

DRBF Forum

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By Jaime Gray and
Julio Peña

Peru has passed Law No. 30225, allowing the use of Dispute Resolution Boards for public procurement in Peru.

Dispute Boards in Peruvian Public Procurement

Introduction

It is common knowledge that the construction industry is extremely complex and, therefore, it is usual, predictable and almost inevitable that a wide range of disputes and claims relating to the execution of additional work, recognition of expenses, deadlines, scheduling activities etc. will occur. As a result, owners, builders, engineers, supervisors and others involved in a construction project are constantly looking for the most cost efficient way to resolve these type of claims and consequent disputes. The most recent Peruvian public procurement regulations seek to achieve the same goal.

With the passing of Law No. 30225 - Law on Government Procurement (hereinafter the Act) and its Regulations approved by Supreme Decree No. 350-2015-EF (hereinafter the Regulation), new pro-

visions have been approved regarding various aspects of public procurement in Peru. However, the most important changes are related to the dispute resolution system during the execution of public works as now the use of Dispute Resolution Boards (DRB) are allowed.

The main reasons for the implementation of the DRB are: (i) it provides a quick solution for disputes arising from public works, (ii) it uses public resources efficiently, (iii) it has been successful internationally, and (iv) it adds value to business and conflict management in projects.

We aim in this article to conduct a brief review of the main characteristics, features and overall regulation of the new dispute resolution mechanism that has been enacted.

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President's Page



Doug Holen
President
DRBF Executive
Board of Directors

Dear Members, Supporters and Friends of the DRBF,

Nearly six months have passed since our Annual Conference in San Francisco and there are many positive developments to report.

Region 2 hosted a successful conference in Istanbul, Turkey in November and another one in February in Livingstone, Zambia. I understand that the attendees in Livingstone included a significant number of owner representatives... always a good sign!

The International Conference in Santiago is just around the corner. It should be an interesting event with training on Wednesday, the 11th of May, engaging presentations and lively panel discussions on Thursday and Friday, the 12th and 13th of May, and a winery tour on Saturday the 14th. Looking forward to tasting some Chilean Carmenere! Come join us if you can.

Our Treasurer, Tom Peterson, reports that we finished 2015 with a positive addition to our reserves and that we added 195 first time members to our membership. Near the end of 2015, with Tom's guidance, the regional boards developed and the executive board approved a budget for the Foundation for 2016.

Lori Krutzsch, the DRBF Membership Coordinator reported our membership stood at 949 at the close of 2015 and advises that enrollment for 2016 is well underway. Will we see 1,000 members by the end of the year? Many members in all three regions are actively engaged in attempting to meet that objective. I wish you all the best of luck in your endeavors!

In early February, the first handful of chapters for the new *DRBF Practices and Procedures Manual* were sent to the professional editor for review. Graham Easton and his committee intend to send her another installment later this month. Thanks to all the members who have contributed manuscripts for Graham and the editor to review.

Ann McGough told me this past week that all of the back end work is done for the website revision, and the front end text is underway. Testing will begin later this spring. Hopefully you will see an email announcing that the new website is up and running soon thereafter.

Jim Perry, past President of Region 2 and the current Chair of the Institutional Liaison Committee together with several other senior members of Region 2 are in the process of developing a Memorandum of Understanding covering detailed cooperation between the DRBF and FIDIC regarding the development and maintenance of national lists of adjudicators in several countries. Congratulations to Jim and the other senior members in Region 2 for their continued success in fostering and maintaining a long term relationship with FIDIC and the Development Banks. Those institutions are the life blood of operations in Region 2.

That's it for now. I hope to have continuing reports on these activities and of other initiatives under way in our next issue of the *Forum*. Until then...

Warmest regards,

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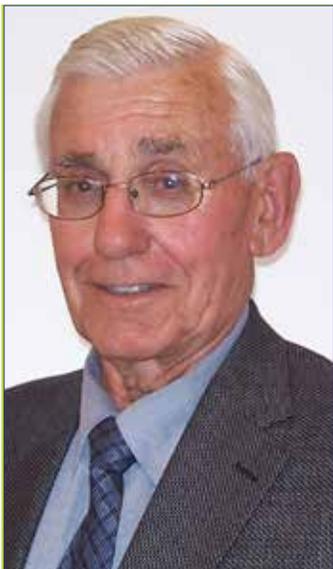
The Forum welcomes articles on all aspects of Dispute Resolution Boards, and members are encouraged to submit articles or topics to the DRBF, attn: Editor.

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A conversation with... Graeme Peck



Graeme Peck
Recipient of the
Al Mathews Award
for Dispute Board
Excellence (2011)

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

A My first appointment was a dam in Western Australia being constructed for the WA Water Authority. The Authority was a leader in introducing the US Bureau of Reclamation's 'partnering' into contracts in Australia and this led them into a DB for a major dam contract which commenced about 1991. This DB was only the second used in Australia after the completion of the Sydney Outfall contracts where DBs were adopted at the behest of the US consultants Jacobs, who were in JV with an Australian consulting group for design and supervision of the outfall contracts.

I was the contractor nominee, WA Water nominated a Perth-based consultant, and the parties together agreed on Max McDougall as the DB Chair. My association with Max on this first DRB was a great learning experience for me. Max became an early champion of DBs in Australia following a long association with Al Matthews on a major underground dispute which arose during the Sydney Eastern Suburbs railway construction.

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

A A particularly difficult contract involved an owner letting a long term contract to a single contractor that involved specialist technology, several specialist technology providers as subcontractors and various third parties with substantial interests in the contracted product, but with no formal contractual link to the owner or the contractor. The DB routine meeting procedures were also significantly pre-ordained by the owner

in the DB agreement. The DB had great difficulty in getting the parties to openly discuss with the DB members and each other the numerous issues these arrangements generated and it took the DB over one year to achieve the beginning of a sensible working arrangement. Then a different owner took over the contract, multiple project team and management changes followed and the initial gains with the original owner representatives were largely lost. Achieving a satisfactory interparty relationship and outcome and building trust with the DB so that all issues could be shared openly was a continual struggle throughout this contract.

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

A A number of DBs that I have served on have achieved excellent outcomes – ahead of time, under budget, no formal referrals. I am loath to name any single one as the “most satisfying”. What was extremely satisfying on all these projects was the cooperative attitude of both contract parties to openly discuss the numerous issues which inevitably arise on any major project and endeavouring to identify “best-for-project” solutions which ensured neither party should pay more than was necessary regardless of where responsibility lay. This approach generally led to outcomes which were close to nil extra cost for either party.

Q Should the DRBF recommend maximum and minimum age limits for DB members?

A I do not favour specific age limits. However, it is imperative that younger Dispute Board members have sufficient experience to ensure that any comments



made during routine meetings are recognised as credible by the contract parties. At the upper age level, the ability to see the contract out is necessary (unexpected health issues aside).

My own view is that the standard nominee process would ensure that the nominating parties would cover both ends of the age spectrum in their deliberations.

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

A This depends on the nature and complexity of the contracts, whether one is Chair or an ordinary member (the former involves significantly more work than the latter), extent of travel required for each DB, and an individual's other commitments.

