



# Forum

VOLUME 16, ISSUE 4

NOVEMBER 2012

## Dispute Boards: East vs. West

*Editor's note: This paper was presented at the American College of Construction Lawyers/Canadian College of Construction Lawyers in October of 2012, with the intention of contrasting the status of Dispute Boards in the country of their origin, the USA, and in countries across the Atlantic Ocean, all the way to the Asian side of the Pacific Ocean. At the same time a parallel intention to is speculate regarding the future of Dispute Boards outside the USA.*

By Gordon L. Jaynes

Broadly speaking, despite the fact that Dispute Boards in the USA typically make non-binding “Recommendations,” they have a remarkable record of assisting contract parties to avoid further dispute arenas, such as litigation or arbitration. If the Recommendations are not accepted as written, it seems they enable the parties to resume negotiations and settle amicably. It is this record which has led to the adoption of Dispute Boards in many government agencies in the USA.

There has been much speculation regarding why comparable success had not been achieved in countries to the East of the USA. Some commentators have suggested that it is the high cost of litigation and arbitration in the USA which accounts for

much of the success of Dispute Boards there; however, speaking as an observer of the cost of litigation and arbitration East of the USA, this suggestion seems to me questionable: litigation and arbitration of construction disputes is not cheap East of the USA.

This paper suggests there are three principal problem areas which are restraining a more successful use of Dispute Boards in the East. In alphabetical order they are Education, Cost, and Philosophy.

Education: The acceptance of Dispute Boards in the USA has been a gradual process, beginning with a tunnelling project in 1975. Gradually, and in large part through the “missionary” efforts of

*(continued on page 14)*

“...there are three principal problem areas which are restraining a more successful use of Dispute Boards in the East. In alphabetical order they are Education, Cost, and Philosophy.”

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## President's Page

Members, Supporters and Friends of the DRBF,

With my first article as President, I was hoping to talk more about the great annual meeting we had in New York and my memories of a 6 AM walk every morning through Times Square seeing all the neon lights. Instead, I am going to pass for now and send my, and I know all of you reading this, our sincere condolences regarding the recent disastrous storms you and the rest of the East coast have recently endured. Our hearts go out to all of you.

The Executive Board has set some challenging goals for the coming year and is establishing committees to accomplish them. They are as follows:

- Increase funding for the DRBF – Standing Committee Chair Doug Holen
- Update the DRBF Manual to include Regions II & III – Standing Committee Chair Dan Meyer
- Adopt specifications, policies and procedures for one-person DRBs – Committee Chair Warren Bullock
- DRBF's Strategic Planning Committee (formerly the 10 Year Plan) – Standing committee Chair Harold McKittrick
- Finalize and publish the DRBF adopted Policies and Administrative Procedures Handbook – Committee Chair Harold McKittrick
- Training for all Regions – Standing committee Chair Kurt Dettman
- Refocus the DRBF vision to dispute avoidance / prevention as number 1 priority over dispute resolution
- Replacements for Jim Donaldson who is stepping down as DRBF Treasurer and Steve Fox who is retiring in June, 2014 – Executive Board President
- Marketing Committees
  - Region I – Deborah Mastin
  - Region II – Paul Taggart
  - Region III – Doug Jones

As you can see from above, this will be a busy year for the DRBF which means a lot of assistance is needed from members. All of the committees listed above can use additional help and I urge all of you to consider assisting wherever you can. We are a non-profit organization and rely heavily on volunteers to give some of their time to support our efforts. Finding new DRB users, public agencies or private work, for example, can be done via telephone and computer. Get leads to the committee chairs and they will arrange for a follow-up one-on-one presentation.

A handwritten signature in black ink, appearing to read 'Roger Brown'. The signature is stylized and cursive.

Roger Brown, President  
DRBF Executive Board of Directors

*An ounce of prevention is worth a pound of cure."*

*-Benjamin Franklin*

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The Executive Committee meets monthly. Recent topics have included:

- Appointment of new committees and committee chairs
- Outreach to markets beyond construction
- Creation of DRBF policy with regard to One-Person DRBs

Summaries of the Executive Board meetings are available to all DRBF members on the DRBF web site. To access the **Board of Directors Meeting Minutes Summary**, go to [www.drb.org](http://www.drb.org). Click on the **Member Login** button, and then click on **DRBF Board of Directors**.

## Executive Board of Directors Meeting Schedule:

November 19, 2012 by conference call  
December 17, 2012 by conference call  
January 21, 2013 by conference call

The Boards of Regions 1 and 2 also meet on a monthly basis. Questions for the Executive or Regional Boards should be addressed to the Board President, care of:

Dispute Resolution Board Foundation  
19550 International Blvd. So., Suite 314, Seattle, WA 98188  
Phone: 206-878-3336 Fax: 206-878-3338 Toll free (US only) 888-523-5208  
Email: [info@drb.org](mailto:info@drb.org) Web: [www.drb.org](http://www.drb.org)

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# Letter to the Editor:

## So, Just Whose Process is this Anyway?

To the *Forum* editor,

One of the threads running through presentations and discussions at the recent Annual Meeting in NYC was placing greater emphasis on Disputes Avoidance over Disputes Resolution as a principal function of DRBs. During a breakout session on “Should DRB Decisions be Admissible,” a show of hands was asked for on whether participants favored the admissibility of DRB decisions in subsequent arbitration/court proceedings. A notable dissenter among the vast majority favoring admissibility was Bill Edgerton, a member of the DRBF Practices and Procedures Manual Committee. Bill was asked for an explanation of his position, in light of the Manual strongly favoring admissibility (“*Experience has shown that [admissibility] has been a major factor in the effectiveness of DRBs ....Changing this provision to make DRB [decisions] inadmissible undermines the value of the entire DRB process.*”). Bill pointed out that he had been the only member of the Manual Committee to oppose admissibility. Bill said that owners’ attorneys have told him that when project specifications provide for admissibility, their practice has been to “lawyer-up” DRB hearings. Bill observed that “lawyering-up” can have unintended consequences such as intimidating hearing participants and inhibiting open and candid discussions. Bill added that another result of “lawyering-up” is the inherent delay in getting to the DRB. Prevailing wisdom is that early submittal of issues to the DRB is helpful, before the parties’ positions harden to such an extent that they cannot compromise. Also, to reach agreement, the parties’ mind-set should be focused on how to settle – not how to set up the documentation to win in a subsequent adjudicative proceeding if the DRB is not successful.

Bill and I then discussed the larger issue of emphasis on dispute avoidance vs. dispute resolution. The unintended consequences of admissibility have a bearing on this larger issue. Intimidating hearing participants and inhibiting open and candid discussions can also have an adverse effect on dispute avoidance. To that point, Bill and I both observed that some Annual Meeting participants exhibited a “heavy handed” or prescriptive attitude in discussions of how DRBs should handle particular situations that might arise, e.g. “*Do what we say, even if you are not inclined to do so. We know what’s best for you.*”

By way of an example, in relation to a DRB on which I am presently serving, the project is now winding down, but a fair number of unresolved change orders and time extension requests remain and the project is progressively falling behind schedule. The owner and contractor both wish to discontinue the periodic DRB meetings so that they can concentrate on more pressing matters. The DRB disagrees. We feel that the pressure of having to face the DRB will incentivize the parties to resolve outstanding issues more quickly to the overall benefit of the project and disputes avoidance. But we are of divided opinion on just how hard to push the issue. While we think we know what’s best, the question remains “So just whose process is this, anyway?”

