the afternoon session with an interesting overview of the process to secure Dispute Boards for the upcoming Olympic Games project in London.

Sunday morning started off with another owner's panel about setting up the DRB process in their state or on a project. Mike Kissel of Caltrans discussed at some length ideas that are being implemented by the state of California including the use of one man DRBs.

John Duke gave a discussion of how to prepare a DRB recommendation and showed examples of some he had done. His is a very well formatted approach, and is widely used in Florida as the basic recommendation format.

Ferdinand Fourie, director of contract & claims administration for Kiewit, gave his view of the contractor's perspective on the DRB process. He is in favor of the DRB being proactive and bringing out all possible disputes by asking very pointed questions and to put both the contractor and the owner on notice that the DRB will expect up-to-date progress reports on any possible claims. His opinion is that if his people let a claim get to a hearing then they have failed. He picks his DRB members not only on experience but how many hearings they had been a party to. Almost from the first words the room was as quiet as it had been during the whole conference, indicating an excellent speaker and a well thought out presentation. □

US Regional Representatives Report

Excitement and energy flowed at the meeting of the US Regional Representatives in Orlando on Oct. 7. In preparation, the new coordinator John Madden worked with the reps to set individual goals toward the DRBF's mission of promoting the use of DRBs throughout their region. Each Regional Rep selected at least two activities to be accomplished prior to the meeting.

When the Regional Reps met, there was a great sense of excitement about the accomplished goals. Blase Reardon (New England) reported he and Kurt Dettman met with a surety industry rep, which led to them to be invited to speak at the mid-year National Surety Association conference on behalf of the DRBF. Bill Colson (Southwest) talked to the San Diego Water Authority about using DRBs on upcoming projects.

John Madden told of turning a chance encounter with New Jersey Governor Jon Corzine into a 15 minute one-on-one chat on DRB use, which in turn led to a meeting between John and DRBF Executive Director Larry Delmore with the Governor's Office, NJDOT, the State Treasurer's Office and the Schools Construction Corporation. The following day, the commissioner of the NJDOT called the DRBF see how to get the ball rolling on using DRBs on future New Jersey highway projects. Moreover, the Governor's representative indicated interest in having the DRBF contact the Commissioners of several other authorities to foster the use of DRBs. Others talked of various meetings with potential DRB users that were being set up to bring the word of the success of DRBs throughout the US.

At the meeting, the Regional Reps then put their heads together to come up with new goals for December 31st. New Regional Rep Mac Smith (South Central) has come on like gangbusters with goals of meeting with Texas DOT in relation to their recent RFP for DRB members as well as approaching appropriate governmental agencies in 3-4 major cities in Texas. Go Mac!

In summary, the level of commitment was very high, as the representatives share the inevitable prospect of the need for state representatives in the not-too-distant future. To make this happen, the reps discussed the development of a "kit" which would be prepared by the DRBF to use when approaching potential users of DRBs.

In all, it was apparent we are at the beginning of something very exciting in the construction industry and all agreed that we are very proud to be part of this movement throughout the US.

John P. Madden



A MESSAGE FROM THE EXECUTIVE DIRECTOR...

I am writing this column in Chicago's O'Hare Terminal at 5:10 am on Saturday after landing on the first of two legs of a red eye returning from Phoenix.

I was in Phoenix for the fall meeting of the ABA's Forum Committee on the Construction Industry. Two days of efforts in Phoenix have resulted in a request by AIA for a paper explaining how to use DRBs for use by AIA, further meetings and development of educational programs with AIA, invitations from law firms in Florida and California to make DRB presentations to their partners; additional meetings with officials of New Jersey with the goal of an implementing a DRB program and an invitation to speak before the Florida Construction Users Roundtable.

Most telling was the number of attorneys requesting DRB information, since they have been approached by their clients questioning whether they should use DRBs.

We have reached the tipping point and the direction the DRBF now is heading will bring us successes in 2007 that previously were unimaginable.

There always has been a vision of success for DRBs.

Now we are beginning to see we are achieving and succeeding that vision of success, both for today and for tomorrow.

The energy and enthusiasm that Hal McKittrick brought to the resurgence of the Regional Representatives was highly visible in their meeting at the DRBF Annual Meeting. Eleven of your fellow DRBF members have volunteered to be responsible for seeking DRB opportunities in their geographic areas under the direction of John Madden.

These Regional Representatives are listed on the DRBF web site. Identify the Regional Representative for your area and make contact. We will be holding regional meetings in 2007 – please come. Share your knowledge and your contacts.

There always has been a vision of success for DRBs.

I find myself still trying to process all that transpired in Orlando during our Annual Meeting.

We had record attendance for the domestic Annual Meeting. Forty individuals completed the A&P and Chairing Workshops, over thirty percent of whom were from countries other than the U.S.

The presentations were engaging and informative. This space is too limiting to summarize all that transpired, so let me focus on one session.

Saturday morning we heard the initial results of scholarly research that I requested be performed on the data arising from DRB projects. The volunteer work of these individuals provides a tremendous benefit to the DRBF, for it scientifically quantifies that which all of us have known all along – that DRB can save time and money – but lacked the sustainable proof of that fact.

The University of Illinois' Dr. Finiosky Pena Mora and Carol Menassa examined 1275 disputes with DRB hearings. They found 1231 of these disputes had a settlement after the hearing, a settlement rate of 96.55%. They found on DRB projects with a construction value between \$1 million and \$100 million, there were less than 2 disputes per project. They also found that on DRB projects with a construction value

