

# DRBF Forum

Volume 20 Issue 2 November 2016



## To Admit or Not to Admit, Revisited

By Kurt Dettman

*“Experience has shown that this practice has been a major factor in the effectiveness of DRBs since it allows the litigation forum access to a reasoned written report prepared by knowledgeable industry experts who have witnessed, first hand, the construction of the project.”*

### Introduction

In Volume 14 Issue 4 of the November 2010 issue of the *Forum*, I published an article that explored the factors Dispute Review Board (DRB) users should consider in making DRB reports admissible—or inadmissible—in later legal proceedings. My conclusion was that there was no “wrong” answer, as long as the drafters of DRB specifications make informed decisions after considering the pros and cons of admissibility vs. inadmissibility. Indeed, DRB users vary on the topic—ranging from no admissibility to letting in the entire DRB record.

Since then the author has heard from some users of the DRB process that ad-

missibility of the DRB report (and sometimes the records of the DRB process) has led to unintended consequences that raise the question whether parties will be thinking more about the “end game”—arbitration or litigation—rather than on how to make the DRB process most effective as an informal dispute resolution process at the project level.

### Reasons for Not Permitting Admissibility

The current DRBF Practices and Procedures Manual in Section 2.8.3 states:

“Experience has shown that this practice [admissibility of DRB reports in evidence] has been a major factor in the

*(continued on page 6)*

➔	To Admit or Not to Admit, Revisited	1
➔	Ethics in Today’s World of DRBs	4
➔	New Legislation in Italy Embraces a Form of Dispute Board for Public Works Contracts	8
➔	16th Annual International Conference - Santiago, Chile	11
➔	Lean Dispute Avoidance for Lean Construction	12
➔	20th Annual Meeting & Conference - Washington, DC	22
➔	DRBF Peer Review Workshop	24
➔	Al Mathews and Excellence in Dispute Avoidance & Resolution Awards	27-28
➔	DRBF Representative for the United Kingdom: John Papworth	29
➔	DRBF Membership Committee Launch Users Forum in US and Canada	35



## President's Page



**Doug Holen**  
DRBF Executive  
Board of Directors

Dear Members, Supporters and Friends of the DRBF,

In September we held our Annual Conference in Washington, DC and this was our 20th year. The conference committee planned an excellent program with interesting topics such as the use of DRBs on P3 projects, the interplay between DRBs and Mediation, and a look at the "International Report Card" on Dispute Boards. In addition, we hosted almost as many attendees at the DRBF Regional Conference in Sofia, Bulgaria in early November. This event introduced the Dispute Board concept to many new owners and practitioners in Eastern Europe, and we expect to see projects using the process. The papers and presentations from both conferences are available for download at [www.drbfconferences.org](http://www.drbfconferences.org).

In May I attended the DRBF International Conference in Santiago, Chile. The conference was well attended with 90 delegates in residence. Eduardo Sanhueza, the DRBF Representative for Chile and the chair of the conference organizing committee, assembled an interesting and informative program with excellent speakers from throughout South America and around the world. The committee arranged for the Gala Dinner to be held at "View Santiago." The dinner was well attended, the menu was superb and the "view" of the city and surrounding snowcapped mountain range was marvelous. The committee also arranged for an optional wine tour on the day following the conference. Several of us remained for an extra day for that event and, although it rained, we had great fun visiting three wineries in the Maipo Valley.

Each year we have elections for positions on the Executive Board and Region 1 Boards in late summer, for installation at the Board meetings held in conjunction with the Annual Meeting & Conference. We had good participation from our membership and welcome the newest members (see list on facing page).

Ann McGough, our Executive Director, advises that the new DRBF website will be ready for a beta test shortly. The test will be performed by Board Members from all Regions and the Executive Board. Once the results are in and any corrections made, the site will be open to the membership. There will be several new features to the site, including a library with over 600 papers and publications for reference, and a configuration that will make it easy for prospective owners, contractors and others to access member resumes. You are all encouraged to update your resumes when the site opens.

Work continues on a new edition of the DRBF Practice & Procedures Manual. Many members are at work preparing chapters for our editor to review. There will be some new features in the manual including: the use of DBs with projects using Design/Build, P3, and FIDIC contracts, a look at various "rules" such as ICC, CIArb, and ConsensusDocs, and updates to the DRBF's recommended best practices. Graham Easton, the Manual Committee chair, provided an update at the Annual Meeting.

A final note: in June, the DRBF signed a cooperative agreement with CAM, the Chamber of Arbitration of Milan, and in September with CBMA (Centro Brasileiro de Mediação e Arbitragem). This agreement is consistent with cooperative agreements the Foundation has entered into with other professional organizations in the past year, including Construction Managers Association of America (CMAA), American Association of Cost Engineers International (AACE) and the ADR Institute of Canada (ADRIC).

Warmest regards,

## DRBF Board of Directors



### Executive Board of Directors

Dick Appuhn, President  
 Doug Holen, Immediate Past President  
 Ron Finlay, President-Elect  
 Tom Peterson, Secretary/Treasurer  
 Bill Hinton, Director and President, Region 1 Board  
 Levent Irmak, Director and President, Region 2 Board  
 Doug Jones, Director and President, Region 3 Board  
 Robert Smith, Founder, Honorary Director  
 Joe Sperry, PE, Founder, Honorary Director

### Region 1 Board of Directors

Bill Hinton, President  
 Ferdi Fourie, President-Elect  
 Eric Kerness, Immediate Past President  
 Felix Peguero, Treasurer  
 Joe Gildner  
 Gerald McEniry  
 Matt Michalak  
 Elizabeth Tippin

### Region 2 Board of Directors

Levent Irmak, President  
 Murray Armes, President-Elect  
 Andy Griffiths, Past President  
 Xavier Leynaud, Treasurer  
 Julio Bueno  
 Mark Entwistle  
 Lindy Patterson  
 Marcello Viglino

### Region 3 Board of Directors

Doug Jones, President  
 Alan McLennan, Vice President  
 Ron Finlay, Secretary  
 Barry Tozer, Treasurer  
 Derek Firth  
 Spencer Flay  
 Steve Goldstein  
 Richard Kell  
 Lindsay Le Compte  
 Graeme Peck  
 John Sharkey

Forum Editor:  
 Ann McGough

Contact:  
 Dispute Resolution  
 Board Foundation  
 3440 Toringdon Way  
 Suite 205  
 Charlotte, NC 28277 USA  
 Phone: +1-908-265-2367  
[amcgough@drb.org](mailto:amcgough@drb.org)  
[www.drb.org](http://www.drb.org)

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

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

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

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

Copyright © 2016  
 Dispute Resolution  
 Board Foundation



# Ethics in Today's World of DRBs

## When is a Conflict of Interest not a Conflict?



**Christopher Miers**  
Past President,  
DRBF Region 2  
Board and DRBF  
Country Represent-  
ative Coordinator

Impartiality, independence and relevant experience are key starting points in the characteristics of Dispute Board (DB) members, and these requirements are typically enshrined in the express terms of the dispute adjudication agreement<sup>1</sup> between each DB member and the parties.

International views differ, however, as to the practical interpretation of “impartiality” and “independence”.

We see this, for example, in the difference in acceptability of Med-Arb around the world, where in some cultures it is entirely normal for a mediator to be able to progress into the role of arbitrator if the mediation fails, notwithstanding the mediator’s private discussions with each party during the mediation (Hong Kong and China for example), whereas in other cultures (UK for example<sup>2</sup>) such private discussions may prohibit a subsequent role of the mediator as arbitrator, due to the inability of a party to be aware of matters placed before the arbitrator by the other party during the mediation caucuses and to respond to such matters.

Under English common law, the well-established test of “apparent bias” is referenced to the question of “*Whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the*

*tribunal was biased*”.<sup>3</sup>

How to achieve a common understanding of conflicts of interest across different jurisdictions and dispute resolution cultures in international commercial arbitration was addressed some years ago<sup>4</sup> by the International Bar Association (IBA) in its IBA Guidelines on Conflict of Interest in International Arbitration (“the IBA Guidelines”).

The IBA Guidelines are a widely respected source of reference for assessing potential conflicts of interest for Dispute Board members as much as arbitrators and other third-party neutrals. Practitioners will probably be familiar with the “traffic light” system of categorisation of potential conflicts across a range of typical commercial situations, to assist the potential third-party neutral in evaluating whether a current or prior relationship with a party may represent a conflict which prevents the acceptance of the appointment (“Non-waivable red list”), or requires disclosure and acceptance by the parties (“Waivable red list”) or non-objection (“Orange list”), or may be ignored (“Green list”).

However even “Non-waivable” circumstances may be waived, we now see, dependent on the facts. In a case earlier this year<sup>5</sup> concerning a project in Iraq, a British Virgin Islands and a Malaysian

<sup>1</sup> For international DABs.

<sup>2</sup> See for example *Glencot Development & Design Ltd v Ben Barrett & Son (Contractors) Ltd* [2001] EWHC Technology 15, where the Judge declined to enforce an adjudicator’s decision on a summary basis.

<sup>3</sup> This test under English law was extensively discussed by Lord Hope of Craighead in *Porter v Magill* [2002] 2AC 357. In his judgment Lord Hope approved, with a small adjustment, the test established by Lord Goff of Chieveley in *R v Gough* [1993] AC 646.

<sup>4</sup> 2004, updated 2014.

<sup>5</sup> In the English High Court of Justice, Queen’s Bench Division Commercial Court, re *W Ltd v M SDN BHD* [2016] EWHC 422 (Comm).



company became involved in a dispute and appointed a sole arbitrator. The arbitrator had published two awards, and the claimant challenged these in court<sup>6</sup> on the basis that it had come to its notice that the arbitrator's company, in which he was a partner, regularly advised and derived income from advising the defendant; and that this was a conflict of interest falling within paragraph 1.4 of the Non-Waivable Red List of the IBA Guidelines. This states that there is a conflict of interest in situations where:

*“The arbitrator or his or her firm regularly advises the party, or an affiliate of the party, and the arbitrator or his or her firm derives significant financial income therefrom.”*<sup>7</sup>

The court considered the facts in detail of the arbitrator's practical working relationship with his firm. On a day-to-day basis the arbitrator operated effectively as a sole practitioner using the law firm's resources for secretarial and administrative assistance. The court concluded that, applying the test for apparent bias, “the fair-minded and informed observer” would not conclude that there was a real possibility of bias in this case. The claimant's application failed.<sup>8</sup>

The court noted that the published guidelines were not binding and provide assistance to the court only; and that the case suggests there are weaknesses in the 2014 IBA Guidelines in two inter-

connected respects. “First, in treating compendiously (a) the arbitrator and his or her firm, and (b) a party and any affiliate of the party, in the context of the provision of regular advice from which significant financial income is derived. Second, in this treatment occurring without reference to the question whether the particular facts could realistically have any effect on impartiality or independence (including where the facts were not known to the arbitrator).”