### Forum Editor: Ann McGough

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

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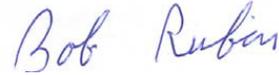
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***Thank you for  
your support!***

As Dispute Avoidance assumes a greater DRB emphasis, the dilemma of “just whose process is this” will arise with greater frequency. I am anxious to see further discussion of this subject.



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# DRBF 16th ANNUAL MEETING & CONFERENCE REPORT

By Eric Kerness, Conference Chair and Member, DRBF Region 1 Board of Directors

New York City rolled out its welcome and red carpet for the DRBF's 16th Annual Meeting and Conference. The conference provided attendees a unique opportunity to learn about the DRB process and spent some meaningful time in one of the nation's greatest cities.

Preceding the conference, experienced trainers Eric Kerness and Kurt Dettman presented the Administrative & Practice workshop to those new to the process. They also conducted the Advanced/Chair Workshop which provided practical experience and the ins and outs of serving as a DRB Chair. In addition, Region 2 Trainers Murray Armes and Christopher Miers conducted an informative Introduction to International Dispute Board Practice workshop covering FIDIC forms and ICC Dispute Board rules.

Prior to the conference participants and guests were able to attend optional events that included a tour the World Trade Center Memorial and the MTA Fulton Street Transit Center project. The conference kicked off with an informative presentation by Alan Paskoff, Senior Vice President for MTA Capital Construction for East Side Access which focused on the MTA's multi-billion dollar Capital Construction program. His key note address was followed by presentations on DRB practice from Mitch Ball, Virginia Department of Transportation, Tom Byron, Florida Department of Transportation and Brad Jones, Ohio Department of Transportation. A session on expanding the DRB role beyond transportation and infrastructure was led by Region 1 Board members Kurt Dettman and Deborah Mastin. To recognize the global reach of DRBs, Doug Jones provided a presentation on Dispute Boards in Australia.

A highlight of the conference was the outstanding

memorable luncheon address given by Steve Plate, Director of World Trade Center Construction, who received a lengthy standing ovation after his presentation on the World Trade Center Freedom Tower project which is dedicated to the memory of the 3,800 who perished on September 11. Afternoon sessions included an Ethics session conducted by James Philips and Allen Thompson and Robert Rubin.

The 16<sup>th</sup> conference featured individual "Breakout" sessions that included Robert Rubin's session on "Should DRB Decisions be Admissible? The Role of Lawyers and Experts," Deborah Mastin and Doug Holen's "How to Obtain a DRB appointment" and Richard DiFedele's "Adhering to Contract Provisions, Accepting and Rejecting a DRB Decision." The breakout session enabled participants to engage in in-depth discussion, and left DRB leadership with some food for thought on these topics.

The day concluded with Ralph Ellis' presentation on "How to Write an Effective DRB Decision" and Andrew Thomson's MTACC presentation on DRB program on the East Side Access project. The evening featured a World Yacht dinner cruise around Manhattan Island and the Al Mathews Award presentation to Jim Brady and Toshihiko Omoto (see page 7).

The second day of the conference featured presentations on expanded DRB usage in Canada by DRBF Country Representative Gerald McEniry and a mock DRB presentation patterned after a DRB decision from the Wakota Bridge Project in Minnesota by Kurt Dettman and Tom Welby. The formal session conclude with by an examination of the Dispute Board program in place for the London Olympics 2012 presented by Executive Board Secretary and Region 2 Board Member Murray Armes.

If you were not able to attend this year's confer-

ence, DRBF members can access the papers and presentations on the DRBF conference website: [www.drbfconferences.org/newyork.htm](http://www.drbfconferences.org/newyork.htm).

As usual the conference would not be possible without the hard work throughout the year of my planning committee that included Kurt Dettman, Rich DiFedele, Everett McIndoe, Bob Rubin, Tom Welby, our DRBF conference professional Ann McGough, and our Seattle office staff, Steve Fox

and Lori Jenkins. Many thanks to our many sponsors, and to our fundraising committee chaired by Hal McKittrick and Pete Douglass.

Plans are currently underway for next year's Annual Meeting in Miami, Florida. Mark your calendars and join us.

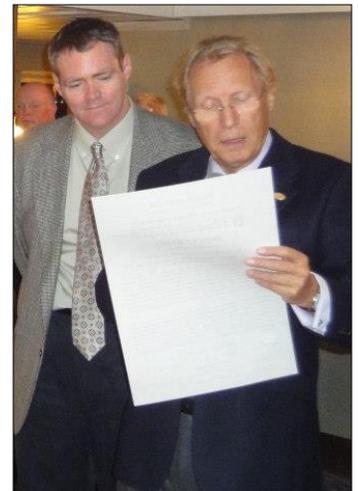
**Eric Kerness can be reached at [eric@kerness.com](mailto:eric@kerness.com)**

## **James Brady and Toshihiko Omoto Receive DRBF's 2012 Al Mathews Award for Excellence**

The Dispute Resolution Board Foundation presents the prestigious Al Mathews Award each year 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 the 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 in New York.

Congratulations to his year's recipients: **James J. Brady** and **Toshihiko Omoto**.

**James (Jim) Brady** has been has been proactive in the alternate dispute resolution processes for over 50 years, first as a contractor, then a consultant and then active in the DRB process as a member on both DRBs and DABs (domestic and international). Jim is a Registered Professional Engineer and has been responsible for many large heavy civil projects (while employed by S. J. Groves, Gates and Fox, and Morrison Knudson, and then as President of his own firm, B. U. Corp, since 1988. Jim is a member of the Moles and played a key role in assisting the Port Authority of New York and New Jersey in completing a new underground station and connecting subway tunnels following the tragic event at the World Trade Center. Jim has served as member (and sometimes Chair) on over 15 DRBs and DABs throughout the US and Canada and in China and Africa on projects totaling over US\$1.5 billion. He has contributed widely to the promotion of the DRB process in the world wide construction industry and in 2008-2009 served as President of the DRBF. Jim was unable to attend the awards dinner and his son, Jim Brady Jr., accepted the award on his behalf.



*Volker Jurowich presents the Al Mathews award and proclamation to Jim Brady Jr.*



*Dr. Toshihiko Omoto accepts the AI Mathews Award*

**Toshihiko Omoto** holds a Doctorate in Engineering, as well as a BSc and MSc in Civil Engineering, from Kyoto University, and an MSc in Construction Law and Arbitration from King's College, University of London. He is a Fellow of the Japan Society of Civil Engineers, and in the United Kingdom he is a Fellow of both the Institution of Civil Engineers and the Chartered Institute of Arbitrators. He joined the Dispute Resolution Board Foundation in January, 1997, at which time he was responsible for administering dispute resolution for Taisei Corporation's engineering and construction contracts outside Japan. After retiring from Taisei Corporation, he was made a full Professor at Kyoto University, holding a Chair in Conflict Resolution, and during his work as professor he has promoted the use of Dispute Boards and the DRBF. For fourteen years, until 2012, he served as DRBF Country Representative for Japan. He is the author of the first book published in Japan on Dispute Boards. Also, he was the first Asian appointed

to the FIDIC President's List of Approved Adjudicators and now serves as one of three members of FIDIC's Assessment Panel for Adjudicators, which assesses applicants for entry on that FIDIC President's List.