FOUNDERS OF THE DISPUTE RESOLUTION BOARD FOUNDATION

R. M. Matyas
A.A. Mathews
R.J. Smith
P.E. Sperry

CHARTER MEMBERS OF THE DRB FOUNDATION

Jack Alkire, Esq.
Romano Allione
Rodney D. Aschenbrenner
Balfour Beatty Construction, Inc.
S.H. Bartholomew, Inc.
John Beyer
Roger Brown
William C. Charvat AIA
Frank Coluccio Construction Co.
Dillingham Construction, Inc.
Raymond J. Dodson, Inc.
James P. Donaldson
Peter M. Douglass, Inc.
Paul Eller & Associates
Frontier-Kemper Constructors, Inc.
Steven M. Goldblatt
Granite Construction, Inc.
Guy F. Atkinson Co. of California
Greg M. Harris, Esq.
Paul R. Heather
Impregilo SPA
Gordon L. Jaynes, Esq.
Al Johnson Construction Co.
Keating Associates
Thomas R. Kuesel
Kerry C. Lawrence
Kellogg, LLC
Kiewit Construction Group Inc.
Lemley & Associates, Inc.
Al Mathews Corporation
McNally Tunneling Corporation
Mechanical Contractors Association
of Western Washington
Meyer Construction Consulting
Mole Constructors, Inc.
Nadel Associates
Stephen J. Navin
John W. Nichols, P.E.
Parsons Brinckerhoff Quade &
Douglas, Inc.
Pease & Sons
Edward W. Peterson
H. Ray Poulsen Jr.
Quadrant II Inc.
John Reilly Associates
Arthur B. Rounds
Seifer Yeats & Mills L.L.P.
Shannon & Wilson, Inc.
J.F. Shea Co., Inc.
Patrick A. Sullivan, Esq.
Traylor Brothers, Inc.
Underground Technology Research
Council
Watt, Tieder & Hoffer, L.L.P.
James L. Wilton
Woodward-Clyde Consultants
Ed Zublin AG

between \$1 million and \$100 million, over 98% of the disputes were settled. Finally, their research showed a correlation between DRBs and repeat contractor business with the same owner.

The University of Florida's Dr. Ralph Ellis examined all of the DRB and non-DRB projects of the Florida DOT and found that net cost growth savings experienced with DRBs was 2.7% of the construction cost and the net time growth savings with DRBs was 15.3%. He also found that DRB Recommendations are an indicator to the owner of areas that needed improvement.

Dr. Kathleen Harmon examined the data from Boston's Central Artery/Tunnel (CA/T) project and found that the total contractor claims presented to DRBs was \$169,263,570 and the total CA/T payout after the DRB was \$7,462,000. An examination of both non-DRB contracts and DRB contracts with respect to the average savings between the original contract amount and the engineer's estimate was 12.25% for non-DRB contracts and 13.4% for DRB contracts.

There always has been a vision of success for DRBs.

We now have scientific proof of what we have known all along – DRBs resolve issues before they become disputes, provide a positive change to the project level discourse and save time and money. This research is just starting. The reports presented at the Annual Meeting are available on the DRBF website. Look them up. Analyze the results. Send me any comments, suggestions or data. This is your DRBF. This is your data. This data will benefit you.

One of the sessions raised the prospect of unpaid "internships" – where those who have completed the DRBF workshops but have yet to be chosen can offer to attend DRB meetings and hearings from inception to completion (after signing acceptable confidentiality agreements) in order to "apprentice" and gain insight into the actual workings of the DRB process, to say nothing of gaining exposure.

There was criticism of these "novices" getting a leg up when the older DRB member had to do it the hard way and work to get their first assignment. I received an e-mail from a member

who questioned how a +25 year experienced construction professional could be characterized as a novice.

One of the weightiest burdens I have experienced in the past two years has been membership attrition. We lose as many members each year as we gain. The yearly attrition offsets my efforts to increase membership.

There are too many exciting opportunities in the near future for the DRBF to lose members. I believe we need a visible path available to new members to increase their potential to be chosen for a DRB. I believe DRBF members feel there are benefits to their membership. I believe all of us can contribute to increased success of the DRBF and the resultant increased opportunities for DRBF members to serve on DRBs.

Some would feel more comfortable remaining where they are, yet the world moves at a significant rate of speed. Every business in the U.S. is looking for ways to expand in the international market. The DRBF is already there, we just need to expand and maximize our presence. Look at the international attendance figures I cited above.

I had the Annual Meeting evaluations analyzed by a professional meeting planner specializing in meetings of 2,000 to 6,000 attendees. She had three summary points:

- The meeting venue can never be a point of displeasure. This will not happen again.
- Personal dislikes without constructive criticism are just personal dislikes.
- Positive comments and constructive criticism set the baseline for planning future conferences.

The excitement generated by this year's Annual Meeting will energize the actions of those who want to improve the DRBF and move it forward. If we retain the status quo, we fall behind. Let all of us continually move the DRBF forward throughout 2007.

Larry Delmore, Executive Director
T: 781-400-1024
E: lfdelmore.drb@comcast.net

Interested in taking a DRBF training course?

Visit www.drb.org for the latest offerings and workshop schedule.



Spotlight on the DRBF's Representative in Romania

Country Rep: Alina Oprea

“Romania will be the most pleasant surprise of Europe, from an economical point of view!” declared Romanian President Traian Basescu recently in an interview for the German magazine *Focus*, talking about the accession of Romania to the European Union.

Our country is open to Europe and to the entire world, eager to demonstrate her value which was shadowed, temporarily, during the long period of communist regime. Shining stars like Nadia Comaneci, Ilie Nastase, Constantin Brancusi, Mariana Nicolesco, Angela Gheorghiu and others were rays of light through the thick curtain which covered Romania all these years. And now, here we are, ready to show our whole worth to the world!

Romania is a beautiful country, and those who do not believe this should ask those who have already visited (or, even better, see it with your own eyes). We still have much to do to facilitate visits for tourism or business, especially in the field of infrastructure. Roads, railways, ports and airports are needed to reach some of the most beautiful areas in our country.

For this purpose, in the early 1990s Romania started an ambitious program for rehabilitating and developing the transport infrastructure, financed by international financing institutions and the European Commission. It is well known that the transport network is, for a country, what the blood system is for a live organism.

When I graduated in 1990 from the Technical University of Civil Works in Bucharest, I witnessed the start of the development process by working for three years in a prestigious design institute (I.P.T.A.N.A. Bucharest

Institute of Designing for Road, Water and Air Transport Infrastructure), and then joining the National Administration of Roads (N.A.R.) from Romania (now called “The Romanian National Company of Motorways and National Roads – R.N.C.M.N.R.”), the administrator and developer of the national (main) roads and motorways in Romania.

To rehabilitate, construct and develop the transport infrastructure, “FIDIC Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer, 1987 edition” and the 1999 edition started to be used to a large extent.

That was the time when I entered into the amazing world of international contracts for construction, with all their rules, sometimes broken by the parties...

Conflicts always appear between the parties in the contracts, the idea is to manage them as well as possible, in order to have the works done and fairly paid.