A prospective Dispute Board member however will still wish to disclose all such known facts.

**Chris Miers can be reached at [cmiers@probyn-miers.com](mailto:cmiers@probyn-miers.com).**

## Forum Newsletter Editorial Deadline

Our readers love to hear Dispute Board success stories, 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 Ann McGough at [amcgough@drb.org](mailto:amcgough@drb.org)

Deadline for the next issue:

**January 1, 2017**

## Ethics Commentary or Question?

Contact  
**Jim Phillips, Chair,**  
 DRBF Ethics  
 Committee  
 P: +1-804-289-8192  
 E: [jphillip@richmond.edu](mailto:jphillip@richmond.edu)

<sup>6</sup> In England under the English ‘Arbitration Act 1996’ s. 68(2) which states that a party may “apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award”

<sup>7</sup> This specific wording was an amendment between the 2004 and 2014 editions of the IBA Guidelines

<sup>8</sup> Note however the contrasting 2015 decision of the French Cour de Cassation (Cour de Cassation, Civ. 1, 16 December 2015, N°D14-26.279) which ruled that the sole arbitrator's failure to disclose his firm's role in a transaction involving the parent company of one of the parties to the arbitration was “such as to reasonably cause a doubt regarding the independence and impartiality of the arbitrator”.



*(continued from page 1)*

effectiveness of DRBs since it allows the litigation forum access to a reasoned written report prepared by knowledgeable industry experts who have witnessed, first hand, the construction of the project.”

The Manual does not explain how this practice increases the effectiveness of DRBs in general. The author has heard from some practitioners the argument that reports, if admissible, will be given greater weight by a later legal tribunal (arbitration or court), and therefore will cause the parties to “take the report more seriously since they will have to live with the consequences later.” While there is probably some truth to this “fear factor,” the author questions, for the following reasons, whether this should be a reason for encouraging admissibility of DRB reports.

First, the purpose of the DRB process is to resolve disputes between the parties, negotiating at the project level. For that reason, the DRB process is meant to be relatively informal; does not follow rules of evidence; encourages candor and open discussion on contested points; and is intended to be a basis for the parties to resolve issues for themselves, without recourse to legal proceedings.

Second, the purpose of the DRB report is intended to provide guidance to the parties on the relative merits of their arguments; an analysis of the dispute as presented to the DRB; is not based on an evidentiary record; and is intended to be persuasive to the parties to accept the DRB recommendation, or at least use it as basis for negotiations to resolve the dispute. Stated another way, the report is

not written for the purpose of being used in later legal proceedings, nor should it be.

Third, if the DRB report can be used in later legal proceedings, then the parties must at least think about how to present the dispute so that they preserve their positions in those proceedings, if they do not accept the DRB report or negotiate a resolution. This factor also could have the unintended consequence of encouraging more legal and claims consultant involvement in the DRB process because of the need to shape the DRB process and submissions to protect legal interests later. Obviously this goes against other DRB best practices that discourages lawyer, and to some claims consultant, involvement in the DRB hearing process.

Fourth, from a purely legal perspective, making the report admissible in evidence means that everything in the report “goes in,” regardless of arbitration or court rules that might otherwise prevent it from being used or at least require some sort of foundation for its use. This means that the parties are, in essence, waiving evidentiary protections that they might otherwise have in later legal proceedings. That is not the intent of the DRB process, but that could be the result if admissibility in evidence is permitted.

### **Proposal: DRB Best Practices Should Discourage Admissibility in Later Proceedings**

For the following reasons, the author proposes that the DRBF change the recommended best practice to be that DRB reports should not be admissible in later legal proceedings:



- DRB reports are intended to help the parties resolve disputes, at the project level.
- The DRB process is not intended to be a step on the way to arbitration or litigation—it is a much different process with a much different intended outcome than legal proceedings.
- DRBs should not be given the (unintended) responsibility of writing reports that will be used in later legal proceedings.
- Parties should not have to fear what happens with the DRB report in other legal proceedings—and should not be forced to modify what they would do in the informal DRB process to protect themselves in later legal proceedings.
- Parties can make risk assessments on what might happen in later legal proceedings based on the DRB report on the merits of the dispute—but taking into account the DRB’s analysis and recommendations should not be conflated with an analysis of its admissibility in later legal proceedings.

The author proposes the following recommended best practice on admissibility:

The DRBF discourages the admissibility of the DRB report and DRB records in later legal proceedings since it undermines the informal nature of the DRB process, which is intended to help the parties reach a resolution at the project level. If the parties have selected later legal proceedings that follow the DRB process, those legal proceedings should stand on their own procedures and merits, as respects the dispute resolution process.

In the event that the parties believe that admissibility would be preferable, then admissibility should have two conditions: 1. Only the DRB report itself should be admissible. 2. There should be some accompanying statement to the effect that the DRB report resulted from an informal process that did not include application of rules of evidence and that neither party has waived any arguments that it has as to admissibility of information in the DRB report.

### Conclusion

Making DRB reports inadmissible preserves the intent of the DRB process to provide the parties with recommendations that they can decide to accept, reject, or use as the basis for a negotiated resolution. Making DRB reports admissible carries the risk of unintended consequences—the informality of the DRB process may be changed or undermined by parties adding to the DRB process protective measures relating to later legal proceedings.

*Kurt L. Dettman, Esq. is the principal of Constructive Dispute Resolutions and serves as Training Director of Dispute Resolution Board Foundation Region 1 (US and Canada). He can be reached by email at [kdettman@c-adr.com](mailto:kdettman@c-adr.com).*

## New Legislation in Italy Embraces a Form of Dispute Board for Public Works Contracts

By Andrea Del Grosso and Jacopo Naldini

Visit the website of Camera Arbitrale Milano at:

[www.camera-arbitrale.it](http://www.camera-arbitrale.it)

Click on “Dispute Resolution Board” in the toolbar; on this page you can view the DB Rules (in Italian and English) and a list of DB experts.

On April 19, 2016, Italy enacted a new law on public works (Decreto legislativo 18 aprile 2016, n° 50, hereinafter “Decree”) to transpose the European Directives 2014/23/UE, 2014/24/UE and 2014/25/UE on the award of concession contracts, public procurement and procurement by entities operating in the water, energy, transport and postal service sectors.

One of the novelties brought in by the Decree is the introduction of a procedure to prevent the disputes that, in practice, correspond to the Dispute Board mechanism. The procedure is regulated by Article 207 of the Decree, in the section “Alternative Disputes Resolution” (Rimedi alternativi alla tutela giurisdizionale), where other ways to prevent or to resolve disputes connected with the performance of public contracts are located (i.e. Accordo Bonario, Transazione, Arbitrato). The name given to the board is Collegio Consultivo Tecnico (hereinafter “CCT”).

For those consultants whose aim is to explain to the parties to a construction project how the risk of extension of time on completion and additional costs of a project can be minimized through the use of Dispute Boards, the new piece of legislation is extremely welcome. This is because the concept of a Dispute Board has until now been practically unknown to all the Italian public and private employers and Italian contractors that do not work abroad. As a matter of fact, it was very difficult for experienced international consultants to lead said operators to seriously evaluate the use of a Dispute Board, as it was seen as an exotic tool. However, it is worth mentioning that in Italy there have been two attempts in the public works sector to use a Dispute Board. Both of them were in the railway industry, one in the year 2001 (members of the DB were Andrea Del Grosso, Piero Sembenelli and Giuseppe Mancini) for the construction of the high speed train station of Turin and another one commencing in the year 2004 (members of the DB were Gianni Arrigoni, Pierre Gen-

ton and Igor Leto) for the construction of the high speed train station of Bologna. Both of them were named Collegio Consultivo Tecnico, the same name used in the Decree. However, these two cases were not sufficient to spread the knowledge of the Dispute Board mechanism nationwide.

Thanks to the introduction of the CCT in the Decree, it is therefore much easier today for consultants who wish to promote the use of Dispute Boards, to refer to an existing piece of legislation and to bring the operators to evaluate the relative benefits; on the other hand, employers and contractors might feel more “relieved” in taking choices which are expressly named and regulated in the law on public procurement.

It must be observed that, as it happens in other countries, also in Italy contractors bid a strongly discounted price with the expectation to recover the losses in the course of the contract. This practice clearly leads the contractor to submit to the Employer any possible claims, some or most of them being blown up in the quantum and/or groundless. In this scenario, a contractor might not be attracted by the presence of a Dispute Board that would dispute the merits and/or diminish the quantum of a groundless or blown up claim.

On the other hand, the employer might be reluctant to introduce a mechanism according to which, the contractor might appear entitled to early payments pursuant to evaluation by the Dispute Board of grounded contractor’s claims. Indeed, under the current regime, while the appointment of a CCT must be agreed by the parties, a different, compulsory mechanism, the so-called Accordo Bonario applies, which states that all the claims submitted by the contractor cannot be subject to a settlement until the total value of the claims exceeds 5% of the value of the contract. If and when the ceiling of 5% is reached, a procedure is commenced according to which an expert is to suggest a proposal to the parties for a fair settlement.



However, the employer may not accept the proposal and therefore the contractor can only commence litigation or arbitration. In other words, it may happen that a contractor who wishes to pursue grounded claims, can commence litigation or arbitration only if (i) the total of its claims exceeds the 5% of the value of the contract and (ii) the *Accordo Bonario* procedure – which may last many months – has failed.

Accordingly, it seems hard, at present, to spread in the short term the use of the CCT. Nevertheless, it is a great help to have the mechanism regulated in the Decree and, in the hope that employers and contractors will one day work more genuinely for the success of the project, the CCT might be widely used.