An outstanding example of his continuous promotion of Dispute Boards and our Foundation is his leadership in the establishment by the Japan International Cooperation Agency ("JICA") of a program of training on use of Dispute Boards for contracts financed by that agency throughout Southeast Asia, including the training and subsequent assessment of Asian nationals who wish to serve as Dispute Board members accredited by the Asian Member Associations of the International Federation of Consulting Engineers ("FIDIC"). In this work he has promoted interest in, and membership in, the DRBF, and has involved DRBF members in the training and assessment.

***The distinguished list of past winners of the AI Mathews Award includes:***

**AI Mathews  
Robert Matyas  
Robert Smith  
Joe Sperry  
Jimmy Lairscey  
Carlos Ospina  
Pete Douglass  
Jim Donaldson  
Steve Fox  
Gordon L. Jaynes**

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Romano Allione  
Harold V. McKittrick  
Jack Feller  
Richard Appuhn  
Gwyn Owen  
Robert Rubin  
Graeme M. Peck**

# Welcome to New DRBF Members

## MEMBER ADDITIONS JULY - SEPTEMBER 2012

Hiroki Aoki  
Nagashima Ohno & Tsunematsu  
Tokyo, JAPAN

Richard Kerry  
TYPASA  
Sofia, BULGARIA

Yvonne Bernard  
Yvonne Bernard Management Consultants  
Fort Lee, NJ USA

Christian Landry  
Demathieu & Bard Inc.  
St-Jerome, QC CANADA

Donald Bounds, Esquire  
Donald Bounds LLC  
Parker, CO USA

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Avondale Estates, GA USA

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Bernardo M. Cremades  
B. Cremades y Asociados, S.L.  
Madrid, SPAIN

Jacopo Monaci Naldini  
JMU Law Firm  
Florence, ITALY

Frank Daams  
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HJN Construction Consulting LLC  
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Yutaro Kawabata  
Nishimura & Asahi  
Tokyo, JAPAN

**Know someone interested in  
joining the DRBF?**

Help us expand by sharing DRBF membership information with your colleagues. Complete details can be found on the DRBF web site ([www.drbf.org](http://www.drbf.org)) or contact the main office for details.



## Ethics in Today's World of DRBs:

### An owner's project manager from a completed project asks a DRB Member for a reference for a new position with a new contractor

By Jim Phillips Ph. D.

The question posed at the end of the last column was how should you, as a former DRB member on a project which has been completed, handle being asked by the owner's Project Manager for a job reference for a new position with a private contractor. This issue at first does not look too complicated. I first thought that there would be no ethical problem in providing the requested reference.

However, the more I considered it, the more a number of red flags went up. How would one reconcile the role of a neutral party with becoming an advocate for one of the party's employees or consultants? Also, what would I tell the prospective new employer? My observations of the Project Manager were limited to regular DRB meetings and Formal Hearings. What should I say about those roles? Most importantly, how would providing a reference impact my neutrality as DRB member in the industry, and would I be seen as an "owner's advocate" or "owner friendly"?

The issues of a DRB member's links with either owners or contractors and how perceptions are fueled and how they impact a DRB member's appearance of neutrality are important ones. I know quite a few Foundation members sit on many Boards for either the same owner or the same contractor. This, on its face, is perfectly proper, but could lead to a perception that the individual is an "owner" member or a "contractor" member.

A cornerstone of the DRBF's Canons of Ethics found in Canon 1 is that a DRB member should be at all times during the life of the project a neutral party and avoid the "appearance of partiality" to one of the parties on the project. The question becomes: after a project is over, does this duty continue? Another question is: does providing a refer-

ence show partiality to either an owner or contractor? If it does, could it not be cured by disclosing it the next time this member is being considered for a DRB on a project where one of the parties is the potential new employer?

This brings me to a discussion of another Canon of Ethics, Canon 2. Canon 2 provides that the conduct of Board members should be above reproach and that even an appearance of a conflict of interest should be avoided. Usually we think of conflicts of interest as financial interests or stakes that would have an impact on a DRB member's neutrality. Does a reference letter or telephone call rise to this level? I do not think so unless for some reason the Project Manager in our case has promised some type of favor in return. Obviously, business people provide each other references and referrals all of the time without any expectation of a *quid pro quo*.

I think you can argue this question either way. The project is completed and there is no duty of neutrality to either of the parties. A reference letter is not a financial interest. A reference letter, however, if it is part of a larger pattern of conduct which creates an appearance of being an "owner's advocate" or being biased toward owners, and could create an appearance that this Board member is going to favor an owner on a project.

That is the interesting aspect of appearances. They are in the minds of the observers and two people can have totally different reactions to the same actions of someone. As I indicated, if this letter of reference was a part of a larger pattern that leads to this Board member having a reputation as being partial to owners, then it can be a problem. The next time this DRB member is being considered for a DRB, this may come out and have an impact on whether he or she is accepted.

I would be interested in hearing from a reader on this question. This is a good example of a “sticky wicket” that does not fit into a neat category that can easily be analyzed and answered. This situation might be one where the Board member could telephone or email a colleague and ask for advice on how to best respond to such a request. I have sat on Boards where we counseled each other in many areas even after a project was completed. This has been extremely helpful and an effective way to reach a good decision on a number of questions.

This raises the purpose for this column and the DRBF’s commitment to providing a forum for discussions about ethical issues that we all come into contact with from time to time. I would encourage all readers who are faced with an ethical challenge to take advantage of the opportunity of contacting experienced colleagues or to write in or call me with a question. The Foundation has established a protocol whereby we can confidentially discuss an ethical dilemma that is posed and provide a consensus-based answer to those in this business who might need some advice. The DRBF's commitment to providing an opportunity for discussion of ethical challenges is a large component of the organization's mission to ensure that the DRB and other similar processes are delivered at the highest level of professional integrity and ethical conduct.

## **NEXT ETHICS CHALLENGE**

Assume you are the Chair of a DRB and that the contractor, in its presentation to the Board of a dispute in a formal hearing; presented a very detailed analysis and argument to support its position which was produced by a claims consultant. During the hearing, it came to light that the claims consultant had never been to the site, had no direct knowledge of the factual circumstances and that his analysis was carried out three months after the events. The owner strenuously argues that the analysis and presentation should not be allowed or admitted because it was not a ‘contemporary record’ and that it should not be taken into account by the Board’s decision. You have found that the analysis was well produced, relevant and supported by the contractor’s project records.

### **What should the Board do?**

## **Ethics Commentary or Question?**

#### **Please contact:**

Jim Phillips

DRBF Ethics Committee Chair

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## **Forum Newsletter Editorial Deadline**

Our readers love to hear DRB success stories, challenges facing the process, and the latest industry news and events. If you have new information about DRBs, DRBF members, or an article to share, please tell us!

Contact Forum Editor Ann McGough by email at [amcgough@drb.org](mailto:amcgough@drb.org).