In the communist regime there were no conflicts (officially!). The only owner was the government – no private owners. Which (Romanian) contractor could raise his voice against the owner, the government? The Romanian contractors were also government bodies, in fact, and all the government bodies had to act for the “happiness” of the Romanian people. As of the foreign contractors... who could possibly know, at that time? This kind of information was of very restricted circulation.

Now, the contractors and the owners (no longer a unique one) can raise their voice when something goes wrong.

Arbitration, court... these are methods to settle the disputes between parties in

DRBF Country Representatives

Australia & New Zealand

Graeme Maxwell Peck

Austria

Maria Theresa Trofaier

Bahamas

Colin Arthur Marshall

Belgium

William Buyse

Brazil

Gilberto José Vaz

Ethiopia

Michael Gunta

France

James C. Perry

Germany

Dr. Helmut Koentges

Greece

Rohan Shorland

Iceland

Páll Ólafsson

India

Shri K. Subrahmanian

Ireland

Dr. Nael G. Bunni

Italy

Dr. Ing. Igor V. Leto

Japan

Toshihiko Omoto

Malaysia

Sundra Rajoo

Mexico

Dr. Lic. Herfried Wöess

Netherlands

S.C. Conway

Pakistan

Khail-Ur-Rehman Khan

Phillippines

Salvador P. Castro, Jr.

Poland

Adam K. Heine

Romania

Alina Oprea

Singapore

Christopher Redfearn

Southern Africa

Andrew L. Griffiths

Switzerland

Pierre M. Genton

Thailand

Victor James Smith

United Arab Emirates

Hamish F. MacDonald

United Kingdom

Peter H.J. Chapman

Vietnam

Richard L. Francisco

contracts, but are they the fastest, the most suitable ways, in all cases? Work has to be continued, and no break is desired by an owner eager to have his roads network modernized as quickly as possible! And when the conflicts are settled and the right price is paid for the job, the constructor is happier, he is working faster and of best quality, and the owner is content.

A good way to achieve the desired results is through alternative dispute resolution methods. More and more, constructors, supervising engineers, financiers, and public institutions in Romania realize Dispute Boards are a suitable solution to settle conflicts. The most recent claims and disputes course held in Bucharest (in 9-10 October 2006) – organized by European Construction Ventures in collaboration with FIDIC and ARIC (Romanian Association of Consultant Engineers) had a large attendance; therefore, it is to be repeated. The experienced trainers, Mr. David Heslett and Mr. Brian Totterdill, expressed their opinion that Romania is, probably, the best country to do such training in!

In Romania, we (people involved in the large scale construction industry) are very interested in adopting and working with international conditions of contracts – such as FIDIC rules, and more and more we understand the benefits of using Dispute Boards as a method of settling disputes that arise over the course of the contract.

Already, all the contracts related to rehabilitating and developing the transport infrastructure in Romania financed by the European Union, and some of the ones financed by international financing institutions, have Dispute Boards in place – Dispute Adjudication as well as Dispute Resolution Boards. In the field of road network rehabilitation and construction alone, there are more than 10 DBs currently in place.

Romania is on its way to adopting FIDIC Conditions of Contracts as the national conditions of contracts for construction. Several actions are underway by governmental and professional bodies: the Red,

Yellow, Silver and Green Books of FIDIC (as the friends of FIDIC call them) are in the process of having their translation accepted by the relevant bodies; and Romanian legislation is in the process of being harmonized with FIDIC Conditions of Contracts. The Ministry of Public Finances – Managing Authority for Infrastructure, and ARIC - Romanian Association of Consultant Engineers, as well as individuals, are doing their best to achieve this.

Some could realize that, in the context of current conditions of Romania, Dispute Boards have the chance to develop spectacularly. Those who have been in Romania since the early 1990s (right after the 1989 Revolution when we blew up the communist cage and came into the free world) can tell that fantastic development has happened. And we are only at the beginning!

There is much to construct, much to develop, much to be seen and much to protect in Romania. Anyone could say this after visiting and, even better, living in Romania. There are so many wonderful areas which are not adequately developed and promoted to the rest of the world.

We have the famous middle age Sighisoara Citadel, still inhabited, Neolithic remains of Cucuteni and other such cultures, and incredible sights. One third of the country is mountains up to 2500 metres high with fantastic caves, one third hilly areas and the other third plains, with a North Sea border and the famous and amazing Delta of Danube.

Take it from me, Romania is a place well worth visiting, to work (and to solve disputes, because only those who do not work do not make mistakes, and therefore do not enter into disputes which are to be settled...), to visit, to enjoy!

Note: Alina Valentina Oprea is the DRBF Country Representative for Romania. Born in Bucharest, she is married and has a son, Andrei. She currently works for the Romanian National Company of Motorways & National Roads. She can be reached by email at alina.oprea.v@gmail.com.

Ethics in Today's World of DRBs

Although you usually just go by the name of Bob, your grandchildren have called you "Bob the Builder" ever since the toy of that name came out some years ago. After 43 years of working for contractors across the country and around the world, you have retired to Arizona, from where you do arbitration, mediation and DRBs. You like to say it gets you out of the house and keeps your mind working. You never tell anyone, but you know that you have a full slate of such assignments because you are fair and honest in all such dealings.

You have been best friends with Charlie Bizee ever since you were in high school and played on the football, basketball and baseball teams with him. He got his engineering degree from the University of Michigan and you got yours from the University of Wisconsin. He worked for owners his career and you for contractors. He lives across the fairway from you in Scottsdale. Your family and his usually got together for a week vacation and continued vacationing together until you both moved to Scottsdale. Charlie's wife died last spring and he has been over for dinner with you and your wife frequently over the past four months.

Charlie has gone home for the night and you are watching the end of the NLCS game on the TV. You cannot keep your mind off what Charlie said to you tonight.

He said he and Al Billings had been chosen by the Southwest Applied Power (owner) and Advantage Construction (contractor) to be DRB members for a 35 mw cogen plant fifty miles away. Charlie said he and Al chose you to be the Chair.

You requested all disclosures and Charlie had walked across the fairway and returned with all pertinent conflict documents. You determined there were no apparent conflicts and stated that you would accept the assignment as Chair. Charlie returned home and brought back a large FedEx box with what the said the owner and contractor had provided in case you accepted. Charlie finally left to go home for the night, telling you on leaving that he was so excited about serving with you on a DRB.