A translation in English of Article 207 of the Decree is reported here below (page 10). It will be noted that most of the features of a proper Dispute Board are reproduced such as:

- The CCT is expressly aimed at preventing disputes;
- The CCT is a standing board;
- There is an express call to settle disputes quickly;
- The CCT may hear any kind of dispute so, despite the denomination “technical board”, it may hear juridical issues;
- Upon constitution of the board, a copy of the entire documentation concerning the contract must be delivered to it;
- The CCT can informally hear the parties (but see comment below on hearing of both parties);
- The CCT issues a non-binding written proposal to settle the dispute. If accepted, it becomes binding as a settlement agreement (*Transazione*). But see comment below on proposal in writing).

However, there are principles usually adopted in a Dispute Board procedure which miss or could be better defined in the De-

creed, such principles being:

- Duty for the board to remain conversant with the project. This principle is not mentioned at all in the Decree;
- Possibility for the board to settle disputes without issuing a written proposal. Based on the wording of the Decree, it cannot be excluded that the board sorts out disputes by working on the respective positions of the parties without necessarily expressing its opinion in writing. But the Decree states that the dispute is settled by issuing a written proposal, regardless of the fact that many situations that theoretically can be assimilated to disputes, can be settled by the board before they become a proper dispute;
- The member appointed by the employer is preferably selected within its staff. This is clearly in conflict with the requirement of neutrality that characterizes a Dispute Board;
- Paragraph 4 of Article 207 states that “*In case of disputes, the advisory board can enter into informal hearing of the parties to facilitate the quick settlement of any disputes. It can also convene the parties to allow the simultaneous presentation of the respective cases.*” Therefore, it cannot be excluded that the board can hear the parties separately, provided that it “*can also*” convene the parties to allow the “*simultaneous presentation*” (*in contraddittorio*) of the respective cases. This interpretation may represent the only principle in the CCT procedure that deviates from standard practice in Dispute Board procedures.

See page 10 for a copy of Article 207 of the Decree in Italian and English.

**Andrea Del Grosso** can be reached at [andrea.delgrosso@unige.it](mailto:andrea.delgrosso@unige.it) and **Jacopo Naldini** can be reached at [jmn@jacopomonacinaldini.it](mailto:jmn@jacopomonacinaldini.it).



Articolo 207 (Collegio consultivo tecnico)	Article 207 (Technical advisory board)
<p>1. Al fine di prevenire controversie relative all'esecuzione del contratto le parti possono convenire che prima dell'avvio dell'esecuzione, o comunque non oltre novanta giorni da tale data, sia costituito un collegio consultivo tecnico con funzioni di assistenza per la rapida risoluzione delle dispute di ogni natura suscettibili di insorgere nel corso dell'esecuzione del contratto stesso.</p>	<p>1. With the aim of preventing disputes arising out of the performance of the contract, the parties may agree, before the commencement of the contract, or in any case no later than ninety days from such a date, to constitute a technical advisory board with the task of providing assistance for the swift settlement of disputes of any kind that may arise during the performance of the contract.</p>
<p>2. Il collegio consultivo tecnico è formato da tre membri dotati di esperienza e qualificazione professionale adeguata alla tipologia dell'opera. I componenti del collegio possono essere scelti dalle parti di comune accordo, ovvero le parti possono concordare che ciascuna di esse nomini un componente e che il terzo componente sia scelto dai due componenti di nomina di parte; in ogni caso, tutti i componenti devono essere approvati dalle parti. Il componente nominato dalla stazione appaltante è preferibilmente scelto all'interno della struttura di cui all'articolo 31, comma 9, ove istituita. Le parti concordano il compenso del terzo componente nei limiti stabiliti con il decreto di cui all'articolo 209, comma 16.</p>	<p>2. The technical advisory board is composed of three members with suitable experience and professional qualifications for that kind of work. The members of the board can be selected by the parties jointly, or the parties may agree that each of them appoint a member and that the third member be appointed by the two members appointed by the parties; in any case, all the members must be approved by the parties. The member appointed by the employer is preferably selected from the structure indicated under article 31, paragraph 9, if existing. The parties determine the fees of the third member within the limits imposed by the decree mentioned under article 209, paragraph 16.</p>
<p>3. Il collegio consultivo tecnico si intende costituito al momento di sottoscrizione dell'accordo da parte dei componenti designati e delle parti contrattuali. All'atto della costituzione è fornita al collegio consultivo copia dell'intera documentazione inerente al contratto.</p>	<p>3. The technical advisory board is to be deemed constituted at the time of the signing of the agreement by the appointed members and parties to the contract. Upon constitution, a copy of the entire documentation concerning the contract must be delivered to the advisory board.</p>
<p>4. Nel caso in cui insorgano controversie, il collegio consultivo può procedere all'ascolto informale delle parti per favorire la rapida risoluzione delle controversie eventualmente insorte. Può altresì convocare le parti per consentire l'esposizione in contraddittorio delle rispettive ragioni.</p>	<p>4. In case of disputes, the advisory board can enter into informal hearing of the parties to facilitate the quick settlement of any disputes. It can also convene the parties to allow the simultaneous presentation of the respective cases.</p>
<p>5. Ad esito della propria attività il collegio consultivo formula in forma scritta una proposta di soluzione della controversia dando sintetico atto della motivazione. La proposta del collegio non vincola le parti.</p>	<p>5. The advisory board, pursuant to its activity, issues a proposed settlement of the dispute in writing, giving concise reasons. The proposal of the board is not binding for the parties.</p>
<p>6. Se le parti accettano la soluzione offerta dal collegio consultivo, l'atto contenente la proposta viene sottoscritto dai contraenti alla presenza di almeno due componenti del Collegio e costituisce prova dell'accordo sul suo contenuto. L'accordo sottoscritto vale come transazione.</p>	<p>6. If the parties accept the solution offered by the advisory board, the deed containing the proposal is undersigned by the parties before at least two members of the Board and constitutes proof of the agreement on its content. The undersigned agreement is to be deemed as a contractual settlement.</p>
<p>7. Nel caso in cui la controversia non sia composta mediante la procedura di cui ai commi precedenti, i componenti del collegio consultivo non possono essere chiamati quali testimoni nell'eventuale giudizio civile che abbia ad oggetto la controversia medesima.</p>	<p>7. If the dispute is not settled by means of the aforementioned procedure, the members of the advisory board cannot be called as witnesses in a litigation for the same dispute.</p>
<p>8. Il collegio consultivo tecnico è sciolto al termine dell'esecuzione del contratto o in data anteriore su accordo delle parti.</p>	<p>8. The technical advisory board is dissolved upon completion of the performance of the contract or earlier upon mutual agreement of the parties.</p>

# DRBF 16th Annual International Conference - Santiago, Chile

## Dispute Boards: An Essential Tool for Building Trust on Projects

*Dispute Boards: Una Herramienta Esencial para la Construcción de Confianza en Proyectos*

The 16th Annual International Conference headed south to Santiago, Chile in May 2016. Speakers and delegates came from throughout Latin America and from as far away as Australia for an engaging program focused on the use of Dispute Boards as a mechanism to enhance trust on construction projects.

The International Conference offered extended educational opportunities through the training workshops offered for those new to the Dispute Board process as well as experienced practitioners and users. In addition, delegates enjoyed the networking opportunities at the welcome reception, gala dinner, and group lunches.

The conference was opened by a keynote speech by Ramiro Mendoza, Former Comptroller General of the Republic of Chile, during which he addressed corruption and the often contentious environment on projects, and the need for a better way by building trust among con-

tracting parties.

A diverse range of topics was explored throughout the two-day conference, from the fine points of realizing the unique dispute avoidance benefits of DBs to establishing collaborative relationships with internal and external stakeholders and the cost impact on projects. Interested readers may access the presentations and papers at the website:

[www.drbfconferences.org](http://www.drbfconferences.org)

The conference would not have been possible without the generous support of sponsors. Promotional support was provided by CAM Santiago, FIDIC, ICC Chile, SCL, SCL Chile, and SADEC. An article about the conference with quotes from several speakers ran in the local business publication “Infogate.”

*DRBF Representative for Chile and International Conference Chair **Eduardo Sanhueza** can be reached by email at [esanhueza@varela-cia.cl](mailto:esanhueza@varela-cia.cl).*



The DRBF is grateful to the sponsors of the 16th Annual International Conference:

- CCHC
- Salini Impregilo
- Sinohydro
- Astaldi
- Gcila
- Navarro Paredes Gray
- PDS Australia
- Peckar & Abramson
- Pulso
- Radovic & Asociados
- Techno Engineering & Associates

# Lean Dispute Avoidance for Lean Construction

## Looking Back at Applying Dispute Boards in the Construction of Major Projects - Where are We Now?

By Philip Loots  
and Rob Fraser

A look back at some major projects over the last 15 years in Southern Africa and Australia, to see whether our observations from on Disputes Boards (DBs) published in the *DRBF Forum* Volume 3, Issue 3, July, 1999 still hold in the current project environment of 'lean construction', and what positive developments may be worth incorporating today.

### BACKGROUND

According to the DRBF project database, through 2014, over 2,700 projects amounting to \$225Bn have used a Dispute Board (DB). International institutions such as the International Federation of Consulting Engineers (FIDIC), the World Bank, the International Chamber of Commerce, and the Institution of Civil Engineers have embraced the concept of DBs, while the UK-developed NEC3 contracts have embraced the similar process of Adjudication. All of these have drafted standard clauses and rules to assist in their application.

In 2014 the Supreme Court of Australia incorporated a Dispute Board in the RedCrest development contract for the Commercial Causes List's IT program. Standards Australia published its new draft form of construction contract AS 11000, which provides for an optional Dispute Board which means that parties on each project will have to make a conscious decision to incorporate or not to incorporate a Dispute Board on the project.

### CONSTRUCTION DISPUTES

In our previous article, we commented that large engineering contracts have shown themselves to be prone to complex contractual disputes not easily or cost-effectively resolved by the conventional processes of arbitration or litigation. We were unanimous that the introduction of alternative disputes review/resolution techniques to avoid such formal legal routes was a welcome and largely successful development, and, when presented with the opportunity of implementing these techniques on the Lesotho Highlands Development Project, we had seized upon that opportunity. The financiers of the project had supported this approach. The immediate question was how to maximize this development by structuring the DBs to the best advantage of the project. The project authorities made use of various alternatives for different contracts which

have assisted in later evaluation of their relative merits and outcomes. The Lesotho developments were followed by wider experience gained on numerous other projects with certain variations on the theme, but using similar basic structures. It is not often that one has the opportunity to structure the DB in different ways, implement them and test them on large projects of a similar nature and in the same environment. We can now give our perceptions of the outcomes with what went well, and what did not.