*Deadline for the February issue is*

**January 1, 2013**

# DRBF REGIONAL CONFERENCE – DOHA

## Effective Use of Dispute Boards for Dispute Avoidance and Resolution on Major Projects

By Wayne Clark

The first DRBF conference to be held in the State of Qatar took place in Doha on 6<sup>th</sup> and 7<sup>th</sup> November 2012. Qatar's success in its bid to host the 2022 FIFA World Cup will bring about a surge of construction projects, and with it the potential for a significant rise in the number of disputes. Construction disputes in Qatar have, in recent years, given rise to contracting Parties doing battle in the courts (or in arbitration) and their projects suffering as a result, particularly in respect of costs and excessive delays. Qatar's successful World Cup bid has changed the dynamics for its construction programme. This dynamic is time. The projects that need to be in place for the World Cup cannot be late. One of the core reasons for projects in the region experiencing delays has been the lack of a sensible dispute resolution structure in contracts.

Dispute Boards is the only dispute management process that, if applied correctly, can actually *prevent* disputes in the construction projects and the prevention (or early resolution) of disputes can contribute significantly to major construction projects being delivered on time. With the Qatar 2022 FIFA World Cup in mind, the theme for this Regional Conference focused on the role of Dispute Boards in the prevention and early resolution of construction disputes.

The conference kicked off on with an *Introduction to the Dispute Board Process* chaired by **Christopher Miers** with presentations by **Laura Warren** and **Giovanni di Falco**. In this session Laura explained the dispute resolution forum 'climate' in Qatar, which primarily centres around the court system and the difficulties such a process can be, in particular for international construction companies. Giovanni highlighted the advantages of using Dispute Boards in construction projects, the positive effect of Dispute Boards on tendering and tender prices and the fact that contractors are very much in favour of the Dispute Board mechanism.

The main theme of the conference was then taken up in the session on *Dispute Avoidance: A Unique Benefit to Dispute Boards*, chaired by **Murray Armes**. Speakers **Mark Hoyle** and **Aisha Nadar** examined the techniques that can be applied by and challenges facing standing Dispute Board members in their quest to help parties find solutions to differences before they develop into full-blown disputes, especially in a multi-cultural environment such as the Gulf and MENA regions. The application of mediation techniques and effective communication, in particular cross-culture communication, if applied skillfully, can be most effective in dispute avoidance.

The first day's sessions closed with presentations on the *Roles of the Parties* given by **Ehmemmed Ghula**, **Nabeel Khokhar** and **Simon Delves** under the chairmanship of **Paul Taggart**. This session also included a role-play mock DB Hearing, which was well received by most participants. During the afternoon, the delegates were treated to a tour of several major developments underway in Doha and visited two of Doha's most prestigious projects *the Pearl* and *Lusail City Development* where representatives explained the intricacies of the developments with the aid of impressive project models. The day ended rather fittingly with a well-attended Gala Dinner situated in the hotel gardens alongside the sea and overlooking Doha's impressive downtown (West Bay) skyline.

The final day of the conference began with a Keynote Address *Knowledge is a Treasure, but Practice is the Key to it* delivered by **Dr Minas Khatchadourian** the CEO and Secretary General of the Qatar International Centre for Conciliation and Arbitration. Dr Minas stated that from his observations, parties to construction contracts in the region, particularly Employers (thanks to a large extent to the use of FIDIC forms of contract), are realizing the importance of Dispute Boards who, when pro-active, can help prevent disputes in our industry. Dr Minas believes there is a real opportu-

nity for DBs to flourish in the coming years and if handled by real experts, he is convinced of the success of Dispute Boards in preventing unnecessary cost and delays.

A two-hour panel discussion then followed in which various aspects of the use (or otherwise) of *Dispute Boards in the Gulf Region* were discussed. Chaired by **Wayne Clark**, the panel of experts, who represented six of the Gulf/MENA countries, was asked to share their experiences and views on the use of Dispute Boards in their respective countries. The panel members were **Dr Sherif El-Haggan** (Egypt), **Dr Nabil Abbas** (Kingdom of Saudi Arabia), **Andy Hewitt** (United Arab Emirates), **Jamie Kallick** (Oman and Bahrain) and **Oliver Alexander** (State of Qatar). A range of topics and questions were offered to panel members and delegates, who all actively participated in what transpired to be a lively and stimulating debate.

The final session before lunch, chaired by **David Savage**, was appropriately entitled *Compare and Contrast: Dispute Boards under Civil and Sharia'a Law*. Thought provoking presentations were given by **Dr Minas Khatchadourian**, **Yasemin Cetinel** and **Dr Sherif El-Haggan**. Dr Sherif explained how under Islamic or Sharia'a law settlement of disputes is not merely encouraged, but mandatory and that the settlement of disputes is one of the richest areas of Islamic Law. Dr Minas provided an interesting comparative table in which he compared conflict and conflict resolution approaches and how they differ under Western and Middle-eastern cultures. Yasemin explained some aspects of Turkish law and how disputes are dealt with in Turkey and that in many contracts, Dispute Board provisions are deleted.

In the afternoon **Nicholas Gould** presented *Five Steps for a Successful Dispute Board Process*. Nicholas provided some very useful and practical guidelines for Dispute Board members and construction managers alike. These included the basic principles of sound technical management, good communication and understanding/using the contract. Nicholas' five steps for success are (i) setting up the project, (ii) running the project, (iii) managing change, (iv) dispute avoidance, and (v) dispute management. Execute these steps well and wisely

and the project will succeed.

**Murray Armes** chaired the next two sessions with presentations by **Marc Bryant** on *Avoiding Acrimony: Dispute Avoidance from the Client's Perspective* and **Ismail Essa** on *Dispute Board Process for Complex Projects: World Cup in South Africa*. Marc took the delegates through the dispute resolution procedure adopted for some of the London Olympic Games projects, such as an Independent Dispute Avoidance Panel, which appeared to have been successful. From the statistics provided by Marc, there have been no acrimonious court battles and only two adjudications, one of which was suspended. Ismail provided some encouraging data from some of the major infrastructure projects undertaken in preparation for the FIFA World Cup hosted by South Africa. Of the 18 projects cited by Ismail as having Dispute Boards, on only one project was there a significant number of disputes referred to the DAB for a decision. It appears that the Dispute Board avoidance techniques were highly successful in sunny South Africa.

In the final session, **Dr Imad Al Jamal** gave a forceful presentation on *Dispute Boards in the Gulf Region* in which he focused on his home territory, the United Arab Emirates. Dr Jamal believes that while there is still some skepticism and reluctance to the use of Dispute Boards, DBs are here (to stay) and employers, engineers and consultants need to be made aware of how effective Dispute Boards are. In all, over 50 delegates and speakers attended this Regional Conference, representing eighteen countries, twelve of which were outside the Gulf/MENA Region. Based on the feedback received from the delegates, the vast majority found the conference rewarding and informative.

While it is evident to those of us based in the region that Dispute Boards are not widely used in construction projects, what is encouraging, at least for the State of Qatar, is that one of the major government employers that has been vigorously resisting the use of Dispute Boards, is now seriously considering revising its policy and including Dispute Boards in its future construction contracts.

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(continued from page 1)

the Dispute Resolution Board Foundation, it has come to be widely used, especially by Departments of Transportation of the various states. That educational process has extended over almost four decades and continues today, fostered by the DRBF and its public conferences and workshops, as well as “in house” training programs for Dispute Board users.