My own experience has been that four DBs running concurrently (with three as Chair) has been a challenge, and I have declined additional DB nominations while that situation has remained.

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

A In my early experiences, lack of appreciation of flexibility in the pre-or-

ained routine Board processes has led to unnecessarily difficult DB arrangements. In my later years, I have indicated my concerns with any such matters in my nomination responses and have included my suggested modifications. This has usually resulted in a sensible adjustment where my nomination has been accepted.

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

A Within Australia, it is now a standard requirement that all routine DB meetings and any reports produced to the DB at such meetings (before any formal dispute referral) are "Without Prejudice" and cannot be used or referred to if any formal referral should subsequently emerge. I believe this is a fundamental requirement for open and honest discussion of problems so that "best-for-project" solutions can be identified and agreed with a view to dispute avoidance.

Q How do you keep fit and healthy and what is your preferred relaxation?

A Regular exercise (gym and/or walking), skiing, golf (poor standard!), fishing, and things other than DBs!

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

A I have travelled extensively in all continents for both business and pleasure reasons. I have no desire to live in any other country than Australia.

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

A Willingness to invest your own time in industry support roles and conference contributions. Essential to become known and respected by industry participants as a potential DB member. Persis-

tence is necessary – it may be some time before one can establish the necessary recognition.

You are chosen or nominated by experienced industry practitioners who in effect are investing in you as a member of a group whose advice may well be against their initial views of their entitlement. Thus industry credibility is an essential requirement. You must be seen by the industry as even-handed, regardless which ‘side’ is your most common contact point.

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Upcoming DRBF Events

May 11 - 13, 2016
16th Annual DRBF International Conference
Santiago, Chile

June 3, 2016
DRBF Northwest Regional Conference
Seattle, Washington, USA

September 22 - 24, 2016
20th Annual Meeting & Conference
Washington, DC, USA

November 3 - 4, 2016
DRBF Regional Conference & Workshops
Sofia, Bulgaria

Complete details at www.drb.org



DRBF 16th Annual Meeting & Conference

May 11-13, 2016
Grand Hyatt Hotel Santiago, Chile

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

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

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

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Ethics in Today's World of DRBs

Owner Questions the Volume of Documents Requested by the Dispute Board Referred to in the Operating Procedures Approved by all Parties to the Contract



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Ethics Commentary or Question?

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The question posed at the conclusion of the last column regarding an owner's reluctance to provide project documents to the Dispute Board as required by the Operating Procedures is one, while seemingly minor, has potentially far reaching implications for the Board's ability to operate effectively. Moreover, the fact that the owner previously approved the sharing of certain documents by approving the Operating Procedures speaks volumes about the genuine interest in having an effective operating Board on the project.

Most Dispute Boards that I have been familiar with take the position upon being seated that the best method for keeping its members educated about the progress and potential disputes is to be copied on much of the project's correspondence in real time. This enables all parties to be kept up to speed on project activities, and does not create a burden to generate extra documents just for the Board's benefit. Many of us have said to parties many times at the outset of a Board's operations, "We do not want you to create any additional documents just for the Board, because that is not what this process is about. All we need is to be copied on regular correspondence."

Most, if not all, parties with a Dispute Board on their project welcome not having to generate additional documents for the Board's use. In this case, assuming that the owner was the party that included a Board Specification on its contract documents, it's hard to understand why,

after agreeing to Operating Procedures requiring documentation to be sent to the Board, an owner would change completely and become opposed to it. The question also suggests that the owner is opposed to a proactive Board engaged in disputes avoidance. This may explain part of the story.

Depending on a party's experience with and/or philosophy about Dispute Boards, the appropriate and comfortable degree to which a Board is permitted to insert itself into the operations of a project will vary. If the philosophy is that the Board is available only when the parties wish them to hold hearings, listen to formal disputes, and issue reports and recommendations or decisions, then the effort by the Board to be proactive will most probably not be successful. Being proactive, in the effort to avoid disputes, requires parties to communicate more frequently, disclose more data, and be more open to having the other party become more knowledgeable about how it is approaching and completing the project's requirements. This approach is most often more expensive as it requires more of the Board's time.

Moreover, it is possible that the owner in the question posed has had a negative experience in the past with a Board that did request the creation of new documents just for the Board's review which became problematic to staying on time and under budget. While requiring extra documentation, on its face, is not unethical, it clearly undermines the role of



the Board and the ability of the parties to prosecute the work. This should be avoided at all costs.

The Dispute Board in this situation has several alternatives. It can agree to scale back its requests in terms of volume and frequency. It should make it clear that no new documents need to be generated just for its use. For that matter, if I am a Board member, I ONLY want to see the authentic documentation from the project and not something prepared with additional editorializing or commentary. This practice ensures that Canon 5 of the DRBF's Canons of Ethics is adhered to. "Reports shall be based solely on the provisions of the contract documents and the facts of the disputes."

**ETHICS:
FOR NEXT TIME**

Assume you are a Dispute Board member sitting in a formal hearing listening to presentations concerning a dispute between the parties. During a break in the proceedings, the contractor's Vice President approaches you about wanting to sponsor a Dispute Resolution Board Foundation event at its offices.

What should you do?

**DRBF Regional Conference & Workshop
"Dispute Boards as Lifeboats
to the Project Ship"
November 3 & 4, 2016
Sofia Hotel Balkan • Sofia, Bulgaria**

The DRBF will present an interactive workshop and conference focused on the application of Dispute Boards in Bulgaria and the surrounding region, as well as best practices shared by international practitioners.

The conference will also cover the unique preventative role that Dispute Boards offer. Experienced practitioners will share their insight on best practices and lessons learned. The first day offers workshops for those new to the process and experienced users and Dispute Board practitioners, and Day 2 will deal in some depth with the dispute avoidance role of DBs, FIDIC, implementation of the process and DB procedures in practice.

Delegates will enjoy a Welcome Reception on Thursday evening, and an optional dinner in Bulgarian style on Friday. Tourism options provided for delegates and guests.

Save the date and plan to join us!

(continued from page 1)

THE DISPUTE RESOLUTION BOARD IN THE NEW PUBLIC PROCUREMENT LAW AND IN INTERNATIONAL PRACTICE

The regulation of the Dispute Resolution Boards for the settlement of disputes arising during the execution of works has been supplemented by Directive 020-2016-OSCE/CD passed February 27, 2016. This body of law deals more specifically with the establishment, functions and activities of DRBs.

WHAT KIND OF DISPUTE RESOLUTION BOARD HAS BEEN REGULATED?

Article 45 of the Act says:

(...) The parties may appeal to the Dispute Resolution Board in respect of works contracts, depending on the reference value and other requirements in the regulations, and any DRB decisions are binding (...) (our emphasis).