### THE WAY IT WAS THEN

There had been concern and controversy in engineering circles over the distinguishing feature of the Dispute Adjudication Board (DAB) over the Dispute Review Board (DRB); that is the dilution in traditional Conditions of Contract such as FIDIC of the definitive role of the Engineer in the dispute process, whereby the DAB process replaces the engineer's decision in dispute adjudication (in contrast to the nonbinding recommendation of the DRB). Where a DAB is appointed once a dispute has arisen, for example, the Contractor persists in a claim which has been rejected by the Engineer, rather than the Engineer issuing the Engineer's Decision, the DAB is charged with the responsibility of adjudicating and ruling on that issue. The DAB's decision is final and binding unless a party formally refers the dispute to arbitration or litigation, in a similar procedure to that which previously followed the Engineer's decision.

Since their introduction on the construction of the Eisenhower Tunnel in 1975, the use of Dispute Boards had become increasingly widespread, but had not yet been adopted in Southern Africa. The World Bank adopted a policy requiring the appointment of Dispute Review Boards on its larger projects, and FIDIC adopted Dispute Adjudication Boards (DAB) with similar provisions for its standard contracts. The FIDIC 4th Edition Red Book, including its 1992 Appen-



dix A containing DAB provisions, had been mandated by the World Bank for use in projects in which World Bank funding was involved.

The intention of the DB is to change behaviours and enhance the independence of the adjudication process, thereby increasing the chances of acceptance by the parties and reducing the potential for arbitration (and also incidentally assist in complying with corporate governance and compliance concerns). As far as payment disputes are concerned, the role of the DAB can be seen as being similar to that of a statutory adjudicator under Security of Payments Legislation in Australia, except that the DAB has the added advantage of being chosen by the parties themselves, (which is permissible but not usually the practice in Australia). Both DABs and DRBs are intended to be constituted for the duration of the contract, and so ensure continuity and consistency in approach.

A further benefit incorporated in the FIDIC approach is that of the opportunity for the parties, at any stage prior to the Engineer's determination, to approach the DAB jointly for the Board's opinion on any matter on which there may be disagreement. This is seen as an under-utilised process which could resolve many a matter that is eventually formally disputed and referred to the DAB. Indeed, rather than the Engineer proceed headlong into what what could inevitably be disputed, the Engineer should encourage the parties to make use of this valid opening for dispute avoidance in preference to dispute adjudication.

### **RETROSPECTIVE**

We previously commented that there are certain benefits which Dispute Boards bring and which are not usually found in other alternative dispute resolution concepts. The presence of a DB had minimized posturing, facilitated open communication, built positive relationships and cooperation and promoted mutual respect and resolution. How-

ever, we found that from a practical point of view, there are certain important considerations in the structuring of the alternative dispute processes, particularly when using FIDIC documentation.

### **THE LESOTHO HIGHLANDS WATER PROJECT**

From 1987 to 1990, the Lesotho Highlands Water Project (LHWP) was designed and planned using the FIDIC 4th Edition (1998 update) as its basis for the construction contracts. This pre-dated the formal introduction by FIDIC of the amendments brought about in 1992 by the Appendix A providing for DABs. The RSA's Trans-Caledon Tunnel Authority (TCTA) negotiated a Disputes Review Board (DRB) system with the contractor, HMC Tunnelling Venture, late in 1990, prior to award of the R560 million (1 US\$ = R 3.00) contract for the Delivery Tunnel North (DTN) section of the project. The Lesotho Highlands Development Authority (LHDA) followed by introducing DRBs sometime after award of their three Phase IA contracts which totalled some R1800 million over six years of construction.

### **PROCEDURES FOR THE BOARD**

Whereas the LHDA had adopted the conventional appointment of an independent tribunal for the DRB, and TCTA had opted for three persons comprising senior directors of the Employer, Contractor and Engineer, all individuals with decision making authority who had to be demonstrably remote from the contract. The latter structure was expected to be cost-effective and sufficiently objective to provide rational and contractually sound engineering solutions to disputes as part of the 'amicable settlement' requirement in FIDIC. These Boards were specified in relatively simple terms for both the LHDA and TCTA contracts, with a minimum of procedural constraint compared with the later 1992 more formal procedures. In both cases the Boards themselves were responsible for their own final detailed procedures. The outcomes were



similar in that they focused on early identification and evaluation of disputes, prompt resolution and the use of informal procedures. Whilst the processes actually adopted required some refinement, a significant number of complex and diverse disputes were resolved satisfactorily and cost effectively through reference to the DRB's on the RSA's Delivery Tunnel North and each of the three Lesotho Phase 1A contracts (Katse Dam, Transfer Tunnel and Delivery Tunnel South) respectively. There were no delays to any of these vast engineering works arising from disputes or dispute procedures.

Seven years later, the LHDA for the Phase 1B Contracts, in contrast to what it had done before, introduced a very closely specified and formal procedure for the appointment and functioning of the DRB. Whilst the FIDIC Appendix A on the implementation of a DAB was carefully considered, the LHDA elected to avoid too radical a departure from the past, especially regarding the role of the Engineer. The LHDA provisions included formal hearings and defined time frames but stopped short of the recommendations having to be legally tested before being issued. Despite the Engineer issuing carefully and legally-referenced decisions, a number of disputes ended in Arbitration, which could otherwise have been more elegantly resolved by a DAB with a binding decision. Indeed, this included the Employer disputing the very Engineer's decisions that were largely upheld in subsequent arbitration.

The LHDA's systematic approach to the appointment of and procedures for DRB members for the Phase 1B contracts, whilst somewhat rigid, nevertheless went a long way to avoiding the possible procedural pitfalls of arrangements which might have been seen to be too loose.

In a different arena in 1998, the R343 million (1 US\$ = R 6.00) contract for the Maguga Dam in Swaziland for the Komati Basin Water Authority (KOBWA) adopted the above-mentioned FIDIC system for a DAB. The Maguga Dam documents placed proce-

dural constraints on the party wishing to approach the DAB, and the earlier intervention of the Board in the time-frame of the disputes clauses meant more timeous decisions, greater independence and probably brought a wider spectrum of perspectives to bear on the decision earlier in the process. However, there was a constraint which allowed the parties to only take to arbitration the evidence and arguments presented to the DAB, which severely hamstrung the DAB procedures by way of time-consuming and extensive legal preparation for any DAB referral. In the end the disputes that may have been formally referred to the DAB were curtailed to the DAB's opinions only and the disputes abandoned by mutual agreement in favour of a conventional Engineer's decision.

In any case, the most contentious issue was primarily one of technical complexity involving underground rock hardness brought by a drilling subcontractor. This eventually led to a mutually acceptable and timeous conclusion of all matters under the contract within three months of defects period completion, based on the parties' confidence in the impartiality of the Engineer.

## REFLECTIONS ON DEVELOPMENTS

These developments involved many hours of deliberation of principle and practicality with a wide spectrum of eminent persons in the South African construction industry. This background provided fertile ground for reflection on the merits of the alternative approaches to ADR adopted in the form of the various Disputes Boards. Such reflection must be placed in the context of ongoing experience and developments in an evolutionary process which, we believed, had not yet achieved full maturity.

One such development that is worth mentioning is that of the Coega IDZ Infrastructure Project, adjacent to the new Ngqura Harbour near Port Elizabeth, South Africa. Facing numerous engineering contracts greatly differing in value, extent and nature, the Coega Authority embarked on a well-constructed set of agreements and procedures for the



operation of a DAB Panel across this wide spectrum of small and large contracts. This could constitute a valuable reference source towards modelling the set-up of such a Panel approach to cover a broad spectrum of contracts, even in the context of larger contracts for a single authority, such as an oil and gas operator or a mining house. This approach would avoid the search for a new DAB each time a new contract is contemplated, DAB member(s) then being drawn from such a Panel ad hoc, depending on availability, to address disputes as they arise, while still being substantially aware of the project background and contract programme developments. Formulating the amendments to applicable standard conditions, e.g. FIDIC, would be part of such an Employer-specific development process, and could be integrated with more current ADR guidelines and aligned with internal Employer procedures. This would additionally spread the benefits of ADR to small-value contracts without the high cost of a dedicated DAB specifically established for each.

## THE ROLE OF THE BOARD

It is worth noting that the World Bank favours DRBs, in which the Board expresses a non-binding opinion, while FIDIC adopts the DAB.

We have commented that in essence, the purpose of a DRB was to offer the parties a practical route to ‘amicable settlement’, sometimes seen as an ineffectual formality for parties already at loggerheads. Nevertheless, if it is workable it becomes an effective means of avoiding the subsequent and inevitably lengthy and costly legal process usually specified (arbitration or litigation). A clearly defined role of the DB is essential, so that the Parties’ expectations and the functioning of the DB are aligned. The intention is to provide a mechanism within the contract for the independent review of formal disputes by a Board which through

its wide contractual and technical experience of contracts, as well as frequent visits to the site, would recommend rational and sound settlements. Whilst the parties could choose whether or not to be bound by such recommendations, the process would afford them a ‘think-again’ opportunity to reassess their positions before proceeding headlong into arbitration. This would apply particularly to those disputes which are so often generated in the ‘heat of battle’, caused by under-performance, cash-flow and cost constraints, and reliance on partisan interpretations and win-at-all-costs attitudes. A by-product was a cost-effective referral system which avoided allegations (often unfounded) against the Engineer of non-compliance with the impartiality clause, so prudently included in FIDIC. A more recent observation is that the process provides a real-time resolution of issues arising where conventional legal remedies applied years after the event might be ineffectual<sup>1</sup> and the management of attitudes and behaviours becomes a decisive factor.

### 1. The Constitution of the Board

The attributes of members of a DRB are now largely prescribed by organisations such as the DRBF and FIDIC, in order to give proper effect to the role outlined above.