By comparison, use of Dispute Boards in the East is new. The first use of a Dispute Board outside the USA was the El Cajon Hydropower Project in Honduras in 1981. The use was successful and no disputes went to arbitration or litigation. Yet it was not until 1995 that The World Bank (which had financed the El Cajon project) introduced the Dispute Board to its Standard Bidding Document, “Procurement of Works”, for use on construction contracts in which the design is performed by others. That same year, FIDIC introduced its form of Dispute Board in its Conditions for Design-Build and Turnkey Contracts. Thus, some 14 years had elapsed between initial successful use and wider use. Use by other Multilateral Development Banks was sporadic and it was not until 2005 that widespread use by these banks began, with the adoption of the FIDIC MDB Harmonised Edition of the Conditions for Construction. This “harmonisation” of the procurement practices of the MDBs was an outgrowth of the United Nations’ Millennium Development Goals.

Comparing West and East the lengths of educational efforts have been some four decades vs. 1.5 decades. Also, during the comparatively short time that educational efforts have progressed in the East, those efforts have been focused almost exclusively on the FIDIC version of the Dispute Board, the “Dispute Adjudication Board”, which has as a distinguishing feature the Board’s ability to make contractually binding decisions, subject only to resorting to international commercial arbitration. Of that, more later.

During the seven years since the Multilateral Development Banks began use of the Harmonised Conditions, and until very recently, no organised

training of bank staff and borrower staff has appeared, despite the fact that in many developing countries the FIDIC Conditions and the role of Dispute Boards were practically unknown. This lack of education has led to misuse, and the appearance of many dysfunctional Dispute Boards.

Cost: In the West, Dispute Board members are paid for the time worked. In the East, under the model developed by The World Bank, each Dispute Board Member is paid two types of fee: a monthly retainer fee and a daily fee. The retainer fee is for availability to come to the project site on other than regularly scheduled visits, for becoming acquainted with the contract and remaining acquainted with its development and maintaining relevant office files, and for other work not covered by the daily fee. The daily fee is for travel to and from the site, for the duration of site visits, for time spent in hearings not held during regular site visits, study of documents submitted regarding disputes, private conferring by the Board members, and preparation of its decisions.

Initially, The World Bank’s Dispute Board provisions set the monthly retainer at three times the daily fee, and the daily fee was set as the equivalent of the daily fee for an arbitrator under the UN’s International Center for Settlement of Investment Disputes (“ICSID”), unless the contract parties agreed a different daily fee. FIDIC did not set any benchmark fee rates, but adopted the two fees approach, as did (later) the ICC Dispute Board Rules. The ICSID daily fee for its arbitrators has risen to a current rate of USD 3,000. If one applies this to a three person Dispute Board on a project of three-years duration, with regularly scheduled site visits quarterly, the cost exceeds USD 1 million even if there are no disputes requiring hearings outside regularly scheduled site visits.

That USD 1 million number also excludes significant expenses of the Dispute Board such as airfares and hotel accommodations. Such expenses become significant because typically Dispute Board members have come predominantly from developed countries, travelling significant distances to serve.

Paradoxically, the Multilateral Development Banks that require the use of Dispute Boards have not developed a consistent policy of extending their financing of the contract to the cost of the Dispute Board, or even the foreign currency cost of a Dispute Board. The European Union is still pursuing a policy toward Dispute Boards that regards them as a form of litigation and thus ineligible for financing by the E.U.

The result has been that especially in developing countries, the Employers/Owners have sought to avoid or reduce the cost of the Boards. In some contracts, despite the requirement for the use of Dispute Board the parties have not established a Board. In other contracts cost reduction efforts have led, in too many cases, to dysfunctional Dispute Boards. Examples? Ignoring the contract provisions and postponing the establishment of the Board until after a dispute has arisen which the parties are unable to resolve by discussion and negotiation; restricting regularly scheduled site visits to once a year, using a single Board on multiple concurrent contracts at different sites.

Philosophy: In many countries, there is a resistance to the FIDIC philosophy that the decision of its Dispute Adjudication Board must be immediately binding on the contract parties, who must implement it forthwith even if one (or both) parties have given Notice of Dissatisfaction and intention to refer the dispute to arbitration. The background to the FIDIC philosophy can be found in the history of its first and still predominant set of Conditions of Contract, the Red Book, for use in construction where the works are designed by other than the contractor.

Until the 4<sup>th</sup> Edition, disputes were decided by the Engineer, and the decisions of the Engineer could not be referred to arbitration until after completion of the contract Works. Although the 4<sup>th</sup> Edition, first published in 1987, introduced the ability of a party to initiate arbitration during construction, the Engineer's decision still was binding and both parties were contractually bound to abide by it unless and until it was altered in arbitration. In 1996, when the supplement to the 4<sup>th</sup> Edition appeared, introducing the Dispute Adjudication Board as an

alternative decider of disputes under the Red Book, the decision of the Board was given the same contractually binding status as the decision of the Engineer. The rationale behind this philosophy is that the progress of construction must be paramount and thus the parties must follow the decision of the Engineer or the DAB, even if that decision is later altered in arbitration.

This philosophy has met with resistance in many countries. Employers facing a decision requiring payment of a large sum of money have simply refused to comply unless and until a final award is issued by an arbitral tribunal. Efforts have been made to obtain court injunctions to force compliance with a DAB decision, or to obtain an interim arbitral award requiring compliance prior to final award, only to discover that under the applicable law, no such temporary or interim enforcement of the DAB decision can be obtained so long as ultimate validity of the DAB decision is subject to a final award of the arbitral tribunal, or a final decision of a court of law.

However this overview of Dispute Board problems in the East would be misleading if it did not mention hopeful efforts which are afoot to overcome the challenges of Education, Cost, and Philosophy.

Education: The Japan International Cooperation Agency ("JICA") has become a leader among the development lenders in two respects. First, it is adopting a consistent policy of treating the cost of Dispute Boards as eligible for financing by JICA. Second, it is financing and executing a training program for effective use of Dispute Boards in those Southeast Asian countries in which it is most active. This training program is being developed in collaboration with the national Member Associations of FIDIC, and the Dispute Resolution Board Foundation. In-country training programs are operated to educate users on the FIDIC MDB Harmonised Conditions for Construction which are being adopted by JICA for use on contracts it finances. Also, additional in-country training workshops are being conducted for persons who wish to serve on Dispute Boards, followed by evaluation workshops, leading to identification of persons recommended

for listing by the local Member Association of FIDIC as approved candidates for appointment to Dispute Boards. JICA has developed the interest of the Asian Development Bank, and more recently, The World Bank in establishing similar training programs in other countries. These programs not only help in effective use of Dispute Boards but also enable creation of Boards using in-country members, thus reducing reliance on foreign members and reducing the cost of Dispute Boards.

Costs: Another cost reduction effort, initiated by members of the Dispute Resolution Board Foundation, is the elimination of the use of monthly retainer fees, and arranging the daily fee for Dispute Board Members to be at a reasonable rate and to be paid for all work done while serving as a Dispute Board Member. There is convincing evidence that the elimination of the monthly retainer fee will not reduce the availability of sufficient and suitable experienced persons to serve on the Boards. The elimination of monthly retainers has been proposed to the Task Force currently reviewing possible revisions to the Dispute Board Rules of the International Chamber of Commerce.