The box contained the plans and specs, a video, and two documents, one entitled, "Findings and Recommendations with Respect to Turbine Pedestal Size and Installation in Favor of Contractor, as Found by Charles Bizee" and the second document entitled, "Findings and Recommendations with Respect to Turbine Pedestal Size and Installation in Favor of Owner, as Found by Al Billings." Finally there are copies of identical letters, one signed by the owner and one by the contractor, which basically state their welcome to you as Chair, stipulate that they agree with the video recording of the hearing before Al and Charlie of the Turbine Pedestal dispute and they each accept the offsetting "Findings and Recommendations" that are enclosed. They ask you to cast the tie-breaking "Finding and Recommendations" so that the issue can move forward without any need to have further hearings.

What do you do?

Overheard at the DRBF Annual Meeting and Conference...

"Ethics is more than making unbiased decisions. It is that you are not going to let your conduct be any cause for concern by those you are committed to."

"If you are willing to be unethical **for** me, I have to believe at some point you will be willing to be unethical **against** me."

"Disclose early, disclose often. There is never a problem with too many disclosures, but you will get tagged by the one you don't disclose."

"The ability to do the job is based on your credibility. You must be honest and truthful."

This problem is part of an ongoing series designed to engage a discussion among the DRBF membership about some of the challenges that occur during the DRB process. A committee of experienced DRB practitioners is being formed to offer ideas and opinions about the ethical dilemmas presented here.

Please send your thoughts on this issue, or problems faced by DRBs, to DRBF Executive Director Larry Delmore by email: lfdelmore.drb@comcast.net or phone: 781-400-1024.

(continued from page 1)

Considerations for the DRB

There are a number of factors that the DRB must take into account in handling such complex disputes. The stakes are much higher for both parties--the dollars involved, as well as the transactional costs of the process itself, will cause the parties to approach the DRB process differently than in the “typical” dispute.

The parties likely will default to their “official positions” because they may perceive that the DRB will “end up somewhere in the middle.” In this “positional” approach the contractor typically will assert that the owner owes all the money claimed, and the owner will assert that the contractor is owed very little, if anything. If there is a large delta between the amounts claimed (or defended against) and the DRB recommendation, it is more likely that the “losing” party will give close scrutiny to the process and outcome.

Complex disputes by their nature involve more issues, more parties/stakeholders, more facts, more documents, and more witnesses. For this reason, process becomes an important issue. For example, the DRB will need to consider the logistics and timing of the preparation of position papers, the handling of the DRB hearings to ensure a fair (but efficient) process for all parties, and the preparation of what will be complex findings and recommendations.

Given these considerations, parties also are likely to involve their legal counsel (and may even ask that legal counsel present and defend against the claims), and parties will pay more attention to contractual/legal defenses and expert opinions. For example, there likely will be issues of contract interpretation and application, as well as general legal principles, such as who has the burden of proof and what needs to be shown to establish causation. Finally, the parties likely will hire experts in the area of engineering or schedule analysis to bolster their positions on issues such as delay and impact responsibility.

The greater complexity of “end of the

contract” disputes makes it incumbent on the DRB to fashion and implement a process consistent with the stakes involved, the heightened sensitivities of the parties, and the greater involvement of legal counsel and experts.

Techniques The DRB Can Use To Handle Complex Disputes

Because complex disputes present both logistical and “fairness” challenges, the DRB will have to closely and proactively manage the process, using some of the approaches suggested below.

First, if a complex claim is going to be presented, the DRB should meet with the parties before the claim is submitted to establish ground rules on how the claim (and defenses) will be submitted to the parties and the DRB. Topics can include the basic theory, elements, and organization of the merits of the claim, as well as the time/damages sought; the level of detail that will be expected to support the parties’ positions; the type and level of documentation that will be submitted; the schedule for the submission and exchange of papers; the role of lawyers and experts; and the manner in which the hearing will be conducted.

By way of illustration, if the claim involves delay or impact, a key topic is the methodology the contractor will use to demonstrate the delay and cause/effect the delay had on its schedule and costs. The DRB should consider (and discuss with the parties before preparation of position papers and expert reports) what type of schedule analysis will be done to support the delay claim, and what type of analysis will be done to support the impact/inefficiency claim (for example, windows analysis, measured mile analysis). There likely will be disagreements between the parties on schedule analysis methodologies—but to the extent the DRB can at least define the issues, the dispute will be more focused by the time it gets to the

DRB, and the work product of the parties will be more germane to the issues

(continued on page 12)

(continued from page 11)

presented. This principle can carry over to any aspect of the claim, including the nature and extent of expert opinions.

Second, the DRB also should encourage the parties to agree on the exchange of information prior to the DRB hearing. The objective of the DRB should be to encourage full disclosure by both sides because, if the matter eventually gets to litigation, all facts and documents (except those legally protected) will be revealed in the discovery process anyway. Moreover, exchanges of information and documents before the DRB hearing will minimize “surprises” that could slow down the process or undermine its legitimacy and acceptability by the parties. This is not to say that there should be “litigation type” exchange information and documents. Rather, the DRB should consider “refereeing” the exchange of information to ensure that relevant information, witnesses and documents will be made available to the parties and the DRB. This will avoid the process being delayed by needless skirmishing between the parties and cries of foul at the hearing because of “surprise.”

Third, the DRB will need to grapple with the conduct of the DRB hearing itself. As with the preparation and submission of the position papers, the DRB should give careful consideration to the process that will be used. For example, the DRB should get agreement in advance of the hearing on the order of the presentation, the type and number of witnesses, and the amount of time presentations will take. The DRB should also consider in advance (and so communicate to the parties) the information that it believes it will need given the nature and substance of the claims (both merit and quantum). The DRB will need to make sure all stakeholders have sufficient opportunity to present their positions, without slowing or encumbering the overall process with unnecessary and confusing witnesses, documents and information.

Fourth, the DRB will need to address the role of legal counsel and expert witnesses.

If there are legal disputes, the DRB should work out in advance what those disputes are and then define the role of the lawyers in presenting/defending those positions. Likewise, the DRB should work out early in the process what expert opinions are going to be provided and how those opinions will be presented at the hearing. One approach could be to ask the parties to file expert reports with the position papers; require the experts at the hearing to present a summary PowerPoint of their investigation, findings, and expert opinion(s); and require that the experts be available at the hearing to answer questions.