As we saw in the final highlighted part of the excerpt from Article 45 above of the Act, DRB decisions are binding and mandatory as in the case of Dispute Adjudication Boards. Additionally, Article 212 of the Regulations provides that “the decision issued by the Dispute Resolution Board is binding and parties should immediately comply with it on notification (...)”¹

The above is not the only provision re-

ferring to the type of Dispute Board adopted. In this regard, paragraph 7.6 of the Directive leaves open the possibility that the DRB may issue recommendations to prevent disputes in the execution of public works, described as the “consultative role” of the DRB:

“(...) At the request of both parties, the DRB may additionally act in a consultative role in order to prevent the emergence of future disputes. This function consists of issuing a non-binding opinion on any issues that may be grounds for a future dispute or that the parties wish to elucidate. This consultative role can be requested in writing by the parties during any meeting, hearing or site visit. (...)” (our emphasis).

We highlight that the Peruvian regulation clearly understands the importance of the dispute avoidance feature of DRBs.

Also, the Directive says that DRBs must be established before the works commence, set rules for the site visits, etc.

In view of the above, it is clear that the type of Dispute Board implemented by the Act is a standing Dispute Adjudication Board which not only is expected to resolve disputes but to avoid them.

Special Features of the Dispute Resolution Board in Peru

We will now briefly consider the main

¹ Article 212 of the Regulation states “the decisions of the Board are binding, must be executed immediately and are mandatory for the parties since its notification, once the term for its correction or clarification is over, and/or once its corrected or clarified, if applicable.

No governmental, arbitral or jurisdictional authority can avoid compliance with the decisions of the Board. The parties are obligated to comply with the decision as soon as possible, even if an objection is filed against the decision and/or there is the intention to submit the dispute to an arbitration. (...)”



features of DRBs:

No obligation: According to Article 182 of the Regulation, it is not mandatory, but optional for the parties to agree on whether or not to apply to a DRB for dispute resolution.

Amount limitation: A DRB can be agreed in contracts exceeding S20,000,000 (Peruvian Soles), equivalent to approximately US\$5,824,112.²

Opportunity for agreement to submit to the DRB: Under Article 205 of the Regulation, in principle, the agreement to use a DRB should be established in the contract or at some later date, before the beginning of the execution phase of the works. We will discuss this issue in more detail later on.

DRB Centres: All DRB procedures should be managed and organized through a centre that meets the requirements of the Regulation and the Directive. In addition, this centre should have a list of accredited Boards members and a fee schedule.

Profile of the DRB members: A sole member DRB and the Chair of a group DRB must necessarily be either an engineer or an architect. Members other than the Chair may be experts in other fields related to the execution of works. In addition, DRB members must fulfill other requirements, which are the same as those required to be an arbitrator, namely, valid registration in the corresponding register, to be independent and impartial at all times and other criteria detailed in sub-article 45.6 of the Act.

Number of members: If the contract amount exceeds S20,000,000 but is under S40,000,000 the DRB must be composed of only one member. If the contract amount exceeds S40,000,000 then the DRB must be composed of three members.

Impediments to being a member of a DRB: Impediments to being a member of a DRB are the same as those for being an arbitrator, provided for in Article 190.³

Functions of the DRB: The main functions of the DRB members are (i) to issue binding decisions, (ii) provide advisory services regarding contractual and/or technical matters when requested by both parties; and, (iii) periodically visit the work site etc. under Article 208 of the Regulation.

Issues that may not be submitted to a DRB: According to Article 205 of the Regulation, neither disputes related to claims for compensation for matters not covered by public procurement law and regulation nor any decision by public entities to approve or not approve changes to the scope of work can be submitted to a DRB.

DRB administration: All DRBs must be organized and managed by a DRB Centre to register decisions and actions, to appoint the members of the DRB if necessary under the Directive, to resolve requests for recusal, oversee compliance with ethical principles, impose ethical sanctions and report these to the Supervisory Board for State Procurement, and

²At the official exchange rate of 1 USD = 3.434 Peruvian Soles on 11 February 2016.

³“Article 190. Impediments to acting as arbitrator” is detailed at the end of this article on page 13.



to provide logistical support to the DRB.

Notification of decisions: Decisions which are not notified within a period of fifteen working days following the conclusion of hearings may not take effect, unless the parties expressly agree to an extension of the deadline.

Compliance with decisions: DRB decisions are mandatory and should immediately be complied with. No judicial, arbitral or administrative authority may prevent compliance. In addition, failure to comply with DRB decisions is regarded as a fundamental breach which entitles the other party to terminate the contract, in accordance with Article 212 of the Regulation. However, parties may submit DRB decisions to arbitration.

Condition-precedent for arbitration: According to Articles 184 and 213 of the Regulation, arbitration proceedings may begin only if the specific dispute was previously resolved by a DRB. Only those decisions which have been the subject of express disagreement by either party within seven days of notification of the decision may be submitted to arbitration. However, submission to the DRB is an essential condition-precedent for resorting to arbitration.⁴

Conclusion

- The implementation of DRBs in Peru is a positive development in the effort to achieve the rapid and efficient resolution of conflicts arising from public works. We expect DRBs to be sufficient for parties to avoid

arbitration rather than merely serve as a first instance to resolve conflicts.

- The legislative option of Dispute Boards adopted by the Act is comparable to the Dispute Adjudication Board as the decisions are binding and mandatory.
- The Directive regulates the conditions for entering into an agreement for submitting disputes to a DRB, the functions and requirement to be met by members of a DRB, etc.

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⁴Article 184 of the regulation states that “If the parties have agreed that disputes are first submitted to a Dispute Resolution Board (DRB), the initiation of arbitration and its term is governed by Article 213”. Article 213 states that “the exhaustion of the proceedings before the DRB, when this mechanism has been agreed, is a pre-condition for arbitrability to the issues under its jurisdiction.”



From page 11, footnote #3 follows:

“Article 190. Impediments to acting as arbitrator

The following may not act as an arbitrator:

1. The President and Vice presidents of Peru, the members of the Congress, the Ministers, and the official members of the public independent organizations recognized by the Constitution.
2. Judges, except Justices of the Peace.
3. Criminal Public Attorneys and Coactive Officers.
4. Public Attorneys and its workers, or the persons working in temporary organizations with transitory and similar functions.
5. The General Comptroller of the Republic and the Vice Comptroller.
6. Presidents of public institutions and organizations of the Executive Power.
7. Regional and Municipal Mayors.
8. Members of the Board of Directors of public companies.
9. Military and police personnel in the performance of their duties.
10. Officials and public servants in cases directly related to the entity or sector in which they work and within the limits established by the rules of incompatibility.
11. OSCE officials, for up to six months after leaving the institution
12. Persons undergoing bankruptcy proceedings.
13. Persons punished with disqualification or suspension of the arbitration function established by the Board of Ethics, while those sanctions are in force, subject to the completion of the cases that has accepted his appointment prior to the date of imposition of the sanction.
14. Persons sanctioned by the respective professional association or administrative bodies, while such sanctions are in force.
15. Persons punished with sentences that will lead to a disqualification from practice, while the sentence is in force.
16. Persons punished for a felony, while the sentence is in force.

In the cases referred to in paragraphs 8 and 10, the impediment is restricted to the sector in which those people work.”