Philosophy: An Eastern expression comes to mind: When facing a strong wind, one should bend with the wise bamboo. In those circumstances where it is difficult or impossible to establish Dispute Boards which issue contractually binding decisions that are effective, let's try Dispute Boards that make non-binding Recommendations. Such Boards have equal capacity to assist the parties in resolving dis-

agreements before they become formal disputes. In other words, they can offer dispute prevention services. Further, and as in the West, even if both parties do not agree with a particular Recommendation, that Recommendation often will open the way for the parties to resume negotiations and find an amicable resolution to the problem without resort to arbitration or litigation.

Such an alternative can be made available under the ICC Dispute Board Rules with a very small change to the "Dispute Review Board" or "DRB" existing under the present rules. Such change has been proposed already to the Task Force reviewing those rules.

And what of FIDIC? The suggestion is that it is time to provide users an option which allows the user to choose either a Dispute Board which makes a contractually binding decision or a Dispute Board which makes a non-binding Recommendation. Also, FIDIC should assure that each type of Dispute Board is established at the commencement of the contract, so that the Board can perform its principal purpose of dispute prevention. The concept of an *ad hoc* Dispute Board, created only if and when a dispute has arisen which the parties are unable to settle by negotiations has proven to be problematic, primarily because its nature prevents it from performing the primary role of a Dispute Board – the prevention of formal disputes.

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## **DRBF PROJECT DATABASE SURVEY**

The DRBF gathers information on projects using a Dispute Board to monitor use and share basic information for educational purposes.

If you are serving on a Board or know of a project with a DB, please take a few minutes to submit the details by email to the DRBF office ([info@drb.org](mailto:info@drb.org)) or complete our online survey. The online version can be found under the "Publications & Data" tab on the DRBF website ([www.drb.org](http://www.drb.org)); select "Database" and then "Survey Form."

# The Development of the Dispute Board for Construction Contracts in Indonesia



By Dr. Sarwono Hardjomuljadi  
DRBF Country Representative for  
Indonesia

The first construction project using the DAB under FIDIC Conditions of Contract for Construction, Edition 1999 within the state-owned

companies in Indonesia was a gas pipelaying project (2008) owned by PT Perusahaan Gas Negara (State Owned Gas Utility Company).

Originally, Peter Chapman, Toshihiko Omoto and I were requested by the parties to be the Dispute Board for one of their projects, but they changed their opinion to use the single DB instead of a three member DB because of some reasons (FIDIC GCC for Construction 1999, Clause 20.2 Appointment of the Dispute Adjudication Board, para 2 mentions that the use of either one or three DB is allowed).

One experience of the use of Dispute Boards in Indonesia is the application problem of DB decision (FIDIC GCC for Construction Clause 20.4 para 4 “.....*The decision shall be binding on both parties, who shall promptly give effect to it.....*”). The contractor asked the employer to “*immediately*” pay their liability to the contractor, but the employer refused to do so. The employer was reluctant to pay because the contractor would not easily return the money back if the future arbitration decided the contrary.

I have presented and shared this complicated matter to the participants of the FIDIC MDB Harmonised Edition Conference in Brussels in June 25-26, 2012 and also in the FIDIC World Conference September 9-12, 2012 in Korea. Most all of the audience agreed that such matter should be taken into consideration in the future development of Conditions of Contract.

Based on several experiences, I am of the opinion that having three DB members is recommended as it is much better than the single DB. Using a single DB may raise many problems, from the lengthy appointment process until the arguable decision.

The problems incurred on that project made me reach out Professor Toshihiko Omoto from Japan, who was at that time the Country Representative for Japan.

We are of the same opinion that the most important thing is to educate the “*decision makers*” with the proper understanding of the DB implementation process.

We successfully hosted a Dispute Board Seminar, supported by JICA and opened by HE Minister of Public Works of Indonesia, Dr. Djoko Kirmanto, on May 14, 2012 in Indonesia, with Toshihiko Omoto and Sebastian Hoek as the speakers. Dr. Djoko Kirmanto as the Minister of Public Works of Indonesia is the responsible decision maker for the policy of all infrastructure projects in Indonesia.



From left, Minister of Public Works Dr. Djoko Kirmanto no6, Sarwono no8, President of DRBF Volker Jurovich no5, JICA Director Takashi Ito no4.



From left: Sarwono, Volker and Saisho

The second activity in Indonesia was a Mock Dispute Board, again sponsored by JICA and opened by HE Minister of Public Works of Indonesia Dr. Djoko Kirmanto, with the actors: Volker Jurowich, the President of the DRBF, Yoichi Saisho (Japan) and Sarwono, and other participants from Germany, Japan, and Hong Kong.

Dr. Djoko Kirmanto again gives his considerable support for the use of Dispute Boards in Indonesia. This is hopefully a sign that the government will continuously support the use of Dispute Boards as one of the alternative dispute resolution methods as mentioned in “*the Law No 30 Year 1999 of Indonesia about Arbitration and Alternative Dispute Resolution*”.

Other activities to promote the use of the Dispute Board in the region are the series of Adjudicator Training Workshop held October 29 - November 2, 2012 (with Gordon Jaynes and Richard Appuhn) and The Assesment Workshop for FIDIC National List of Adjudicator November 5 – 7, 2012 (with Volker Jurowich and Sebastian Hoek), initiated by Toshihiko Omoto as the only Asian on the FIDIC President's List of Adjudicators. The workshops were sponsored by JICA and Asian Development Bank, held in early November 2012 in Manila and attended by the participants from Indonesia, Philippines, Sri Lanka and Vietnam.

In 2012, several road construction projects in the Ministry of Public Works of Indonesia under JICA loans included the use of a Standing Dispute Board in the contract, and several power plant projects owned by the State Electricity Company used the single Dispute Board due to the cost reason. These showed the sign of good support from the government of the use of Dispute Boards for the construction projects in Indonesia.

***Dr Sarwono Hardjomuljadi is Vice Chairman of the Indonesian National Board for Construction Services Development, which was established under the Law of the Republic of Indonesia. He can be reached by email at sarwonohm2@yahoo.co.id.***

## **DRBF 2013 MEMBERSHIP DIRECTORY**

DRBF Members can access the DRBF Membership Directory online in the member's only section of the website, and a printed version is available to members upon request. Requests for a printed copy should be sent to the DRBF office, and will be mailed in January.

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## **DRBF 13th Annual International Conference** **Dispute Boards: Effective Dispute Avoidance and Resolution** **2 - 4 May 2013 - Paris, France**

Reserve 2-4 May for the DRBF's 13th Annual International Conference in Paris, France. Day one offers a full day of practical case study in workshop format. For the first time, the two-day conference will offer split sessions on Friday afternoon and Saturday morning. Participants will have the choice between sessions on the mechanics and procedures of how Dispute Boards function or more advanced topics for experienced practitioners. Content will include an update on the use and financing of Dispute Boards by international financing institutions and the European Union; a look at best practice in public/private partnerships in international construction projects; and the impact of the ICC Dispute Board Center and FIDIC Conditions of Contract. Legal experts will explore the use of DBs in the civil law countries of France, Germany, Italy and Spain, and report on current development in enforcement and other matters. In addition, there will be an update on major projects using DBs from Latin America and France (TGV and ITER), and growth of the process in Asia and Africa. On Friday evening, delegates can enjoy dining in the elegant tradition of the *Belle Epoque* at Le Pavillion Dauphine.