Fifth, the final challenge—and in some respects one of the most important—is the form and content of the DRB’s findings and recommendations. In high stakes claims the parties will very closely scrutinize every element of the DRB’s findings and recommendations. The thoroughness and rationale of the DRB’s findings and recommendations will influence whether the parties accept them. The DRB should assume that the parties’ legal counsel will read the findings and recommendations—and will have a “weighted vote” on whether to accept them.

Taking this into account, the DRB should write its findings and recommendations in a manner that convinces the parties of its thoroughness, professionalism, logic, and clarity. It is suggested that it should, first, set out the parties’ positions on each issues; second, address the outcome of each issue through findings of fact, expert opinion (if applicable), and legal conclusions (if applicable); and third, clearly articulate the recommended outcome. It is important that the DRB shows the parties that all issues (including contractual and legal ones) were given due consideration, that the DRB clearly articulates the rationale of how and why it came to its conclusions, and that the DRB states the recommended outcome with clarity.

Conclusion

The DRB needs to take a more proactive role when presented with complex “end of the contract” claims. The author suggests

that the DRB meet with the parties even before the claim is formally submitted to establish protocols for the presentation of the claim, the exchange of information, the process for the hearing, the role of lawyers and experts, and the groundwork that needs to be laid for the findings and recommendations that will be scrutinized closely by the parties. Thereafter, the DRB will need to “chaperone” the process to ensure that it moves forward efficiently, while giving the parties a fair opportunity to present their claims and defenses. Finally, the DRB will need to produce findings and recommendations that are reasoned, logical and clear.

Note: Kurt L. Dettman is the principal of Constructive Dispute Resolutions, a consulting practice that promotes the use of Alternative Dispute Resolution in the construction industry. He can be reached at kdettman@c-adr.com. □

(continued from page 18)

If the parties can reach no agreement on such aspects, the DRB may decide so. Technically speaking such decision is also considered to be “binding advice” as meant in art. 7:900 Dutch Civil Code. The proceeds of the procedural meeting will be recorded in a Procedural Report, under the responsibility of the DRB. The Procedural Report will be binding upon the DRB and the parties. In that respects it more or less resembles the Terms of Reference as known under art. 18 ICC-Rules. Besides, the DRB may render any procedural orders it may deem fit.

As mentioned, the DRB-Rules provide for à-la-carte dispute resolution.

The first dispute resolution method mentioned in the DRB Rules is mediation (art. 21). (Substitute-) Members of the DRB, provided they are registered mediators, or third parties may be appointed as mediators. Should the mediation not result in a settlement agreement within the time frame set in the Procedural Report, each of the parties has the right to request the DRB to resolve the dispute by “binding advice”. Once appointed, DRB-members may not be involved in the resolution of the same dispute by “binding advice” should the mediation fail.

The next method of dispute resolution

mentioned in the DRB Rules is expert determination. Once agreed in the Procedural Report the DRB may decide to appoint experts, either from its own members or outside experts. The DRB-rules suggest that such expert determination may be used in assisting the parties to settle the dispute themselves, either or not assisted by the DRB, or in assisting the DRB in rendering a “binding advice”. Again, should the expert determination (to be used to assist the parties) fail to accomplish a result within the time frame set, each of the parties has the right to request the DRB to resolve the dispute by “binding advice”.

The focal point of the DRB-rules is the advice procedure (art. 23). The rules set out the order of the proceedings, including the possibility for a hearing. Should there be the need for an expedient decision, the DRB may render a provisional advice. The DRB will render the final advice within the time set in the Procedural Report. The DRB-rules provide for some more guidance: the advice should be written, preferably be reached by consensus. Within two weeks after receipt of the advice the parties may request the DRB to rectify apparent mistakes. As mentioned before, the advice will become a binding advice if not challenged within four weeks after it has been rendered. However, the parties are bound to comply with the “binding advice” as long as it has not been overthrown by a court decision or arbitral award, whatever applicable.

Finally, the DRB-rules provide that the DRB and the parties may resort to such other methods of dispute resolution as they agree on.

Article 25 of the DRB-Rules provide that the DRB may, on request of one of the parties, render an advice in which it establishes that no settlement has been reached. Such advice enables the parties to submit their dispute to the court or to arbitration without much further ado.

Conclusion

With these DRB-Rules, the Dutch construction community hopes it has provided the international construction community with fresh material which may assist in bringing the DAB- and the DRB-worlds together. The DRB-Rules at least provide for final and binding resolution within a reasonable speedy time frame, whereas they are not designed to act as a rigid, overly formal structure which in fact would be nothing short of formal arbitration. As usual, the proof of the pudding, however, is in the eating. □

Dispute Board Member Pupilage

Mentoring Provides Practical Experience to New Board Member Candidates

By Gwyn Owen

How do you become a Dispute Board (DB) member when you have no experience and in reality are unaware of how to get that first appointment? With no experience and your name an unknown quantity to most employers and contractors, getting nominated is an uphill struggle. You may decide you should get your name onto certain panels, such as the FIDIC President's List or an in-house list at Caltrans, but that involves significant effort normally away from your home and office and could also involve some form of study, examination and cost. Being on the list will also only make you available to users of that particular list. You may decide the best approach is to undertake some "networking" at conferences and seminars, which always helps, but it's a little like throwing "wanabee seeds" into the desert and hoping that they will grow in time and then someone will pick your name - that is if they happen to be crossing the same desert. There appear to be so many unknowns and uncertainties and it is always a wonder to me that anyone gets there at all in the end.

So what other routes do you have to being on a Board, possibly a more certain route? May I suggest pupilage. Pupilage is a system of "mentoring" where an experienced DB member takes you under his wing for a fixed period of time and provides you with a structured course of learning while giving you hands-on practical guidance and experience. During the process your name becomes known to all the practitioners involved and after the pupilage period is over you will have beaten the "chicken and egg" syndrome and you will have some practical experience and will be ready to go!

I am sure that with the experience gained under mentoring you will be more attractive to a prospective DB user than someone new on the shelf looking for his first post.

In order to make a start with this system and to open it up to all potential users I have created a basic program which is currently operating under the FIDIC organisation. Details of this system may be obtained from the FIDIC web site at: <http://www1.fidic.org/resources/adjudicators/pupilage.html>. I hope that eventually the use of the system will become widespread and globally adopted, and new DBs being created in emerging countries will incorporate at least one member who has completed a recognized pupilage program. This concept and type of program is not new and the system of pupilage has been widely used in the legal profession in many jurisdictions throughout time. Furthermore, craftsmen have successfully used a similar system of apprenticeship for years. Either way, such a system of guardianship whilst building up practical experience post qualification has been successful, and those completing the course end up with the respect of their industry and peers.