Avoiding Pitfalls in the DRB Specification Process

Panelists and article authors: Joe Keating (Chair), Warren Bullock, Deborah Mastin, and Harold McKittrick

This article summarizes the views of four DRBF practitioners from a session held at the DRBF's 19th Annual Meeting in San Francisco in October, 2015 addressing the important factors in the DRB process that must be considered to improve the process and encourage proper implementation in the post-contract award phase. It is understood that many specific changes are necessary to conform to an agency's regulations and owner's preferences as well as the standard general conditions. However, it is the best practices that concern the DRB specifications that are addressed. The focus is on the North American DRB model, although there are lessons to be gleaned that apply to Dispute Boards worldwide.

I. PROBLEM PROVISIONS

Recommendations Not Decisions

The first element of a successful DRB is to ensure that it issues recommendations and not decisions. If Boards are required to issue decisions there will be a legal assault on the DRB procedures to ensure due process. It will go the way of arbitration, a process originally intended to ensure rapid and inexpensive solutions to disputes but has now become totally dominated by the legal profession, often resulting in lengthy and costly cases mired down in interrogatories, discovery and other actions derived from legal proceedings.

The writer has come across several different specifications that require binding decisions for issues under a certain cap amount in the range of \$75,000 to \$200,000. The probable theory behind these "small issues" is that they are too minor to pursue with a lot of legal fire power and certainly not costly enough to pursue in the court system. Although the writer has had these conditions on some projects, the small issues decision process was never utilized.

One famous (or infamous case) of utilizing binding decisions occurred on a nationally famous infrastructure project, when partway through the project the owner and the contractor agreed (through the change order process) to make the DRB's recommendations binding. That project saw multiple successive dispute boards, issues continu-

ing more than a decade after the project was completed and accumulated legal fees that were reminiscent of a John Grisham novel. In other words it was a complete disaster.

Admissibility

The second important element is the admissibility of DRB recommendations in subsequent adjudication proceedings. Most of the specifications under which the writer has worked prohibit the use of the DRB recommendations in subsequent adjudication. This is a mistake in that it lessens the effect and stature of the DRB process. It is understood that some attorneys are opposed to admissibility based on the fact that DRB proceedings are not conducted in accordance with the rule of law. However, similar to expert reports, DRB recommendations provide the courts with reasoned recommendations based on the facts of the issues and the conclusions of three independent and impartial experts in the field. Although the writer has never experienced an attempt by a party to introduce a DRB's recommendation in spite of a contractual prohibition, it is suspected that a court could allow its introduction if the court so desired.

Timely Seating of the Board

Most contracts state that a DRB should be constituted and the first DRB meeting held shortly after the contract is executed and the Notice to Proceed is given to the contractor. The reality is that the Board is treated as an afterthought on most contracts and is often seated six months to over a year after



the first shovel full of dirt has been dug. The writer has found this to be true on over one half the contracts on which he has served, with certain notable exceptions. Owners that have utilized the process for many years on many projects are very cognizant of the value of DRBs and seat them at least within a few months of Notice to Proceed or contract execution. The writer also has found that DRBs are seated with this same degree of efficiency on Design-Build projects. This is attributable to the designer being the lead dog in the early stages of that type of project; and the construction people left with more time to focus on design review, constructability issues and contract conditions.

Ad Hoc Boards

Once boards are seated, too many of them meet once and never meet again. (They are essentially Ad Hoc Boards.) This is attributable to a number of reasons. A few are cited below:

- a. The field level people of both the owner and contractor have had little or no experience with respect to DRBs and have had the DRB requirement imposed on them by the contract and their superiors. They cannot wait to get rid of the Board.
- b. Having no apparent issues, the parties in the field believe they can save money in the contract that can be applied to other contract needs.
- c. Particularly at early stages of the project, the parties in the field believe they can solve their own issues through partnering, issue escalation, etc.
- d. The parties in the field do not want added sets of eyes knowing what they are doing.

The reality is that this is all penny wise and pound foolish. A recent personal example is a project that has maintained for over a year that it has no issues to hear; but its most recent management group has decided it is necessary for the DRB to meet in light of huge cost overruns and serious project delays.

However, the most common reason is that the industry does not appreciate the dispute avoidance aspect of Dispute Boards. Some users, after they have had a few DRB meetings and do not have a defined list of issues requiring resolution will dismiss a Board in the early stages of the project. The impetus generally comes from the owner with the contractor acquiescing to maintain good relations with the owner.

One contract under which the writer worked called for the DRB to meet only if a hearing was required. (The mother of all Ad Hoc Boards.) Although titled a DRB, this Board basically was an arbitration panel.

An unappreciated benefit of DRBs is that the presence of Boards fosters open communication between the parties that would not exist but for the presence of Boards. The writer has been told on numerous occasions that the only time the parties openly communicated with each other was in DRB meetings.

Indemnification

Legal relations between and obligations of the parties are established in the Three-Party Agreement. The DRBF recommended model contains an indemnification section in which each Board member is held harmless for any personal or professional liability arising from or related to DRB activities. Most agreements the writer has signed have had this or effectively the same language. The language should not be modified or eliminated. Doing so would suggest an attempt to hold Board members personally or professionally liable for their efforts to resolve disputes. It would underscore a lack of confidence in the DRB process and create an atmosphere that is not conducive to dispute resolution.

The writer has seen one participation invitation for DRB members that not only did not indemnify DRB members but required the DRB members to indemnify the agency. The writer was asked to serve on another whose specifications required the same. Needless to



say the writer did not reply affirmatively to either and recommends you do likewise if presented with such an invitation.

If the legal relationship language varies from the DRBF specification, contact the DRBF office and you will be put in touch with a person who can advise you on your Three-Party Agreement language.

Timely Scheduling of Hearings

One final point of the Problem Provisions portion of this paper is the timely scheduling of hearings. Most specifications rightly call for the parties to seriously attempt to negotiate settlement of an issue, prior to bringing it to the DRB. However, there are some contract documents that specify required steps with time allowances, up to and including a contracting officer's final decision, as a condition precedent to bringing an issue to the Board. Such requirements greatly extend the process and effectively nullify the main benefit of the DRB process, namely a reasonably speedy expert recommendation to assist in the resolution of disputes. Typically when a hearing is requested, the DRB will schedule it at the next quarterly DRB meeting, or sooner if requested by the parties.

Do not eschew Advisory Opinion Hearings. They are cheaper and less time consuming than formal hearings and give the parties an early reading on the DRB's view of an issue. Requesting a full hearing on the same issue in the future is not precluded. However, some users do not allow advisory hearings.

With problem provisions noted, the DRB specifications must contain certain essential elements.

II ESSENTIAL ELEMENTS OF DRB SPECIFICATIONS

Scope and Term

Consider the DRB panel's work when writing the DRB specification. Claims mitigation and avoidance is the primary function of the Board. Assessing entitlement, liability

and quantum on issues is a secondary function. The parties always can agree to amend the specification if it is unworkable. DRBs work when the parties have confidence in, and the trust of, the panel members, who bring great value to the table. The parties are presented a unique opportunity for dispute avoidance and resolution; and the most beneficial aspect is that unforeseen conditions can be addressed expeditiously while there is still time for the parties to agree on the chosen response, and not wait until after money has been spent, usually by the contractor, only to argue about who should be responsible to pay for the unplanned work already performed.