The constitution of the DRB for DTN involved senior off-site Directors of the three parties, demonstrably ‘distanced from the policies and emotions’ of the contract. This operated well enough primarily due to the integrity and disposition of the three individuals, and the respect which they held for each other and for their respective organisations. Each director was sufficiently senior and obviously in a strong position to motivate and explain the recommendations of the Board within his own organisation, even if the recommendations were not entirely favourable to their own organisations or unanimous, which enhanced objectivity regarding differ-

<sup>1</sup> See Loots & Charrett – Being Held to Ransom or “Wielding the Whip or the Rod”; How Unscrupulous Dealing, Illegitimate Pressure and Tough Negotiation Tactics can be overcome by the legal remedy of Economic Duress [2014] 1 CLR 211.



ences among the parties. We pointed out that the costs of this system are considerably reduced in comparison with any of the other arrangements, and the resulting recommendations stood the greatest chance of acceptance by the two contracting parties. However, our conclusion was that such a constitution was not sufficiently independent or impartial, especially with respect to the requirements of transparency and independence stipulated under certain jurisdictions. Furthermore, compared with an independent DB, such an “internal” Board might be inevitably more concerned with the success of the project and the DRB members themselves might feel a greater burden of personal responsibility to be seen to “make it work” for the good of the project. This process therefore may not be entirely free from possible external influence, accusation of collusion or pressure in adversarial circumstances.

The selection of independent members is, with the benefit of further experience, definitely to be preferred from a probity and corporate governance standpoint.

Experience in civil contracts has shown that many disputes still revolve around measurement/quantities, programming issues (including concurrency and extensions of time (EOT’s)) and P&G payments. Among the technical issues, ground conditions per se appear to have diminished somewhat, only to be replaced by a combination of the suitability of designed structures and ground re-characterisation processes. Hence the presence of appropriate engineering and programming expertise in the members of any DB is generally vital.

In sophisticated contracts, such as FIDIC, legal construction experience and expertise are also highly desirable. Especially when tight time-frames superimposed on technical, environmental and social challenges are involved, the law and the Parties’ respective legal rights, obligations and liabilities need to be brought into sharp focus. Such complexities are fairly commonplace in major projects today. Such specialisation should be

confined to one member of the DAB, bearing in mind that each member must typically comply with three criteria, eg those set out in Clause 3 of FIDIC’s General Conditions of DB Agreement:

*“(a) experienced in the work which the Contractor is to carry out under the Contract,*

*(b) experienced in the interpretation of contract documentation, and*

*(c) fluent in the language for communications defined in the Contract.”*

While legal expertise on the Board is invaluable, care must be taken that it is not overbearing.

The members’ obligation towards fairness in an even-handed environment, for example as embodied in the FIDIC Procedural Rules, is far removed from a legally-dominated and adversarial environment.

## 2. Legal Representatives for Parties

While the presence, advice and opinion of eminent construction lawyers on the DAB are desirable and often essential, the representation of the parties’ respective cases by lawyers in the DAB process is generally inappropriate in any hearings on the matter. While a certain degree of robustness is always appropriate for the people involved in finding contractually sound solutions, the DAB is not intended to be an arbitration or a court of law, but an environment as typically set out in the FIDIC Procedural Rules.

## 3. Engineer’s Role and Authority

Perhaps the most important question is whether the recommendations of the DB should be merely advisory or final and binding on both parties.<sup>2</sup> We said that far from being an erosion of the powers and authority of the Engineer in traditional contracts, the DRB should be seen as enhancing the Engineer’s role, the key element remaining the Engineer’s decision. In contrast, the



FIDIC DAB process replaces the Engineer's decision in the dispute resolution process. In practice, concerns about diminishing the role and authority of the Engineer were unfounded. The Engineer's impartiality could be more freely expressed knowing that there was a cost-effective and less adversarial board of appeal prior to arbitration.

#### 4. Operational, Contractual and Practical Considerations

The term 'equity' does not mean latitude to apply some different criteria such as the view of the individual on abstract justice or equitable principles, rather than the application of a fixed and recognisable system of law.<sup>3</sup> Whether such a clause, if it were drafted so as to entitle the members of the DB to act as *amiables compositeurs*, would be legally enforceable is open to doubt anyway. Christie raises the question of whether it would be contrary to public policy to enforce such an award using the coercive powers of the State.<sup>4</sup> Any tendency to give the DRB the power to make 'recommendations' which are final and binding on both of the parties should be resisted. If this is the intent, a DAB should be used.

As with a DAB, a competent DRB should not unilaterally impose its own ideas of fairness upon the parties. It should rather strive for a recommendation consistent with applicable laws and contract provisions.<sup>5</sup>

Another concern raised at the time was that contractors would use the DB as a 'sounding board', inundating it with all manner of fanciful claims in the expectation that the

DB would concede some of these in order to justify its impartiality and fairness. This did not come to pass. The DRB was required to include in its formal report on a dispute any extra-contractual considerations taken into account in arriving at its recommendations, as well as substantiation for adopting that approach. More recent experience also seems to confirm that this fear has not been realized to any great extent elsewhere; on the contrary there still seems to be a general reluctance to admit to disputes by referring matters, trivial or otherwise, to the higher independent level of resolution by DABs.

Similarly, the question of whether the DRB should become involved in problem solving prior to or after the Engineer's decision was considered. It was said that in becoming involved prior to the Engineer's decision no dispute has yet arisen.<sup>6</sup> On the other hand, the role of the DRB may be debated as being more preventative than resolute in nature. Experience of the DRB on the Pula 1000 million North-South Water Carrier Project in Botswana<sup>7</sup> had shown that it was preferable for the Contractor first to formulate its position and for the Engineer to give a decision upon the claim as formulated. Then the DRB could become involved with both parties on clearly defined issues in the dispute resolution process during the amicable settlement period. This further restricted the ability of the Contractor to abuse the function of the DRB.

A further consideration is of utilizing the combined wisdom and experience of the DRB during their regular site visits in a pre-

<sup>2</sup> Advisory Opinion: "If at any time the Parties so agree, they may jointly refer a matter to the DAB for it to give an opinion. Neither Party shall consult the DAB on any matter without the agreement of the other party". (FIDIC cl 20.2); Similar provisions also exist in Australian bespoke contracts.

<sup>3</sup> *Orion Cia Espanola de Seguros v Belfort Mij* [1962] 2 Lloyds Rep 257, 264.

<sup>4</sup> See Professor R H Christie QC FC1 Arb – Amiable Composition in French and English Law; the Journal of the Chartered Institute of Arbitrators Volume 58, No. 4, November 1992 at 261; *Overseas Union Insurance Limited v AA Mutual Insurance Co. Limited* [1988] 2 Lloyds Rep 63, 72; *Home and Overseas Insurance Co. Limited v Mentor Insurance Co (UK) Limited* [1989] 1 Lloyds Rep 473.

<sup>5</sup> *Construction Dispute Review Board Manual* – Matyas, Mathews, Smith, Sperry – McGraw Hill 1996.

<sup>6</sup> *Monmouth County Council v Costelloe and Kemple* [1964] 63 LGR 131.

<sup>7</sup> Philip Loots was a member of the DRB on this Project in which SMEC was the Engineer.



emptive role. Our experience was that it gave greater interest to the DRB in all the contract developments, and a form of peer review whether or not a potential for dispute existed. There was no doubt that the Board's visits generally enhanced and maintained positive behaviours.

It is noted that recent trends worldwide are definitely swinging towards a greater emphasis on dispute avoidance, even in the functioning of DABs, by a more intentional leveraging of their mediatorial role, rather than first awaiting the development of a dispute and only then becoming involved in formal adjudication. By all accounts this trend is developing a higher degree of early resolution based on DB recommendations for settlement of potential disputes than even displayed by the more formal decisions of DABs. This is also much less disruptive at the management level of all parties.

#### 5. Standing of Board Documents and Deliberations

The above comments on the force of the DRB's recommendations leads to the question of the standing of the Board's written and oral deliberations, documents, and considerations. This requires careful consideration i.e. 'What precedent is being set on a particular dispute, especially if that dispute proceeds to arbitration?' In the case of DTN DRB procedure (being advisory in nature), a formal agreement between Employer and Contractor was entered into whereby all the Board's activities would be without prejudice and inadmissible as evidence in further proceedings.

The FIDIC DAB process as adopted for Mangua Dam went further in confining the parties in Arbitration to the documents and arguments previously placed before the DAB. As a result, the parties prepared for the DAB hearing in a similar manner to preparing for arbitration i.e. extremely thorough, time consuming, and legally rigorous. We question whether this constraint advanced the Board's effectiveness in the pursuit of early

resolution and settlement of disputes.

#### 6. DBs as a Project Management Tool

More recently DBs are being seen as an integrated part of the management of a project rather than a separate dispute resolution process. DBs encourage a collaborative approach to issue resolution on a 'best for project' basis, with least cost/time impact. Although we did not recognize this as a benefit at the time the DB concept was introduced, (being more focused on dispute avoidance and management), we can say in hindsight that DBs definitely led to a more collaborative approach, and to furthering the interests of the project over the interests of the individual parties.

Because DBs focus on prevention of disputes rather than a cure, there is now no doubt that DBs contribute to the delivery of projects on time and within budget to the benefit of the Employers and the Contractors. DBs change behaviours and allow disputes to be settled efficiently and inexpensively, removing the controversy from day to day operations and allowing continuation of work without delay or disruption.

The authors' conclusions were that, accepting the advantages of DRBs, we had yet to see a properly balanced approach to DRBs in Southern Africa which would combine independence with maximum practicability, low cost and time-effective disputes resolution or adjudication. At the time of writing, the DRB process developed by the LHDA and adopted for its Phase 1B contracts represented possibly the most comprehensive and effective, if somewhat over-specified, system.

It can be said categorically that DBs as applied on the Lesotho Highlands Water Project provided a 'without prejudice' environment for problem solving and communication between the contracting parties – improved relationships and focused on 'best for project' outcomes.

## 7. Key Elements

It was clear to us that the particular persons appointed to the Board and their personalities are crucial to the success of the activities of the Board and the acceptability to the Parties of the attempts by the Board at conciliation. The issues are often contentious and often involve large sums of money, placing a great responsibility on each member to exercise himself or herself in the proper manner and with detailed attention to the matters before the Board and its consequent tasks. The selection of appropriate persons to fulfil the role remains the single greatest challenge in the process, as all the other largely administrative and procedural matters then fall quite naturally into place.