So what's pupilage all about? The objective is to provide training and mentoring support in order that the pupil may become a DB member or Adjudicator, or and where applicable may apply for FIDIC National Member Association listing. Governments and contractors in a particular country will then have an opportunity to select someone from their own national list. Also if the president of that national association is asked to nominate a DB member of a particular nationality he will nominate from that specific list. However the pupil will not necessarily need to become part of any particular listing as he or she will have the practical experience necessary to launch independently. It is hoped that the mentoring experience will enable a person to become sufficiently knowledgeable to become nominated in his or her own right to DBs. After completing pupilage he or she will certainly know how and where to look for nominations and what is required to

successfully complete the nomination process.

The mentoring system requires at the start that a prospective pupil makes contact with a willing mentor who will undertake the task of pupilage and who will be willing to set aside the time required for the process. Before selecting your mentor you must consider if you are willing to travel and in which jurisdiction you wish to work. Such further considerations as the type of work you wish to become involved with and the scale of the projects may also be primary considerations. When selecting your mentor find someone who fits the bill for your aspirations and who is already busy with DB work. The mentor must also be willing to give you a mentoring assessment report at the end of the pupilage procedure.

There are no set "entry qualifications" for mentoring, but in order to be industry acceptable as a DB member you will need to have at least the standard professional qualifications. Clearly if you're going to adjudicate disputes between parties then you will also need some dispute resolution qualifications or experience and knowledge of the law. In some jurisdictions where the system of adjudication is already sophisticated and advanced you will need significantly more training in the basic skills of adjudication and dispute resolution procedure and have a considerable knowledge of case law.

In order to be eligible for undertaking a FIDIC pupilage program there are certain basic entry criteria. There is no rocket science involved in the selection of requirements for eligibility but it is a logical necessity that the prospective pupil must have the following:

1. Be available and committed to the time and input requirements of a pupilage mentoring program
2. Be a member of or be eligible for membership in a National FIDIC Member Association
3. Be in possession of basic professional qualifications at university first degree level

4. Have a minimum of 15 years post graduate experience
5. Supply a CV
6. Enter into a confidentiality agreement with any parties as necessary for DB site visits and hearings

The main reason for having these entry qualifications to the FIDIC mentoring system is that upon completion of the mentoring, pupils will be eligible for application for listing by the local national FIDIC association. Clearly if the mentoring is not aimed at FIDIC national listing then a revised set of qualifications may be considered which at the least will not have points listed as 2 and 3 in the above list.

I have initially suggested that the mentoring period will be around 12 months which needs to be flexible and will basically slot into six modules each covering specific topics. There is no set time for each module and some may be shorter than others depending upon qualifications, experience and pupil aspirations and also how the pupil progresses with the tasks. The six modules are aimed at a FIDIC national listing and may vary if that is not required. The six modules are:

- Module 1: Understanding of alternative dispute resolution procedures (ADR)
- Module 2: Knowledge and understanding of FIDIC forms of contract
- Module 3: Contract administration and claims
- Module 4: Management of dispute resolution process
- Module 5: Dispute Board procedures
- Module 6: Dispute Board agreements and appointments

In order to start the mentoring process each pupil will need a basic minimum of course materials. For the FIDIC based pupilage system I have suggested that these will consist of:

(continued on page 16)



If you have news about DRBs, DRBF members, or an article to share, please tell us!

Deadline for the next issue of the Forum is January 1, 2007

(continued from page 15)

1. FIDIC Conditions of Contract for Construction - Red Book
2. FIDIC Conditions of Contract for Plant Design Build - Yellow Book
3. FIDIC Conditions of Contract for Construction - MDB Harmonised Edition
4. DB Procedures by G. Owen
5. Project Management Code of Practice – CIOB / Longman
6. Adjudication Standard Text Book (such as Construction Adjudication by Riches & Dancaster / Blackwell)
7. FIDIC Users Guide by Brian Totterdill / Thomas Telford
8. Case Studies x 6
9. Adjudication Appeal Court Judgments (2 cases)
10. Workshop Materials:
 - a. Course Notes
 - b. Standard Forms

How much will it cost? The quick answer is that the whole procedure is a voluntary process and the mentor will provide his time and effort at no cost. My philosophy has always been if you want DB members of the future to have the same outlook and standards as you then you will need to pass on your experience to them. There will be some pupilage materials such as books and course notes which I believe that the mentor should provide at his own cost to the pupils. The basic thought process here is that in some countries access to books often need to be paid for with foreign exchange is hard to come by. However the pupil does not get away expense free as he will need to share the cost of meeting rooms with other pupils and provide his own travelling costs. During the mentoring period he will also need to attend a minimum of one two-day training course at his own expense.

The pupilage is undertaken basically in three ways. The first is a correspondence by email, the second by participating in four workshops, and the third by attending a site visit and a dispute hearing as an observer.

There is also some external learning required and this is achieved by attending a two day

training course supplied by a suitable course provider. There are a number available through the DRBF and FIDIC.

The correspondence section of the course consists of 12 written exercises and will take in the order of about 90 hours to complete.

It will cover the following points:

1. Description of DB procedures
2. Case Study – Arbitration Award (documents only)
3. Case Study – Adjudication Decision (documents only)
4. Procedural directions
5. Design liability – Law & Contract (FIDIC Red & Yellow & MDB)
6. Claim submission
7. Response submission
8. What is a dispute?
9. Administration of projects under FIDIC
10. Post adjudication procedures – amicable settlement, arbitration
11. Source materials
12. Case Study – Draft Decision

The four workshops will each last in the order of 2 – 4 hours and will take the form of a general discussion structured around a particular topic. These are:

Workshop 1: Introduction to ADR and Procedures

Workshop 2: Forms of Contract, Administration and Claims

Workshop 3: DB Procedures and Management

Workshop 4: Interactive Session and Assessment

At the end of this mentoring process you will have had an ample opportunity to ask questions, see the process at work and see how users of Dispute Boards react to both the DB members and procedures. Hopefully you will also have seen the great benefits of the system in assisting the parties to work together and get to the end of the project in agreement. When you have this experience you are ready to go to work ... good luck! □

Contact Gwyn Owen: gwyn@easynet.co.uk

The Dutch DRB Rules

By Arent van Wassenauer

Summary:

In March 2004 a Dutch model for DRB-rules has been established. The "Dispute resolution clause and DRB-rules," as developed by a working party consisting of representatives of various Dutch arbitration and mediation institutes, the Institute for Construction Law and the Tilburg University and CROW, the knowledge centre for traffic, transport and infrastructure, contain a flexible but robust way of resolving construction disputes in an expedient manner. The form has been developed drawing on experiences in national and international construction projects. This article discusses the details.