Regular Meetings

Begin at the beginning of the project and have regular (monthly or at least quarterly) confidential meetings that should be held and not arbitrarily postponed or cancelled. The parties must commit to participate in these meetings. The nature of and intensity of the work will determine the required frequency of meetings. The Board will seek information on issues and have discussions that can be shared without exposure. It is a confidential and flexible process. There are no preconditions to discussing issues; and discussions at regular meetings are a precondition to a formal hearing.

Hearing Process

Recommendations, whether advisory or formal, must be issued timely in accordance with the specifications and the Board's Operating Procedures that are drafted by the Board and agreed by the parties. Limits on time are to be established for clarifications or reconsiderations. The question of admissibility previously discussed also must be established.

Panel Members

It is the position of some DRB advocates, including the writer of this section of the paper, that the composition of the Board should have a lawyer, a view that was not universally shared by other panel mem-

bers. The writer also recommended that the owner pay 100 % of the DRB costs for regular meetings. Both parties share in the cost of the hearings.² The members should be knowledgeable of and experienced in the type of work involved and comply with the DRBF's Code of Ethics including the obligation to fully disclose any conditions that arise during the course of the project that could question the member's neutrality.

III POST AWARD CONCERNS

Delay in Establishing and Convening DRB After Contract Award

DRB specifications usually have a required timeline for establishing the DRB. Frequently, this requirement, commonly 60-90 days after Notice to Proceed, is not met simply because the parties have their hands full with items of higher priority coupled with the absence of any disputes that require the services of the DRB. As a result, the Board is not put in place until later and often only after unresolved issues bring the parties to their senses. Some DRB specifications impose a withholding from contractors' progress payments, or a portion of those progress payments, until the Board is in place and this appears to be effective. It is important for the parties to understand the importance, and the value, of having the DRB established in accordance with the contract requirements.

Non-adherence to DRB Operating Procedures

The DRB Operating Procedures, prepared by the DRB and discussed and agreed upon with the parties before adoption, is a very important document even though it is not a contract document. DRBs the writer is involved in make sure the DRB Operating procedures combine the requirements of the contract's DRB Specification, the Three-Party Agreement and the best practices of the DRBF along with the DRBF Code of Ethics. Before the procedures are adopted it is imperative that the DRB ensures that the parties fully understand every single step of the DRB process by religiously walking

the parties through the document. The step by step review may need to be carried out more than just at the beginning of the project since the Operating Procedures can be improved at any time by changes agreed to between the parties and the DRB. The DRB process works like a charm if the Operating Procedures are strictly adhered to.

Failure to Maintain Regular DRB Meeting Schedule

The importance of regular DRB meetings (monthly or quarterly) cannot be emphasized enough. Either or both parties may decide to skip a regular DRB meeting on the basis that since there are no pending issues why meet and spend money unnecessarily. This, to a DRB, is unacceptable and counterproductive, since it deprives the Board of the opportunity to meet with the parties face to face, determine whether the parties are communicating properly, observe the work in progress, and as importantly, have the opportunity to pro-actively participate in dispute avoidance before issues become disputes. The importance of adherence to regular meetings throughout the duration of the contract needs to be emphasized by the DRB at the first few DRB meetings.

Failure of Parties to be Frank and Open with DRB

An experienced DRB can usually sense if it is not receiving the full story on a matter from one or both parties likely due to hidden agendas one or both may have. For the Parties to properly avail themselves of the knowledge and experience of the DRB they must be frank and open at all times. If the Board does not receive the frank and full story it will be deprived of its ability to provide its best opinion to the parties if a matter eventually comes before the DRB. A Board needs to be pro-active in encouraging the parties to be frank and open with one another, as well as the Board. A specification that provides that regular meetings are confidential (like settlement negotiations) is a crucial element that supports the effective operations of the DRB.



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



Delay in Bringing Disputes to DRB for Hearing

Timely resolution of disputes is a basic tenet of the DRB process but despite a Board's best efforts there is often a reluctance to bring issues to the Board for hearing. It is important at regular meetings for the Board to inquire about disputes identified at prior meetings that appear not to have moved toward resolution and to strongly encourage the parties to either resolve themselves or bring to the DRB sooner rather than later.

Ineffective Dispute Resolution Ladders

DRB specifications usually require disputes to reach a defined impasse before being referred to the DRB for resolution. Additionally, projects often have a dispute resolution ladder that requires disputes that have reached impasse at the project level to be elevated to senior management levels in the parties' organizations to attempt resolution before being referred to the DRB. This process can add significant delay in the dispute resolution process, although this can be mitigated if an agreed upon time frame is established and adhered to for the resolution ladder steps. A better practice is for the DRB specification to treat the regular DRB meetings as precursors to the claims management process and to begin the "stepped" negotiation proceedings after the issue is initially discussed at regular DRB meetings.

Pattern of Rejection of DRB Recommendations by Party who DRB has Assigned Responsibility

There appears to be a trend where one party consistently rejects DRB recommendations that are in favor of the other party relying on continuation of its pre-hearing and hearing arguments and giving little or no consideration to the DRB's neutral opinion. This can often be attributable to "influence" beyond the project or one party waiting until project completion before negotiating a global settlement with the other party. The latter may be a business decision where the end-

of-contract settlement may be more beneficial financially than resolving the disputes during the course of the contract while not honoring the DRB tenet of timely resolution of disputes.

Recommendation not Used by the Parties as a Tool Towards Resolution

Parties frequently do not recognize or use the DRB recommendation report for what it is, namely a tool to assist the parties in resolving the dispute. Although a DRB recommendation report will find in favor of one party the matter is usually neither black nor white. Often there are factors or events that have taken place during the course of the contract work that place some of the contractual responsibilities on the other party. Boards need to impress on the parties the proper recognition and use of DRB Recommendation reports. These recommendations also can be quite useful in subsequent negotiations or mediations to resolve issues of quantum.

Breaches of the DRB Agreement

Breaches of the DRB Agreement are not unusual, most commonly in DRB terminations where one member is terminated to render the DRB dysfunctional until a replacement member is appointed or in terminating the DRB as a whole. Many of the terminations are not carried out in accordance with the Three-Party Agreement. These events are usually triggered because one party disagrees with a DRB recommendation. A DRB has virtually no recourse against breaches of the DRB Agreement but must "stay the course" and strictly follow the contract requirements.

IV CONCLUSION

The paper has addressed what the authors view as the most common deficiencies in recent DRB specifications and provisions; and the essential elements that all DRB specifications should have in order for the process to be most effective. These are set forth in

detail in the DRBF's *Practices and Procedures Manual (2007)*. These have been used for hundreds of projects and are based on the principal of a level playing field for the parties in getting an independent recommendation of the dispute in question. Readers are invited to alert the DRBF of any specifications or conditions prescribed by authors of DRB requirements that could affect the functionality and effectiveness of DRBs.