## 8. More Recent Projects Using DBs in Southern Africa

- Maguga Dam – Swaziland
- VRESAP
- Gautrain
- GFIP
- Thune Dam Botswana
- Mbabane By-Pass – Swaziland
- Medupi Power Station
- Springrove Dam
- Berg Water Project
- Durban Harbour Tunnel
- Coega Harbour – IDZ and Infrastructural Developments
- Dikahatlong Dam – Botswana
- LUSIP – Swaziland
- Nelson Mandela Bay Stadium
- Kusile Power Station
- Olifants River Water Resources Development Project – Stage 2C-H – Pipelines
- Mokolo-Crocodile Water Augmentation Project – Mokolo Pipeline

An interesting development that has become evident is that both of these major

pipeline projects have resulted in serious time over-runs and some significant contracting lessons have been learned. One of these is that, where a contract over-runs to the extent that the limit of delay damages has been reached and the Employer's remedies are largely exhausted, the role of the DAB seems to be relegated to one of less significance. This is especially the case where the Contractor may be continuing with the execution of the contract with all diligence, or at least with good intent<sup>8</sup>, the contractual situation is more likely to be resolved by way of Supplementary Contract Agreements than by disputes and referrals to the DAB. Such circumstances may well be brought to bear in future role-definitions for the DAB.

## 9. Mining, Energy and Resources

While the provision of DBs have been shown to be in the best interests of the project, and for the parties, there is one striking anomaly in the acceptance of DBs worldwide – while many of the major construction projects have embraced the use of DBs, generally the energy and resources industries, while on the cutting-edge of technology, have fallen far behind current best practice in the avoidance and management of disputes. Perhaps there is a conscious reluctance to provide for pro-active dispute avoidance, the strategy being to deliberately force contractors and suppliers or operators into the costly and time consuming public arena of the courts in the event of a payment dispute.<sup>9</sup> This is precisely the type of injustice that Security of Payment legislation in the UK and Australia is aimed at preventing. Perhaps even more curious is that such Security of Payment legislation in some places inexplicably discriminates in favour of the oil, natural gas, and mining industries by carving their construction contracts out



### DRBF FOUNDERS

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

### CHARTER MEMBERS

Jack Alkire, Esq.  
Romano Allione  
Rodney D.  
Aschenbrenner  
Balfour Beatty  
Construction, Inc.  
S.H. Bartholomew, Inc.  
John Beyer  
Roger Brown  
William C. Charvat AIA  
Frank Coluccio  
Construction Co.  
Dillingham  
Construction, Inc.  
Raymond J. Dodson, Inc.  
James P. Donaldson  
Peter M. Douglass, Inc.  
Paul Eller & Associates  
Frontier-Kemper  
Constructors, Inc.  
Steven M. Goldblatt  
Granite Construction, Inc.  
Guy F. Atkinson Co.  
of California  
Greg M. Harris, Esq.  
Paul R. Heather  
Impregilo SPA  
Gordon L. Jaynes, Esq.  
Al Johnson  
Construction Co.  
Keating Associates  
Kellogg, LLC  
Peter Kiewit Sons Inc.  
Thomas R. Kuesel  
Kerry C. Lawrence  
Lemley & Associates, Inc.  
Al Mathews Corporation  
McNally Tunneling  
Corporation

<sup>8</sup> As to Economic Duress, see "Wielding the Whip etc".

<sup>9</sup> The reality is that these matters are often then settled to avoid adverse publicity at sums greatly in excess of true entitlement.



from the jurisdiction of the legislation<sup>10</sup>.

Why this should be the case has not been satisfactorily answered. Nevertheless common sense would tell us that impacts on project progress, the adverse publicity which arbitration and litigation attract, and the undoubted benefits of integrating the DB structure into the management of a contract for reasons of probity and good corporate governance would persuade decision-makers that a culture of hard-ball tactics and discrimination against contractors, subcontractors and suppliers working in the oil, natural gas, and mining industries is in the end counter-productive and expensive.

It can be concluded that our earlier comments remain largely valid. In addition, the inclusion of a DB structure aids the Employer's compliance with corporate governance requirements, reduces the scope for fraud by duress, and provides an independent opinion for the benefit of the Employer's Joint Venturers, auditors and other stakeholders.

#### 10. Current Observations on DBs in Australia

The Australian experience is that, since 2003 when detailed records have been kept, there have been a total of 58 DB/DRB/DAB contracts on record with a range in value from AUD\$22M to AUD\$8.0BN. The value of DB contracts in progress or completed since 2003 now exceeds AUD\$37.6BN. There have been approximately 14 disputes formally deferred to DBs under the contracts and no disputes have yet gone outside the contract.

Most sophisticated clients using Dispute Boards, on the East Coast of Australia in particular, are the transport authorities in New South Wales and Queensland. Both these groups have elected to call their DBs "Dispute Avoidance Boards" to give the emphasis on avoidance rather than resolution, while techniques that are necessary for avoidance of disputes are emphasized in training workshops for DB members rather than just resolution of disputes.

#### 11. Financial Issues

- The estimated base cost of a DB is 0.15% - 0.2% per year for an AU\$100M project (AU\$150-200,000 per year);
- The annual base cost does not increase for projects >AU\$100M;
- The base cost is usually met by Employer (directly or through the Contractor including its share of the DB cost in its tender price);
- Usually DB costs are shared on a 50:50 basis;
- The cost of a DB should be considered a modest 'insurance premium' against major disputes, the legal costs of which can run into hundreds of millions of dollars.

#### 12. Summary

In conclusion, the success of Dispute Boards as an effective management tool is now without question. DBs encourage a collaborative approach to issue resolution on a 'best for project' basis, with least cost/time impact;

<sup>10</sup> For example the Construction Contracts Act 2001 (WA) states in Part 1 s4 that:

"(3) Despite subsection (2) construction work does not include any of the following work on a site in WA –

- (a) drilling for the purposes of discovering or extracting oil or natural gas, whether on land or not;
- (b) constructing a shaft, pit or quarry, or drilling, for the purposes of discovering or extracting any mineral bearing or other substance;
- (c) constructing any plant for the purposes of extracting or processing oil, natural gas or any derivative of natural gas, or any mineral bearing or other substance
- (d) constructing, installing, altering, repairing, restoring, maintaining, extending, dismantling, demolishing, or removing, wholly artistic works, including sculptures, installations and murals;
- (e) work prescribed by the regulations not to be construction work for the purposes of the Act."



are seen as an integrated part of managing a project and DBs are progressively gaining wider acceptance. The evidence shows significant advantages over reference of disputes to litigation at first instance. That said, how they are structured and implemented remains of critical importance. Sometimes you have to give a little to get more.

The pros and cons of various issues have been discussed with the author’s conclusions:

- Review versus Adjudication boards – DABs are generally preferred
- Single versus 3-member boards – to suit the circumstances
- Involvement or otherwise of legal board member(s) – mostly very beneficial, but developing the DAB into a mini-arbitration process is to be avoided
- Legal representation by parties to a dispute – generally to be discouraged to

avoid a mini-arbitration

- More effective use of a Board’s involvement in a project, e.g. in pre-empting disputes and/or early resolution of potential disputes – generally to be encouraged

Project owners who had the courage to accept the then novel inclusion of DBs into their contract documentation and project management procedures acknowledged the overall benefits without qualification<sup>11</sup>: The smooth administration of the project and satisfactory settlement of disputes could be attributed to the attention given to the structuring and drafting of documents prior to commencement of the work, together with, to a large extent, the work done by the Dispute Board established for the project.

*Authors Philip Loots can be reached at philip.loots@westnet.com.au and Rob Fraser at rob.fraser@aurecongroup.com.*

<sup>11</sup> “Please accept my sincerest appreciation of the excellent quality services rendered the past 11 years” said the Chief Executive of the Trans Caledon Tunnel Authority, Martie van Rensburg in drawing the long association with Philip Loots & Associates to its conclusion on the Lesotho Highlands Project.

**TABLE 1: Lesotho Highlands Water Project (LHWP)**

1991 – LHWP Phase 1A – Delivery Tunnel North

- TCTA was the first employer to engage a DRB in South Africa
- A “hybrid” type DRB was established as part of the amicable settlement process. The DRB comprised a senior representative of each of the Employer, Contractor and Engineer.
- 1993 – LHWP Phase 1A – Katse Dam (Double Curvature Arch Dam 185m high)with a crest length of 710m and consisting of 2.3 million m3 of concrete; Transfer Tunnel (45 km long 4,35 m lined diameter) & Delivery Tunnel South (37 km long). Three ‘independent member’ DRBs were established on each contract. FIDIC 4th Ed Conditions of Contract were amended to provide for the DRB procedure before arbitration.
- On Katse Dam, five disputes were resolved; however on six disputes arbitration was required.
- On the Delivery Tunnel South, all disputes referred to the DRB were resolved.

1998 – LHWP Phase 1B – Mohale Dam, Mohale Tunnel Matsoku Weir & Tunnel

- Three-person DRB on all three contracts
- All disputes referred to the DRB were resolved

**CHARTER MEMBERS CONTINUED**

- Mechanical Contractors Association of Western Washington
- Meyer Construction Consulting, Inc.
- Mole Constructors, Inc.
- Nadel Associates
- Stephen J. Navin
- John W. Nichols, P.E.
- Parsons Brinckerhoff
- Quade & Douglas, Inc.
- Pease & Sons
- Edward W. Peterson
- H. Ray Poulsen, Jr.
- Quadrant II Inc.
- John Reilly Associates
- Arthur B. Rounds
- Seifer Yeats & Mills LLP
- Shannon & Wilson, Inc.
- J.F. Shea Co., Inc.
- Patrick A. Sullivan, Esq.
- Traylor Brothers, Inc.
- Underground Technology Research Council
- URS Corporation
- Watt, Tieder & Hoffar, LLP
- James L. Wilton
- Ed Zublin AG

# DRBF 20th Annual Meeting & Conference - Washington, DC

## 20 Years: Looking Ahead



**Harold (Hal) V. McKittrick**  
Conference Committee  
Chair

The DRBF's 20th Annual Meeting & Conference took place at the historic Mayflower Hotel in Washington, D.C., September 24 to 26, 2016. The hotel has been the site of inaugural balls from the term of Calvin Coolidge through the current administration. The event started Thursday with educational workshops covering Administration & Practice and two new workshops: DRBs and Alternate Project Delivery Methods and a Peer Discussion Group (see page 24). A welcoming cocktail reception for all delegates and their guests was held at the hotel on Thursday evening.