A copy of the Rules can be downloaded from the DRBF web site, in the library of the member's only section.

Note:

This article was first published in *Construction Law International*, Vol 1 No 2, June 2006, and is reproduced by kind permission of the International Bar Association, London, UK.

Introduction

Since approximately ten years, there is a growing use of DRB's in the Netherlands. The Dutch rail infrastructure manager, Prorail, has been leading the pack by introducing the concept in all the Design and Construction contracts for the Betuweroute cargo track, which has been constructed between the Rotterdam port and the German border. Various other DB projects followed. The High Speed Line - South, from Amsterdam to the Belgian border, has DRB's in all of its civil contracts and in its DBFM Infrastructure provider contract. Other major infrastructure projects, such as the Westerscheldetunnel, the Sijtwende tunnel, the A59 and N31 DBFM projects, have adopted variations on the DRB theme. Unfortunately those DRB's were all, mistakenly, labelled "Committee of Experts", due to back and forth translations of the original concept. This sometimes led to situations where members of such DRB's, thinking of themselves as real experts, were found conducting site visits, providing directions to the crew on such issues as the pouring of concrete or the bending of steel. In the new DRB-rules, the working party has been able to find a new Dutch term for DRB, "De Raad van Beoordelaars" ("Board of Resolvers"), which has "DRB" as its acronym.

With the introduction of a standard Design and Construct form, the UAV-Gc 2005, in which the appointment of a DRB is an option, it was felt that a standard form for DRB-rules would assist the industry and its employers to further develop the concept of DRB's.

While elsewhere a perpetual debate seems to be going on whether a Dispute Board should be either of an adjudicatory or of a recommendatory nature, or even better a hybrid between these two species, in The Netherlands a more practical approach has been adopted. The standard "Dispute resolution clause and DRB-rules" are based on the principle that each dispute - once not to be resolved by the parties - may merit its bespoke method of resolution. It is the task of the DRB to, in close coordination with the parties, as soon as possible after the dispute has arisen establish the method of dispute resolution to be adopted for the dispute at hand. The methods available are: "binding advice" - a method similar to non-statutory adjudication -, mediation, expert determination, or - if required

such other methods to be agreed upon. The DRB sets a time frame within which the dispute should have been resolved. If this is not accomplished the DRB may, on request of each of the parties, render a resolution that the dispute was not able to be resolved within the scope of the DRB-rules. In that case the parties may resort to the court or to arbitration, whatever has been stipulated in the main contract.

The "Dispute resolution clause and DRB-rules" have been published in a book, in hard copy available from CROW (www.crow.nl). An English version is being prepared.

The Dispute Resolution clauses

Two model clauses for the main contract have been provided, one for application to the regular court system and one for arbitration.

The DRB-rules

The DRB-rules contain 26 articles. Articles 1 to 13 deal with appointment, termination of an appointment, costs, liability, confidentiality and the manner in which the DRB will be provided with information on the project. Articles 14 to 20 deal with general provisions in connection with the DRB-procedure. Articles 21 to 25 contain provisions related to the various methods of dispute resolution the DRB may decide to adopt and article 26 is a catch-all: the DRB may deviate from the DRB-rules if the DRB-rules do not provide a solution, either on request of one of the parties or on its own initiative.

Mission of DRB

According to art. 1 of the DRB-Rules, the aim of the DRB is to "assist the parties in resolving differences of opinion emanating from their contract and to encourage that disputes following such differences of opinion will be resolved as soon as possible by agreeing on a settlement agreement pursuant to art. 7:900 Dutch Civil Code." In order to grasp the full effect of this clause it may help the reader to achieve a better understanding by what is said in art. 7:900 Dutch Civil Code:

"Article 900

1. In a contract of settlement, the parties bind themselves towards each other, in order to end or avoid any uncertainty or dispute in respect of what, in law, shall apply between them, to a settlement which shall also apply to the extent that it deviates from the previously existing juridical (legal) situation. *(continued on page 18)*

(continued from page 17)

2. The settlement can be established pursuant to a joint decision of the parties or to a decision entrusted to one of them or to a third person.
3. A contract as to evidence shall be equated to a contract of settlement, to the extent that it entails an exclusion of counter-evidence.
4. This Title does not apply to a contract of arbitration.”

A settlement agreement is first and foremost an agreement reached between the parties. It can be concluded as a result of settlement negotiations. But a successful mediation will also result in such a settlement agreement, with a little help from the mediator. Section 2 of Article 900 is the most interesting part, at least for international community. What it means is that a “third person” (which also means third persons) may achieve the settlement agreement. In the Dutch context, such procedure is known as “binding advice”. As the code stipulates, its legal implication is that it such binding advice considered to form a contract, a settlement agreement, between the parties, which, if need be, may be enforced in court. According to long established case law, such binding advice may only be set aside by the court if it, either by infringing basic procedural principles, or by its content, is so flagrantly against the reasonableness and fairness that the party wishing to enforce such binding advice would be acting against these principles and therefore may not do so. Also, the law states that such “binding advice” is no arbitration. As far as DRB’s are concerned, the Dutch DRB therefore will either assist the parties in concluding their own settlement agreement, or provide such settlement for them, by rendering a binding advice. Parties will find no difficulties in enforcing such binding advice in The Netherlands, provided the DRB has acted according to the principles as set out by Dutch case law. To what extent such binding advices are enforceable abroad will have to be determined from jurisdiction to jurisdiction.

The working party has chosen the route wherein the DRB has - as one of the options available - the power to render advice, which will only become binding if not challenged within 4 weeks after the advice has been rendered. As long as the court, or - if applicable - a tribunal, will not have quashed the (binding) advice, the parties are bond to comply with the DRB advice.