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DRBF Regional Conference & Workshop
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Register today at www.drb.org

DRB Joint Selection: The Wave of the Future?



By Kurt L.
Dettman

The author acknowledges input and support on this article from Richard Grabinski from Dragados/Flatiron, J.V., and Charlie Guess from Arcadis.

Introduction

Traditionally Dispute Review Boards have been appointed using the model developed for arbitration: each party picks one member for the other party's approval, and then the two members select the third (who usually is the Chair), subject to both parties' approval. Recently, some DRB users in the United States have advised the DRBF that this method is not necessarily resulting in the "ideal" DRB. As a result there is a developing consensus among some in the DRB community that another selection process should be considered. This article explores the current "traditional" process, identifies some of the concerns with this process, explores some of the potential benefits of joint selection of all three DRB members, and uses a case study of a recent project for a possible approach for implementing an effective joint selection process.

Background

The traditional approach for selection of DRB members is that the DRB specification first establishes the qualifications of the DRB members and conflict of interest guidelines to maintain neutrality. Typically the specification provides for the following selection process using the specified qualifications standards and conflict of interest guidelines¹:

1. Within a defined time period each party sends the other party a proposed candidate to serve on the DRB as a member.² Presumably the nominee has been vetted by the nominating party to meet the qualifications and has provided a disclosure statement regarding potential conflicts of interest.
2. Each party then reviews the proposed candidates and advises the other party whether the candidate is approved or rejected. If rejected, there is a re-nomination process until a candidate is approved. It is noteworthy that often the reason for rejection is not articu-

lated, but often it is a "trust" issue based on a concern that the DRB candidate may "favor" the other party in a dispute.

3. The two approved members then select a third member - almost always to serve as Chair - who meets the qualifications requirements and does not have any conflicts of interest. The proposed Chair is subject to the parties' approval. If rejected, the two DRB members re-nominate until a satisfactory Chair is approved.

Recently the DRBF has received feedback from some DRB users about concerns with this process. These concerns are summarized as follows:

1. DRB nominees from parties are often "repeat players" since parties nominate persons they know and trust. Although technically DRB members do not "represent" the nominating party, often parties will select DRB members sharing their background and outlook on the construction industry in general.
2. In the nominations process, which usually is during the "honeymoon" phase of the project, parties want to be seen as cooperative, and so may accede to a nominee in order not to create a conflict at the outset of the project, even though they may not have full confidence in that DRB candidate. Likewise, the parties may see the Chair as the internal gyroscope (a/k/a the "swing vote") that offsets any qualms a party may have about individual DRB member neutrality.
3. If the selection of the Chair is left to the two DRB members, the "repeat player" syndrome may occur, as again the two DRB members select Chairs "whom they know." Sometimes this effect is ameliorated if the parties give a list of potential Chairs to the two DRB members, but again this may result in a reduced potential candidate pool for Chairs.
4. Often what is left out of this process is

¹ See *DRBF Practices and Procedures Manual*, Section 2.2.4, Methods of Member Selection, which summarizes different methods of selection.

² Some DRB specifications call for the parties to propose a "slate" of candidates from which the other party picks one member. See, for example, Nevada Department of Transportation Specification 105.18.



a genuine discussion between the parties as to what type of DRB and DRB members would be best suited for the project's dispute prevention and resolution goals; rather, the focus is more on meeting the minimum qualifications and conflict of interest requirements, with a "trust" element lurking in the background. This may also contribute to a tendency to focus on technical engineering candidates vs. other skill sets (which could contribute to a DRB with carefully blended, complementary skill sets).

The Case and Method for Joint Selection

At the outset, it is noteworthy that the current DRBF Practices and Procedures Manual Guide Specification, Section 4, "Establishment of the DRB," references the parties each selecting a prospective pool of qualified DRB candidates and then jointly agreeing on the three DRB members (Section 4.C). The Guide Specification also allows for the parties to select the Chair (Section 4.D). Thus, although not recommended in the current Manual as the "best" selection process, the DRBF has recognized joint selection as a "preferred" method.

Previously in the Forum the author advocated for using a Dispute Systems Design approach to selecting the DRB process in the first instance.³ Briefly, the suggested approach as follows:

1. Develop a dispute risk profile for the project identifying the type, size and frequency of potential disputes on the project.
2. Identify ways to avoid or mitigate those disputes. More specifically, review available options for implementing dispute prevention and dispute resolution mechanisms.
3. Select the mechanism that is best suited to avoid, mitigate, or manage disputes.

The same basic process could be used for joint selection of DRB members:

1. Jointly develop a dispute risk profile to

identify the types of disputes that might be brought to a DRB.

2. Jointly identify the type of skill sets that the DRB members should have—these could include technical engineering skills; project management experience; knowledge of cost engineering or scheduling; knowledge of contract interpretation and legal applications; and/or claim analysis/dispute resolution experience. In addition, the parties identify other important "soft skill sets" such as ability to manage people and processes, especially for the Chair position.

3. Jointly come to the nomination process with a number of candidates that each party believes meets both the specification-mandated qualifications and conflict of interest requirements - and meets the criteria the parties have established as the "ideal" DRB that can address the dispute risk profile of the project at hand. Selection for the "short list" could also include the goal of looking for complementary skill sets rather than just the technical, engineering aspects of the project.

4. Jointly review the candidates and select all three members from the pool, or add others to the pool if needed to round out the three members. If the parties think that selecting the Chair for other skill sets is desirable, then the parties can select the Chair from the three candidates, or permit the DRB to select the DRB from the three approved members.

Some of the advantages of this process are as follows:

1. The reader will notice the repeated use of the term "jointly" above—this emphasizes that the parties are collaborating on selecting the DRB members. If combined with joint development of a dispute risk profile, it is an ideal way to build a consensus on the "ideal" profile of the DRB and the "ideal" candidates that fit the profile. In some respects, the joint selection process can be considered the first act of partnering on the

³Kurt Dettman and Sid Scott, "Using a Claim Risk Profile to Determine DRB Usage," *DRBF Forum*, April-May 2015.



project, setting a good tone and precedent for joint expectations on how the DRB role of the DRB will be viewed and how it will be used during the course of the project.

2. The corollary to joint selection is the potential that the parties will have greater acceptance of unfavorable outcomes from disputes—it is hard to have “selector’s remorse” later if the DRB a party profiled and selected does not agree with its position on a dispute. The parties will have to explain to each other why they have concerns about candidates and why they favor ones to be selected, before there are any disputes. This should increase in the confidence and trust in the DRB even if the results of the process are not as a party would prefer.

3. A larger purpose to be served by joint selection is potentially broadening the candidate pool as parties will be less able to simply proffer their “favorite” DRB members as long as they meet the minimum specification qualifications and conflict requirements.

Case Study: Joint Selection Process Used on California High Speed Rail Project Packages 2-3

Construction Package 2-3 (CP 2-3) represents the continuation of construction on the California high-speed rail system south towards Kern County. CP 2-3 will extend in excess of 60 miles from the terminus of Construction Package 1 at East American Avenue in Fresno to approximately one mile north of the Tulare-Kern County line. CP 2-3 will include approximately 36 grade separations in the counties of Fresno, Tulare and Kings, including viaducts, underpasses and overpasses. The estimated value of the contract is \$1.5 billion to \$2 billion. CP 2-3 is located within the Fresno to Bakersfield project section.