The theme of the conference was "20 Years: Looking Ahead" and the emphasis in the various sessions was to take stock of what the DRBF had accomplished in that time, but more importantly what lies ahead. However, with the conference taking place in the U.S. capitol in a presidential election year, there was inevitable consideration of the political world as well.

US Congressman Gerry Connolly of Virginia's 11th District opened the conference. Congressman Connolly is a strong infrastructure advocate and congratulated the DRBF for its success in resolving disputes on the work site and helping to keep projects on time and on budget.

The opening session 1 "Deciding to Use DRBs in US Infrastructure Projects" was chaired by Adrian Bastinelli. Panelists included Tom Gourley from the U.S. Army Corps of Engineers, who use DRBs sparingly to Chris Stewart of WMATA who have a long and extensive history of using DRBs. Virginia DOT

was represented by William Cuttler and West Virginia DOT by Darby Clayton. The consensus was that the agencies accepted the DRB recommendations most of the time and found the presence of the DRB encouraged good behavior on the part of the parties. The most important agreement was that there was a place for DRBs on their future projects, particularly large ones.

Jim Perry chaired the session on "The International Report Card on Dispute Boards" with a panel consisting of Chris Brown of the World Bank, Nouhan Keita of the MCC, Roberto Giraldo of IADB and Paul Tichauer of the ICC. Mr. Brown emphasized that the Bank is going to be tougher in the future to see that the terms of its loans are observed with respect to establishing DBs. IADB is still waiting for the "Big Bang" with respect to the use of DBs although IADB has a large number of contracts referencing their use. MCC believes training is necessary to implement DBs on their projects.

Luncheon was highlighted by the award of the Al Mathews Award to Jim Perry. Jim could not attend the dinner at which the award is normally presented. Prior to Jim's receiving the award from incoming DRBF Executive Board President, Dick Appuhn, and acceptance, a large number of former Al Mathews Award recipients were recognized (see page 27).

After lunch, Bill Edgerton chaired a session on a study of the DC Clean Rivers Project with a panel consisting of Chris Allen of DCCR, Scott Shylanski of Gilbane Building Company and Shane Yanagisawa of Impregilo, Healy, Par-



sons. Mr. Allen emphasized DCCR’s Design Build projects are schedule driven and a collaborative process. Partnering and team work is a focus to the extent that both parties collectively putting together exhibits for the DRB meetings.

Harold McKittrick chaired the next session that featured a summary from Matt Michalak and Graham Easton of one of the hot topics of the Peer Review session “The Role of the DB Beyond Holding Hearings and Dispute Avoidance Methods.” Paul Taggart presented a Peer Review topic, open to comments by the delegates, “Problems Encountered by Users and Board Members.” Paul also offered that the DRBF could respond to the ICC’s training needs for DB members.

Kurt Dettman led the final session of the day “DRBs on P3 Projects” with an international panel of Jonathan Gifford, Marc Filet, Chris Kane, Herfried Woess and Ron Finlay. The panel urged a worldwide push to develop P3 projects and discussed the use of DBs of different expertise on the work. P3 use varies from rapidly growing in Europe and Australia to embryonic in Central and South America.

The Mathews Award dinner was held Friday evening and started with awards to projects that best used DBs in 2016 (see article on p. 28 for more detail).

The evening concluded with a show by The Capitol Steps, a famous Washington political satire group, who spared neither presidential candidate nor world leader in their routine.

Saturday’s first session was “Scheduling and Claims – The Industry Standard”

presented by two recognized industry experts in scheduling, John Livengood and Robert D’Onofrio. Different scheduling methods were analyzed and critiqued for their validity and acceptance in the U.S. judicial system.

This was followed by “DRBs and Mediation,” a reprise of a topic that Adrian Bastinelli presented in a former annual meeting presentation. The consensus of the panel, consisting of Deborah Mastin, Val McWhorter, Robert Cedeno, Kathy Barnes and the delegates was the same as the earlier presentation: DRBs cannot perform both a DRB role and a mediation role.

The final panel, chaired by Levent Irmak with Marcus Theil, Andy Griffiths and Romano Allione, explored “New Frontiers for DRBF in South America, Africa, the Middle East and Europe.

After lunch, more than 16 delegates were led on a site tour of the Anacostia River Tunnel Project, a DC Clean Rivers Project by Bill Edgerton.

All in all, the conference was one of the most successful DRBF Annual Meetings in terms of general attendance, work shop attendance and quality of the overall program. The DRBF is grateful to the conference planning committee members, Hal McKittrick (chair), Val McWhorter, Adrian Bastinelli and Bill Edgerton with support from Region 1 President Eric Kerness and Executive Director Ann McGough and her staff. In addition, the conference could not happen without the generous support of our sponsors.

**Hal McKittrick can be reached by email at [hmckittr@cox.net](mailto:hmckittr@cox.net).**

**The DRBF is grateful to the sponsors of the 20th Annual Meeting & Conference:**

- Kiewit
- Fox Rothschild
- Gcila
- Granite
- KRG
- Kenny
- Peckar & Abramson P.C.
- The Rhodes Group
- Smith, Pachter, McWhorter PLC
- AECOM
- Balfour Beatty
- Clark Construction
- Corman Construction
- Capital Project Management
- Facchina
- FTI Consulting
- Lane, McDonough Bolyard Peck
- Schnabel Engineering
- Traylor Bros.
- Navigant



# DRBF Peer Review Workshop

By Harold (Hal)  
V. McKittrick

As part of the DRBF's 20th Annual Meeting & Conference in Washington, D.C., new workshops were held. One was the "Peer Review Workshop" that was brought about by my desire to foster more discussion of DRB experiences and solutions to thorny problems between members of our Foundation. I had found in the past that some of the best parts of Annual Meetings was the dialogue that developed between delegates in a question and answer session at the end of panel discussions. I wished we could have had more of it since it was a time of learning from the experiences of our peers.

When I was asked to chair the 29th Annual meeting in Washington, D.C., I thought it might be an opportunity to offer a dedicated session to discuss problems encountered by DB practitioners and solutions developed to cope with them. The practicality was tested by surveying the DRBF membership. Over 100 members responded and over 50 indicated they were interested in attending such a session and some submitted topics for discussion. More than 20 members volunteered to lead the discussions on selected topics.

Ten topics were selected for discussion slated for a four-hour time period; however, two were combined and only five others were discussed due to time constraints. The topics and presenters were:

1. **The Role of the DB Beyond Providing Recommendations or Advisory Hearings and Procedures for Dispute Avoidance** – Matt Michalak and Graham Easton
2. **Breaches of the DB Agreement by Both Parties** – Warren Bullock
3. **Ex-Parte Communication and What to Do About It** – Don Henderson
4. **Owner Funding the Entire Cost of the DB Program** – Jimmy Lairscey
5. **How to Write an Effective Opinion that the Non-Prevailing Party Will Accept** – Ken Roberts
6. **Discouraging Parties from Develop-**

**ing Overly Legalistic Approaches to DB Procedures, Meetings, Issues and Recommendations** – Gerald McEniry

Of the remaining topics, Paul Taggart led a discussion based on his and Gordon Jaynes' paper "Dysfunctional Boards and How to Avoid Them" the next day in the Friday session of the main conference. Two other topics were prepared by Bill Hinton and Hal McKittrick but not presented due to time constraints.

To make the workshop meaningful for all the attendees, each presenter prepared a several paragraph description of their topic; and all workshop participants were given these synopses two weeks prior to attending the workshop in order to be prepared to engage in meaningful discussions on the topics. It was emphasized to those who chose to attend that the session was not a lecture format but a discussion and exchange of ideas between peers.

The following is a brief summary of the topics raised and some of the input of the attendees. It is not intended to provide an accurate transcript of the proceedings but to give the readers a sample of opinions expressed and a flavor of the dialogue of the session.

In Topic 1, it was emphasized that one of the major strengths of the DB is for the Board members to have a personal and continued real time understanding of the project and issues throughout the course of the project. With that knowledge and by utilizing various techniques, the Board will be in a position to help the parties resolve disputes at the lowest level, in a timely manner, and without a DB hearing. The first discussion point was how the Board was to be kept informed of the project details and issues, and facilitate communication between the parties and the Board, so the Board is aware of issues and kept in the loop. What means and methods could the Board employ?



The response was that the Board should be established early and the parties to the contract should understand what the role of the DB is. The Board should understand the work and know what they are talking about and the parties should realize that. One delegate stated that he kept asking questions to force and facilitate communication. It was important to have regular and frequent DB meetings and to be ensured that the DB was copied on all relevant project communications.

The second discussion point was how the Board was to keep the parties communicating to understand the issues and the position of the other party.

One method used was for the DB to prepare a list of issues for discussion at every DB meeting. More than one response was to find the adults in the room and focus on them. The most popular solution to non-communication was to ask the parties to bring their superiors to future meetings and get the principals together to raise the communication level. It was agreed the board had to control the meetings and squelch incendiary language that always is an impediment to open communication. The Board should encourage a team approach and workshops to resolve difficult issues.

The final discussion point was, with communications and trust established, the means and methods a DB can employ to facilitate a resolution of the dispute without going to a DB hearing.

One opinion was to keep the parties talking short of a hearing and ensure that the DB members are as informed as possible on all aspects of the issue. Another was to suggest the parties engage in workshops facilitated by the DB. Issues are to be addressed early and the DB should move the parties to settle as quickly as possible.

In Topic 2, the central issue was what to do about breaches of the contract including the

parties' failure to appoint the DB within the specified time frame; the parties' failure to meet with the DB on a regular basis; the parties' failure to meet obligations to negotiate any dispute in good faith and to reach an impasse before referring the matter to the DB; and the owner thwarting the DB process near contract completion.

One very strong response to the breaches offered was to write a letter to the principals specifically outlining their violation of the contract.

With respect to failure to negotiate it was observed that the DB must keep the parties talking short of a hearing. If that effort failed, the group consensus was that the DB should first offer the parties an informal or advisory hearing; and that advisory opinion should be in writing in order to be seen by decision makers who were not present at the advisory hearing. The opinion should contain the caveat that the opinion was based on the limited information submitted.