The workshop and conference will be held at **Hotel Concorde La Fayette - Paris**, one of the largest luxury hotels in Paris with spectacular views of the Eiffel Tower and the Arc de Triomphe. A limited number of rooms have been blocked for out-of-town delegates at discounted rates, and early reservations are highly recommended.

### **2 May - Training Workshop (optional)**

One day program designed to introduce those interested in becoming involved with DBs (owners, contract drafters, potential DB panel members) to the mechanics and subtleties of the DB concept and processes.

### **3 & 4 May - Conference**

Delegates will start and end in general session. In the afternoon of the first day and morning of the second, delegates will split into two groups, self-selecting an introductory track or an advanced track.

Topics include:

- ▶ Use of Dispute Boards in Continental Europe
- ▶ Views from the International Financing Institutions

- ▶ Initiatives for Better Dispute Resolution
- ▶ The Melting Pot - spotlight on projects in Brazil, Africa, and more.

Introductory Track Topics:

- ▶ Background of Dispute Boards
- ▶ Mechanics of Dispute Board Operations
- ▶ Contractor's and Employer's Views
- ▶ Africa and the Middle East

Advanced Track Topics:

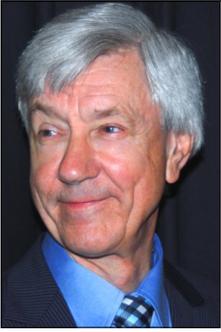
- ▶ Multi-headed Claims
- ▶ Constructive Acceleration
- ▶ DB Member Liability
- ▶ Ways of Improving DAB Decision Enforcement

### **3 May - Gala Dinner (optional)**

Le Pavillion Dauphine; see page 24 for details

## **REGISTRATION**

The DRBF offers secure online registration through our website, [www.drb.org](http://www.drb.org). Click on the Events tab and select Meeting & Conferences or the Calendar from the drop down menu, and then click on the link to access the conference website.



By William Buyse

## Efficiency of Dispute Boards & Enforceability of DAB decisions

Since some time a lot has been written and discussions are ongoing in regard to the enforceability of DAB decisions. Considering that the use of Dispute Boards is a method to avoid and resolve disputes in an effective way during the construction period - which has been proven on many projects - it's astonishing that some authors question them. The case *CRW Joint Operation v. Perusahaan Gas Negara* and the judgments by the Singapore High Court and the Court of Appeal in regard to an ICC arbitral award after the DAB decision came prominently in the picture: the arbitration award confirmed the DAB decision, whereas both the High Court set aside the arbitration award and the Court of Appeal dismissed the appeal although on the basis of different legal arguments. The different positions of the DAB and the arbitration award, and on the other hand both judgments of the courts add to the confusion. However, it must be stressed that until now only a very small percentage of parties have refused to implement the DAB decisions.

During the DRBF conferences, enforceability has arisen several times as the topic of a session, such as during “the legal aspects of DBs” session at the DRBF conference in Brussels in November 2011. Also in the *Forum* publications of August and November 2011, Dr. Sebastian Hök expressed serious doubts on the enforceability of DAB decisions. I do not agree with the following statements: “*Any adjudicator’s decision will be given subject to further arbitration*” or “*Finally under FIDIC an adjudicator’s decision is only provisionally binding and subject to further review by an arbitral tribunal*”. This is obviously not according to art. 20.4 of the FIDIC general contract conditions edition 1999. Indeed, a DAB decision is binding by definition and if no notice of dissatisfaction (NoD) is given by a party, that DAB decision becomes binding and final following the last paragraph of art. 20.4. I would

add here that the term “*final and binding*” used in both the FIDIC and the ICC dispute board rules should better read “*binding and final*” since a DAB decision is binding in first instance and becomes final later on, according to both rules.

If however a NoD is given in regard to the DAB decision within the prescribed time of 28 days according to FIDIC or 30 days according to ICC (art. 5.3), an arbitration may be started if no settlement can be reached by the parties. This is why the above mentioned statements that any DAB decision is subject to further arbitration and only provisionally binding is not correct.

Both texts in FIDIC and ICC indicate a similar idea in regard to a DAB decision: “*The decision shall be binding on both parties, who shall promptly give effect to it ...*” (art. 20.4, 4e paragraph) and “*A decision is binding on the Parties upon its receipt. The parties shall comply with it without delay ...*” (art. 5.2). This means that not respecting the DAB decision without delay is against the contract terms even if a NoD is given: for the parties this is the law of the contract and not respecting the DAB decision corresponds for the non-complying party to a breach of contract for a specific performance.

In case the convicted party does not give effect to a binding DAB decision for which a NoD has been issued, the FIDIC general conditions give no remedy in clause 20 to enforce the decision, except to consider the non-compliant party as being in breach of contract, since the decision is binding. One should in this case refer to art. 20.4 and not to art. 20.7 since this latter article is only applicable for the final and binding decisions, and hence request for an interim or provisional award. In this procedure interest from the date when payment was due corresponding to the DAB decision could be asked for, but seems not to be the best option since the merits of the dispute could come under consideration in the arbitration procedure as result of the

NoD. In the arbitration procedure one should not request for a final award because the DAB decision is only binding and not yet binding and final. Another discussion on the Singapore case is not having addressed the case of non-compliance to the DAB first before going to arbitration. This seems to me less important because it concerns exactly the same dispute, i.e. non-compliance with the decision of the dispute, so this is not another dispute. If the step is taken, the DAB would have to enforce its own decision which seems nonsensical to me. So a non-final DAB decision or a binding DAB decision can be made enforceable by way of interim award (not a final award and even not a partial final award) pending the result of the arbitration as a result of the NoD and wherein the merits of the case will be checked by the arbitration panel. This could lead to a final award different from the DAB decision and therefore have influence on the interim award given earlier. But it concerns two different arbitrations, the first one stating the non-compliance without merits of the case will be examined, while the second one will give a final award after a hearing on the merits. Supporting this solution of an interim award is the fact that it is based on the law of the contract between the concerned parties and is in line with the principle of natural justice.

As professor Naël Bunni identified correctly there exists a gap in the general contract conditions which could be solved when a new edition is available and the text in art. 20.7 is adapted and in line with the gold book text where this problem does not exist.

The importance to obtain an interim or provisional award is quite important for the normal progress of the project, because it is vital for the Contractor in any construction project that the cash flow is preserved and also for the Employer that the progress of the work is ensured, because the Employer wishes to make use of his project and to get the result of his investment as originally scheduled. This seems to be an important item in support for the use of dispute boards, as the first goal of a DB is to avoid disputes and hence also to avoid that a dispute results in additional procedures.