Section 51.5 (Establishment of the DRB) of the CHSRA specifications covers the selection process, summarized as follows:

- The DRB consists of three members jointly selected and approved by the Authority and

the contractor, of which a minimum of two members must be professional engineers.

- As soon as practicable after the effective date of the contract, each party investigates qualifications and determine individuals who are qualified and willing to serve on the DRB. The parties confer about the qualifications to evaluate the potential nominees and jointly select a pool of prospective nominees.

- The parties provide to the prospective nominees a list of the parties to the contract and involved entities (including key employees of each) as known at that time. The prospective members provide CVs and disclosure statements.

- The parties review the information from the prospective candidates and jointly agree on the final selection of the three DRB members.

- In the event that all three members are not selected from the initial pool of nominees, the process is repeated as expeditiously as practicable to complete the selection of three DRB members.

- The DRB Chair may be jointly selected by the parties during the selection process or subsequently nominated by the DRB members, for concurrence by the parties.

In implementing Section 51.5, Dragados/Flatiron JV and CHSRA used the following process to select their DRB:

1. Each party submitted five candidates to the other for review.

2. A joint meeting was held to see if there was concurrence on any names from the list. The parties report that there was consensus in this first round.

3. The parties developed a selection matrix that tracked to the specification requirements such as years of experience, technical qualifications, etc. The matrix included a scoring system so that the score on each of the criteria could be added up for a composite total.

4. Each party ranked each candidate. The



parties report that this was difficult because not all the needed information was on everyone's resume.

5. The parties reviewed the rankings together. This led to more homework in trying to reconcile the disparity in the ratings.

6. Additional information about each candidate was obtained through information requests or discussions with the DRB candidates.

7. With this additional information, the matrix was completed and the three highest rated candidates were selected. The three appointed DRB members then decided amongst themselves who would be the Chair.

Lessons learned from this process included the following:

1. The selection matrix would have been more effective if the criteria developed had been based on the potential issues/risks the project might face instead of based on what make a DRB member "technically qualified" under the DRB specification. The broader criteria would have permitted scoring on their experience serving on projects, or having knowledge on specific types of issues (like ROW, environmental, geotechnical, etc.) in addition to their general experience (design-build, project size and complexity, number of projects, number of DRBs, etc.)

2. There currently is no repository where the parties could obtain updated and accurate resumes, and the resumes the parties reviewed were all different and/or lacking in information. Even the resumes sent to the parties directly from the DRB members did not have the type of information that the parties needed to determine the specific members' experience as it related to the parties' criteria.

3. Whether the joint selection process resulted in a more effective DRB overall remains to be seen as it will be the performance that counts—but at the very

least the parties were in agreement that the DRB selected did meet the criteria the parties set at the outset of the process.

Conclusion

Based on the case study there is no doubt that the DRB selection process takes more effort and time up front—but the author would argue that this is time well spent since the quality and effectiveness of the DRB selected is the most important element of a successful DRB. One of the key points to consider for effective DRB selection is that a project can have the best DRB specification and process in the world, but if it does not select the right DRB members the quality of the process itself will mean nothing. The more the DRB is selected to fit the claim risk profile of the project, and the more consensus the parties have that they have selected the right professionals to address those risks, the more likely the DRB process is going to work. Although the CHSRA project is to be lauded as an "early adopter" of joint selection, the DRBF in developing its recommended best practices for DRB selection will need to take into account some of the lessons learned on what makes the process most effective.

Kurt L. Dettman, Esq. *is the principal of Constructive Dispute Resolutions and serves as Past President of the DRBF Region 1 Board of Directors. He can be reached by email at kdettman@c-adr.com.*

DRBF Regional Conference & Workshops Livingstone, Zambia

The DRBF held its Regional Conference on Dispute Boards in Livingstone, Zambia on 25-26 February 2016. Delegates and speakers participated from many sectors within Zambia, as well as the wider region, including Botswana, Zimbabwe, South Africa, Kenya, Ethiopia, Uganda, England, Italy, Qatar, Turkey and even further from North America.

The venue for the 2016 DRBF Africa Regional Conference was Livingstone, Zambia. The location is gifted with one of the greatest attractions in Africa and one of the most spectacular waterfalls in the world. The Victoria Falls is the only waterfall in the world with a length of more than a kilometer and a height of more than hundred meters. The Victoria Falls is the only waterfall in the world with a length of more than a kilometer and a height of more than hundred meters. It is also considered to be the largest fall in the world. The waterfall Mosi-o-Tunya “The smoke that thunders” is a roaring machine and presents a spectacular sight of awe-inspiring beauty and grandeur on the Zambezi River, forming the border between Zambia and Zimbabwe. The time for the conference was timely. The water levels were almost at peak.

Delegates split into two groups on the first day, with the majority participating in an Introductory Workshop led by DRBF Region 2 Director of Training Simon Fegen, with support of Yasemin Çetinel, Paul Karekezi and Henry Musonda, DRBF Country Representatives for Turkey, Kenya and Zambia respectively. During the first half of the day, history and background of Dispute Boards, selection and appointment of DB members, dispute avoidance and Dispute Board Agreement were discussed. The training continued in the second half with a look at DB Operations, Presentation of Claims and DB Decisions, Amicable Settlements and Enforcement of Dispute Board Decisions under the FIDIC Suite and ICC DB Rules.

An Advanced Workshop was also offered for delegates who have already taken a DRBF Introductory Workshop and/or who are



DRBF Country Representative Henry Musonda opens the conference, with DRBF Region 2 President Andy Griffiths (l) and keynote speaker High Court Judge William Mweemba (r).

currently serving on Dispute Boards as a member or Chair. The Advanced Workshop also provided the delegates a networking event, where DB Practitioners, construction professionals, lawyers and other stakeholders in the construction industry shared and exchanged ideas and methods of providing DB services. President of DRBF Region 2 Board of Directors Andy Griffiths, DRBF Past President Paul Taggart and DRBF Country Representative for South Africa Anton van Langelaar challenged delegates with interactive exercises and discussions.

High Court Judge William Mweemba, who is also the chairman for the CIArb Zambia branch, delivered a keynote address to the conference on day two on “Best Practice in the Use of Dispute Boards for Dispute Avoidance and Resolution.”

The conference theme “Best Practice in the Use of Dispute Boards for Dispute Avoidance and Resolution” provided an opportunity for delegates to the workshops and conference to deliberate the use of Dispute Boards on Infrastructure Projects, in particular, in African countries. The vastness of the continent and the diversity of its infrastructure and multicultural environments makes Africa one of the best examples demonstrating the challenges of the application of Dispute Boards. There was also a presentation on Financial Institution’s View or Experience with Dispute Boards.



“Dispute Review Boards and dispute Advisers may be invaluable where there is a requirement for swift, efficient binding dispute resolution, which is seen by a construction team, possibly drawn from different nationalities, to be impartial.”