Constitution of the DRB (art. 2 - 11)

Art. 3 of the DRB-rules provides that a DRB must consist of an odd number of members. There is no number given. This implies that a DRB can consist of one member. The number will depend on the complexity and other particulars of the project. There may be substitute members appointed. DRB members are neutral and should have no ties whatsoever with the parties. They should be available to fulfil their duties and they should be mastering the contract language. The DRB may appoint a secretary. DRB-members may terminate their appointment without giving reasons. Parties may jointly terminate the appointment of DRB-members. The costs of the DRB will be shared by the parties in equal parts unless they agree otherwise. DRB-members are exonerated for damages as a result of their decisions.

Information and communication. Confidentiality (art. 12 and 13)

The parties are responsible for providing the DRB with all relevant information on the project. They also need to enable the DRB to conduct regular site visits. The DRB may order submission of certain documents. DRB members are bound to confidentiality. At least four times a year the parties will meet the DRB, or so much more often as the DRB finds this necessary. These meetings may be combined with site visits. In practice, this may prove to be too regular. The DRB and the parties will then agree otherwise.

Disputes (art. 14 - 20)

Each dispute resolution procedure will start by the submission of a request by one of the parties (or by the parties together). This needs to be a succinct document, with reference to facts and circumstances for each issue in dispute. The other party needs to respond, again in a succinct document, within two weeks after submission. The DRB then will invite the parties for a procedural meeting, to be called upon as soon as possible. At that meeting, the DRB and the parties will attempt to at least agree on:

- the stipulated facts
- facts to be determined
- the method to be adopted for resolving the dispute and the time available
- possible questions to be dealt with by the DRB
- whether experts need to be appointed
- whether witnesses need to be examined
- a time table
- which members of the DRB shall be dealing with the dispute
- any other business.

(continued on page 13)

DRBF Tour of South East Asia



In Indonesia: F. Nugraha, D. Widodo, Prof. Omoto, S. Bafagih, and B. Santoso.

During September 2006, the Dispute Resolution Board Foundation arranged a very successful tour of South East Asian countries by DRBF representative for Japan and experienced DRB member Professor Toshihiko Omoto of Kyoto University. The tour started in Singapore and included Malaysia, Indonesia and Thailand. With the assistance of each of the DRBF country representatives, seminars were arranged in each of countries' capital cities.

Singapore - The tour kicked off on Monday September, 18 with an evening talk organized in conjunction with the Society of Construction Law, Singapore and chaired by Mr Naresh Mahtani. Prof. Omoto explained the Dispute board concept,

its history in the US and internationally and presented statistics showing the spectacular growth in the use of boards in recent years. He then examined in detail the various dispute board procedures explaining the differences between Dispute Resolution Boards and Dispute Adjudication Boards and introduced the International Chamber of Commerce's innovative Combined Dispute Board. Professor Omoto concluded his presentation by emphasizing the pivotal role of the DRBF in Dispute Board development and encouraged participants to join the DRBF.

Kuala Lumpur, Malaysia - Our event in Kuala Lumpur held on September 21 was co-hosted by the Society of Construction Law Malaysia, the Bar Council of Malaysia and the Chartered Institute of Arbitrators Malaysia Branch. The talk was attended by many lawyers and engineers. Prof. Omoto gave a masterful and lucid explanation of the DRB process prompting lively audience participation including the sharing of experiences. So much so that DRBF Country Rep. Sundra Rajoo, who chaired the session, had to call the session to an end to allow the group to adjourn to the Royal Selangor Club's legendary long bar for drinks and afterwards for dinner at the President's Room.

Jakarta, Indonesia - The seminar was organized and sponsored by PT Paiton Energy, the developer, owner and operator of a 1,230 MW power plant in Eastern Indonesia. Ir. Budi Santoso, Senior Engineer with Paiton Energy, introduced Prof. Omoto to the 25 participants, who included engineers, contractors, lawyers and accountants. Prof. Omoto's paper was very well received, and it stimulated lively discussion and questions. There was particularly vigorous debate with respect to the independence of the engineer under the old FIDIC regime – with one participant insisting that just because the engineer was retained and paid by the owner, this did not mean that he would be unable to be independent and unbiased in his dealings. The evening was rounded out by the presentation of a small gift of appreciation to Prof. Omoto by Paiton Energy's Senior Vice President and Director of Finance, Mr. Syakib Bafagih.

Bangkok, Thailand - The final seminar in the series took place on September 25 with the generous assistance of the Secretariat of ICC Thailand for which the DRBF is most grateful. The run up to the talk was not uneventful. On the evening of September 19 there was a military coup in Thailand, which created a feeling of unease within Bangkok. As a result of the coup the seminar initially was cancelled but, as it became clear that Bangkok was calm, it was decided to proceed. The coup affected bookings for the seminar which although was smaller than expected was a lively session. The seminar was introduced by DRBF Thailand Representative Victor Smith and the participants included Peter Caldwell, the East Asia regional representative of the DRBF, from Hong Kong.

At present dispute boards are not widely used in Thailand and the participants were able to expand their knowledge from Prof. Omoto's experience. Participants were mostly lawyers or construction professionals from Bangkok, and the majority of the participants were Thai. The seminar was well received and there were a number of questions raised by the participants at the end of the event. □



In Malaysia: S. Rajoo and Prof. Omoto



FOUNDATION FORUM

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

FOUNDATION FORUM

NICHOLS AND CHAPMAN HONORED WITH AL MATTHEWS AWARD

The Dispute Resolution Board Foundation bestows the **Al Matthews Award** to one or more members who have given exemplary service in advancing the use of Dispute Resolution Board concepts, and the DRBF. On October 7, the organization recognized two award winners during the banquet held in conjunction with the DRBF Annual Meeting and Conference. The first award was given posthumously to John Nichols, a charter member of the Foundation and a member of the Board of Directors, who passed away in May of this year. His son, John Nichols, Jr. accepted the award on his father's behalf. "The DRBF was an important part of my father's life, and he spoke of it often," he said. "Upon arriving at the banquet, I knew only one person. By the end of the evening, my wife and I felt like we were among old friends."

An award was also given to former DRBF president and Board of Director member Peter H.J Chapman. Mr. Chapman was recognized for his many efforts, including his commitment to the expanding the movement around the world and his leadership in organizing the annual International Conference.

Past Winners of the Al Matthews Award include:

- 2001 Al Matthews**
- 2002 Robert Matyas, Robert Smith, and Joe Sperry**
- 2003 Jimmy Lairscey**
- 2004 Jim Donaldson, Pete Douglass, Carlos Ospina, and Steve Fox**
- 2005 Gordon L. Jaynes**