I realize that not everybody will support my views, more specifically lawyers who tend to take another view and look first at the legal aspects and possible complications to get a DB decision implemented against non-willing parties. On the other hand we have the view of engineers and architects who tend to look first for solutions which can be accepted by the opposing parties. Indeed a DAB should at first instance try to prevent disputes due to their independent view on opposing positions which could lead to disputes: the DB members should interfere and indicate possible problems, suggest solutions with recommendations when asked for and in such way avoid a dispute brought before the DB for decision. As we know that in the US only recommendations are allowed and that in a very high percentage these recommendations are followed up by the concerned parties and do not later lead to arbitrations or the courts, it is logical that similar interventions of a DAB – i.e. the proactive role - can and leads to the same results.

In case of the suggestions of the DAB in its prevention role to avoid disputes is not successful, a formal dispute is brought to the DAB where both parties have the possibility to forward their views. Even during the hearings the DAB can work towards a solution – in the name DRBF there is not without reason the wording “resolution” and hence the possibility to come to an agreement.

When an agreement cannot be reached the DAB will transmit – after the hearings and the study of the papers and documents they received – the decision to the concerned parties. From experience and on the basis of the results noted by the DRBF, a high percentage of the recommendations in the US are respected and do not go further to arbitration or to the courts. Only a very low percentage of DB decisions go on to arbitration or to the courts. If not so, the arbitration panel or the judge will ultimately decide based on the merits of the case. But do not forget that the DAB decision made by experienced persons who followed up the project from the beginning, will be used at least by one party in the arbitration procedure or in court. The DAB members are specialized in the type of construction works of the dispute and as such they are “expert witnesses”

which will have without doubt an important weight in the ultimate decision of the arbitration panel or the judge.

I would like to add here the view formulated by the International Beau-Rivage Palace Forum Working Group of Geneva which has been published in the *Construction Law Journal* (Volume 28 Issue 1 2012) in respect to the enforceability of DB decisions and to safeguard the effectiveness of the DB system. This working group did not only formulate a recommendation but gave a detailed reasoning for their proposal. Apart of the case of absence of NoD the recommendation also addresses a solution in case a NoD has been given. It seems to me that this recommendation could be taken into account when FIDIC and ICC modify their rules for dispute boards which are under discussion at this very moment, i.e. the adaption by FIDIC of the red book more in line with what is already of application in the gold book, and by the ICC a new version of their rules is taken care of by a special task force.

There is no doubt that a “gap” exists at present in the dispute board rules, but it does not mean that the methodology is not good to avoid lengthy and costly procedures for both employer and contractor, which in principle none of them wishes. From the borrower’s perspective neither procedures after the completion of the project are the ideal situation. On the other hand, the present economical circumstances and necessary reduction of expenditures for governments as a direct result may perhaps become a key element to have Dispute Boards generally accepted and applied. However, the DRBF and all persons convinced of the positive results of DBs still have a long way to go to convince parties to use DBs. We have to make efforts for a wider understanding of the benefits to employers, contractors, consulting engineers and architects in using the DB concept, to train DB adjudicators and to have lists of suitable trained persons in the countries where the DB method can and could be applied.

I would like to conclude that Dispute Boards are not at all a “phantom” as mentioned in the title of the recent articles in the *Forums* of August and November 2011, but a real effective method proven by a

large number of projects. One can even say that a DAB is a “real time solution” to solve problems which unavoidably arise when important projects are carried out in the construction business, but also in other sectors as for example the realization of chemical and petro-chemical complexes of which we know that important players in these fields are interested to apply the method.

**About the Author:** Ir. William Buyse has a M.Sc. in Construction Engineering from the University of Ghent, Belgium and obtained a special law degree law as expert witness. He acts as expert witness for the Belgian courts and is an arbitrator. He is president of KRID, the association of Flemish engineer-experts and serves on the board of directors of FEBEX, the Belgian association of experts. He is DRBF Country Representative in Belgium and can be contacted at [buyse@cem-eao.be](mailto:buyse@cem-eao.be).

**Interested in becoming a Country Representative of the DRBF?**

Expand Dispute Board use in your country of residence, and promote membership and interaction at a local and regional level.

Contact Country Rep Coordinator  
Andy Griffiths at [andyg@goba.co.za](mailto:andyg@goba.co.za)  
for details.

# Introductory training in FIDIC contracts in Zambia

By Christopher Miers, Member,  
DRBF Region 2 Board of Directors  
Chair, Region 2 Training Committee

The DRBF ran a 5-day training event in FIDIC contracts for the Road Development Agency (RDA) in Lusaka, Zambia in November 2012. The event was organised by the Association of Consulting Engineers of Zambia (ACEZ) on behalf of the RDA.

The course was run by Dick Appuhn and Chris Miers, both of whom are FIDIC President's List adjudicators and who regularly train professionals in FIDIC contracts. The course provided an intensive, introductory training to three FIDIC contracts: the Conditions of Contract for Construction (Red Book) - First edition 1999; Conditions of contract for Plant and Design-Build (Yellow Book) - First edition 1999; and Conditions of Contract for Construction - MDB Harmonised Edition 2010.

Twenty-four experienced Engineers from the RDA were taken through the three contracts in detail, considering duties and obligations, roles and responsibilities, management procedures, and comparing each contract to consider the differences between them. Each day delegates worked through real project case scenarios, considering the practical application of the terms of the contracts.

Discussion took place regarding the pre-contract preparation of the particular conditions as well as considering the numerous typical situations which can arise on the types of projects which the RDA are undertaking. Special attention was given to avoiding and addressing disputes: one day of the course was dedicated to a consideration of the contract provisions for dealing with claims and working with Dispute Adjudication Boards; and a final day was spent with delegates in role-play in DAB hearings with the RDA Engineers undertaking the roles of DAB, Contractor and Employer.

On completion of the five days all delegates received Certification for FIDIC Modules 1 & 2.



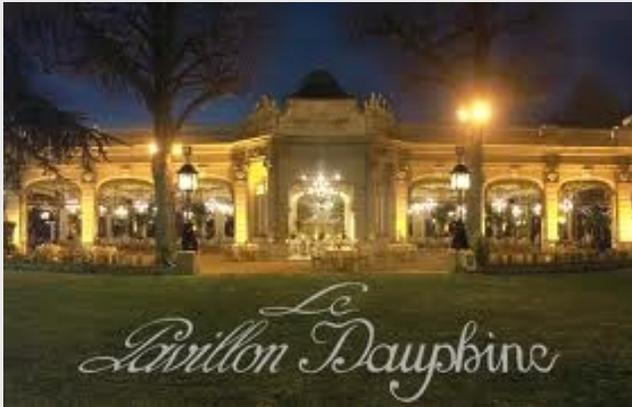


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**DRBF 13th Annual  
International Conference**

**GALA DINNER**

**May 3, 2013  
Le Pavillon Dauphine  
Paris, France**

Join delegates and speakers from the 13th Annual International Conference for an entertaining evening of dining in the elegant tradition of the *Belle Epoque* at Le Pavillon Dauphine.

Built at the beginning of the last century, this elegant venue is surrounded by gardens and offers a prestigious setting for the dinner. Originally constructed by the City of Paris in 1913 as a place to receive official delegations arriving by train at the Porte Dauphine station, the venue has long been used for receptions and balls and is full of history and charm.

Dinner tickets are US \$200 per person, inclusive of beer and wine. Cocktail attire.

**For more information, visit [www.drb.org](http://www.drb.org)**