-High Court Judge of Zambia, William Mweemba

The DRBF is grateful for the generous support of sponsors: Quantum Global Solutions, MC2 Modern Construction Consulting, Techno Engineering & Associates, Beale & Company, GIBB International, and Fenwick Elliott. The conference is also supported by ACEZ, CI Arb, CMP, the Engineering Institution of Zambia, and SAICE.

The 2016 DRBF Africa Regional Workshop and Conference in Livingstone received very positive comments from the participants. The various comments made by the delegates highlighted important thoughts and ideas as to how the DRBF might adapt

/change the next conference. The DRBF, therefore, appreciates and acknowledges the feedback from the evaluations received.

Henry M Musonda, DRBF Country Representative for Zambia, can be reached at musondahenry2008@yahoo.com.

Event photos are posted on the DRBF Facebook page. Interested readers may access the keynote address and conference presentations at the website:

www.drbfconferences.org

Forum Newsletter Editorial Deadline

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

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

Contact Forum Editor Ann McGough at
amcgough@drb.org

Deadline for the next issue:

June 1, 2016



Welcome to New DRBF Members

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Complete membership information can be found on the
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DRBF Signs MOU Between PDRCI and PIArb in Philippines

Engr. Salvador Castro, Jr.
DRBF Country Representative for Philippines

The DRBF Country Representative in the Philippines found new strategic partners and advocates of the DRB/DB concept, through the Philippine Dispute Resolution Center, Inc. (PDRCI) and Philippine Institute of Arbitrators (PIArb). To formalize this strategic partnership of the three organisations, a Memorandum of Understanding (MOU) was signed on 11 November 2015, held at the Board Room of Navarro, Amper and Co at Net Lima Plaza, Bonifacio Global City, Philippines. The signing was led by Mr. Gregorio S. Navarro, PDRCI President, Atty. Teodoro Kalaw IV, PIArb President and Engr. Salvador Castro, Jr., DRBF Country Representative for Philippines, and witnessed by members of the three organizations. The MOU provides that the three organizations shall combine their efforts in developing ADR and ADR practitioners, real time avoidance and resolution of local and international disputes relating to construction, commercial and information technology.

Now, with its newfound strategic partners, the DRBF believes that its efforts in introducing DRB/DB and promoting its use as an effective tool in dispute resolution in the Philippines shall be reinforced in spearheading advocacy campaign with stakeholders on the speedy resolution or “real time” dispute avoidance and dispute resolution. DRBF’s strategic partners - PDRCI, a non-stock, non-profit organization incorporated in 1996 out of the Arbitration Committee of the Philippine Chamber of Commerce and Industry, promotes and encourages the use of arbitration, mediation and other alternative modes of settling commercial disputes, and provides alternative dispute resolution (ADR) services to the business community. It works closely with the

three branches of the Philippine government – the executive, through the Philippine Department of Justice and Trade and Industry, legislative through the Philippine Congress, and judiciary through the Philippine Supreme Court – in drafting substantive and procedural rules on ADR as well as in information dissemination and training on matters concerning ADR, trade law, and commerce. The PIArb is the first learned society in the Philippines dedicated to both promoting private dispute resolution within the country and pursuing initiatives to enable the country to serve as a viable and practical venue for private dispute resolution. It envisions the use of arbitration and other modes of dispute resolution other than resolution by a court as the primary means of resolving conflict in the Philippines.

As a background, sometime in 2004, the Dispute Resolution Board Foundation was first introduced to the Philippines by Mr. Gwyn Owen, then President of the DRBF, when he was invited as a resource person on Alternative Dispute Resolution by the Council of Engineering Consultants of the Philippines (CECOPHIL), then headed by Mr. Salvador Castro, Jr. as President. The event was subsequently followed by a Forum on ADR participated by the construction industry stakeholders and ADR Practitioners in the country where a manifesto was signed by the principals of the organisations signifying their support in its promotion and widespread use as an effective mode of resolving disputes.

In 24 October 2007 a Forum on the Use of Dispute Review Board / Dispute Adjudication Board / Dispute Board was held at The Linden Suites. Ms. Melanie Meilhac, then Manager for the Dispute Resolution



Services of the International Chamber of Commerce (ICC) Paris and Mr. Robert A. Cochrane of FIDIC were the guest speakers. The Forum was attended by representatives from the private sector, judicial sector, and various International Funding Institutions (ADB, World Bank and JICA).

However, while there were a number of local DRB advocates who registered as DRBF members after its launching and despite various information campaigns conducted to promote the same, the move did not catch as much fire. It may have been too early back then for the industry stakeholders and ADR practitioners to fully embrace the DRB/DB concept, and the task to have a sustained promotional campaign was too big a challenge for

few DRB advocates headed by Salvador Castro, who was appointed as Country Representative to the DRBF.

Now, several years after that DRB launching and with the successful accreditation of dispute adjudicators by FIDIC through the generous sponsorships of JICA in 2012, now is the opportune time to reintroduce DRB/DB as these dispute resolution modes are being used in upstream and downstream contracts especially on PPP projects and other projects funded by private institutions.

Engr. Salvador Castro, Jr. can be reached by email at spcastrojr23@gmail.com.



Seated left to right:

PIArb Asst. Vice-President Ian Malilong, PIArb Senior VP for Advocacies Jesusito Morillos, PIArb President Teodoro Kalaw IV, PDRCI President Gregorio S. Navarro, DRBF Country Representative Salvador P. Castro, Jr., DRBF Members Emma C. Fernandez and Roger G. Antonio.

Standing left to right:

PDRCI Asst. Secretary General Francisco Pabilla, Jr., PIArb Asst. VP Jennifer Antiche-Valenton, PIArb Asst. VP Mariliza Kalaw, PDRCI Senior VP for Programs Donemark Calimon, PDRCI Executive Vice-President Ricardo Ongkiko, PDRCI Former President Victor P. Lazatin, PDRCI Secretary General Roberto N. Dio



DRBF Forum

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

DRBF 20th Annual Meeting & Conference “DRBF at 20 Years - Looking Ahead”

**September 22-24, 2016
Mayflower Hotel • Washington, DC**

The DRBF offers an Annual Meeting & Conference which attracts the top Dispute Board practitioners, employers, funding institutions, contractors, legal professionals and consultants all active in alternative dispute resolution. In 2016, the conference returns to Washington, DC.

Day one offers full-day interactive training, with an introductory level workshop for those new to the process, a workshop focusing on DRB use for alternative project delivery, and an advanced level roundtable for experienced Dispute Board practitioners. The two-day conference features engaging presentations and lively panel discussions about the latest developments and issues facing the alternative dispute resolution community worldwide, with an emphasis on building trust and collaboration for effective projects.

The popular Al Mathews Awards dinner will be held on the evening of September 23, with special entertainment by the American political satire group **The Capitol Steps**. The hotel registration website is accepting reservations, so book your room today! Conference registration will open very soon.



**Keynote Speaker:
US Congressman Gerry Connolly**

Mark your calendar and plan to join us!