Topic 3 addressed ex-parte communication and what you should do as a board member when you observe this type of behavior and what actions you should take.

Many attendees raise this issue and its prohibition at the very first board meeting. One approach was to discuss it with the offending party privately, and if the behavior continued, raise the issue at the next board meeting with both the contractor and the owner in open session. Some would ask the offending party to cease the activity and, if the behavior continued, resign themselves.

Topic 4 addressed the efficacy of the owner funding the entire cost of the DB program. It was explained that the State of Florida discovered that the FHWA (Federal Highway Administration) would pay 90% of the cost of the DB only if the state funded all the cost. It was observed that prior to the installation of DBs in Florida projects exceeded budgeted time by 15% and cost by 10%.



Subsequent to using DBs both budgeted time and cost are exceeded by only five percent. There was no discussion on the topic of the owner paying 100% of the cost of the DB.

Topic 5 centered on how to write an effective opinion that the non-prevailing party will accept. DB opinions are most successful when the parties trust the members on the panel and their neutrality. This is achieved by having neutral DB members who are knowledgeable in the industry and familiar with the contract terms and conditions. The working relationship between the DB panelists is instrumental in its ability to write an effective and accepted opinion.

Key observations included:

- The DB starts selling itself the first day it walks into the first regular business meeting. It is the beginning of the parties' perception of the DB.
- When the DB opinion is written it must be a marriage of engineering analysis, adherence to the contract and effective writing.
- It is vital to explain the non-prevailing party's position effectively and completely.
- You are not writing as a judge; you are trying to persuade the parties of the correctness of your recommendation and that it would not be overturned at the next level.

One delegate suggested the concept of debriefing the parties after the recommendation has been issued and been accepted or rejected.

The last topic of the session arose out of a growing tendency of owners to put increasingly restrictive and legalistic conditions in the contract as it relates to DB procedures. This is a consequence of some owners acting out of fear and/or insecurity and unable to abide the creation of a level playing field. The question was "What to do about it?"

One approach was to facilitate discussions with the owner at the DB meetings to emphasize what terms have made the DRB a successful process and how onerous terms could damage the effectiveness of the process.

A more effective approach may be to engage the DRBF to engage in discussions with such owners. (i.e. a DRBF lobbying effort)

The reaction of the attendees to the peer review workshop seemed very favorable and those present were asked to submit suggestions for topics for future workshop discussions.

Over 40 people attended the workshop and there were lively and informative discussions and ideas exchanged throughout the session.

My conclusion is that the peer workshop was well received by the delegates; was successful as a continuing education tool for the DRBF members; and some version of it should be a part of every future Annual Meeting, Annual International Conference and regional conferences.

**Hal McKittrick** can be reached by email at [hmcikittr@cox.net](mailto:hmcikittr@cox.net).

**Do you know someone interested in joining the DRBF?**

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

## 2016 Al Mathews Award Recipient: James Perry



James Perry receives the Al Mathews Award from Dick Appuhn, President of the DRBF Executive Board of Directors.

Each year, the DRBF presents the prestigious Al Mathews Award to a DRBF member who have given exemplary service in advancing the use of the Dispute Board concepts and the DRBF. Nominations are solicited from members and the Executive Board of Directors. The award is presented at the Gala Dinner hosted in conjunction with the DRBF Annual Meeting & Conference, held this year at the Mayflower Hotel in Washington, DC.

Congratulations to this year's recipient, **James (Jim) Perry**.

Jim, an experienced civil engineer and lawyer, graduated in Civil Engineering from Colorado State University in 1981 and became a Juris Doctor in 1985 from Case Western Reserve University. Jim was admitted as a member of the Washington DC Bar in 1985. He is a founding member of the PS Consulting group based in Paris, France. He speaks a number of languages and has worked in over 40 countries on six continents, on some of the world's largest high profile projects including Petronas Towers in Kuala Lumpur, Malaysia. Jim is on the FIDIC President's List. Amongst other accolades he is listed by Syntec-Ingénierie in France and is also a member of the ICC French National Committee and the International Bar Association. He has the unique background of both law and engineering, and has established himself as one of the industry's leading professionals

in dispute avoidance and resolution, adjudication and arbitration on a global basis.

Jim is a past president of the DRBF Region 2 Board of Directors and has served on the DRBF's Executive Board of Directors. He chairs the DRBF's Institutional Liaison Committee as well as serving on its Bank Liaison Committee, and has been a DB trainer on a truly global basis. He has shown leadership in the DRBF by strengthening relationships with key partners such as FIDIC and the ICC and has both identified Country Representatives and has advocated strong administrative practices and fiscal prudence for the Foundation. He has tirelessly travelled the world in furthering the ideals and principles of the DRBF and has been a leading light in the promotion of good practices on behalf of both the DRBF and the international construction industry in general.

Jim has substantial experience as a Dispute Board member throughout the world and is globally respected as a true professional in all respects. He has a strong belief in the benefits of Dispute Boards and shares the global aspirations of the DRBF. The DRBF is grateful for his contribution to the continuing development of the DB concept and through this award recognizes his contribution to the DRBF as an organization and the construction industry as a whole.

# Excellence in Dispute Avoidance and Resolution Award

For the first time, the DRBF honored recipients with the “Excellence in Dispute Avoidance and Resolution” award during the Al Mathews Award dinner. “The purpose of the award is to celebrate successes, share best practices, and acknowledge project teams that achieve extraordinary results,” said Eric Kerness, past president of the DRBF Region 1 Board of Directors. “These teams each exemplified true excellence in dispute avoidance and resolution for some impressive construction projects.”

Project teams (contractor, project owner, and any other relevant parties) are recognized in one of three project categories: category 1 – project budget less than \$25 million; category 2 – project budget between \$25 million and \$250 million; and category 3 – project budget over \$250 million. The winners are:

## **Metro Gold Line Foothill Extension Phase 2A**

Metro Gold Line Foothill Extension Construction Authority, Kiewit Infrastructure West Co., Mass Electric Construction Company, and Parsons Transportation Group.

## **Montlake Triangle - University of Washington**

University of Washington, Sellen/Merlino, Joint Venture, Gary Merlino Construction, and KPFF.

## **Fort Lauderdale/Hollywood International Airport Runway 9R-27L Expansion**

Broward County Aviation Department, AECOM, Parsons Transportation Group, Tutor Perini, Odebrecht, and Archer Western.

## **Blue Plains Tunnel**

DC Clean Rivers, Traylor – Skanska – Jay Dee JV, and CH2M.

The award’s selection committee paid close attention to the adherence to DRBF best practices and Canon of Ethics, use of the advisory opinion or informal DRB process and use of the formal dispute hearing process, clarity of communication and issue resolution, subcontractor involvement in the DRB process, detailed explanation of challenges and obstacles encountered and the method to overcome.

The DRBF is excited to celebrate the 2016 award recipients on their outstanding accomplishments.



# DRBF Representative for the United Kingdom: John Papworth



*John Papworth has been DRBF's UK Representative for nearly two years. Many DRBF members know John from his attendance at international and regional conferences over the past 10 years. Some of you have attended the advanced workshops which he has led at those conferences. Below, we learn of John's perspective on Dispute Boards based on his long history in the field and the specific challenges of using Dispute Boards in the UK.*

John Papworth is a firm believer in Dispute Boards (DBs), mainly because they offer what no other method of dispute resolution does: dispute avoidance. With over 50 years' experience, John is convinced that DBs work well in practice and that we have to do our best to continue promoting them worldwide. They are a valuable means of making sure money is not wasted on disputes. Instead, DBs make sure money is spent on projects to improve the lives of people all over the world, and to preserve good relations among the people and organizations involved in these projects.

In the UK, the task is to convince the project and dispute resolution community that DBs can work there, he says. To date, they have been used very little, so there is a challenge. So far, John and some of the DRBF UK members have made some headway in pulling together the main professional groups representing engineers, architects, quantity surveyors and lawyers to work together to promote DBs in the UK. The first result of this initiative is a promotional event in the autumn (fall).

John is a practising DB Chair and Member and has been for 10 years. Before that, he was a party representative in DB proceedings for six years. The projects have been in Europe, Africa and the Middle East, including infrastructure and building projects. Having been a Chartered Arbitrator for several years and a Chartered Quantity Surveyor for more years than he wants to remember, John is able to deal with legal, technical and quantum issues.

He is a sole practitioner, which he says is the best option when serving in the role of 'referee' or 'umpire,' as there is less likelihood of having conflicts of interests. As well as acting as a DB Member, he is an Adjudicator and Mediator and acts in Expert Determination.

In his spare time, when he can find it, John relaxes by running, walking in isolated areas of the countryside and reading. He also admits to playing cricket and tennis from the armchair, "where it is easiest," he says.

*John can be contacted by email at: [johnrobertpapworth@gmail.com](mailto:johnrobertpapworth@gmail.com).*



## Welcome to New DRBF Members

### DRBF CONTRIBUTORS

#### Patron

Camara Chilena de  
la Construcción  
Salini-Impregilo SpA  
Sinohydro Corporation Ltd.

#### Benefactors

AECOM  
Astaldi SpA  
Balfour Beatty  
Beale & Company  
Capital Project Management  
Clark Construction  
Peter Douglass  
Facchina  
Fenwick Elliott LLP  
Fox Rothschild  
Frontier Kemper  
FTI Consulting  
Granite Construction  
Kenny Construction  
Kenrich Group  
Kiewit  
Lane Construction  
Leach Consultancy Ltd.  
Donald Marston  
McDonough Bolyard Peck  
NPG Abogados  
Peckar and Abramson  
Probyn Miers Ltd.  
Property Development  
Systems  
PS Consulting  
Quantum Global Solutions  
Radovic & Asociados  
Rhodes Group  
Schnabel Engineering  
Smith Pachter McWhorter  
Techno Engineering  
Traylor Bros.  
Watt Tieder Hoffar &  
Fitzgerald

Yziquel Alain  
Damtech Services Ltd  
Egkomi, CYPRUS

Joseph Allen  
Omega Consultants LLC  
Estero, FL USA

Tamar Allen  
Bay Area Rapid Transit  
Oakland, CA USA

James Allsopp  
Dept of Foreign Affairs & Trade  
Barton, ACT AUSTRALIA

Fernando Altounian  
ABECOON  
Rio de Janeiro, Brazil

Zach Amare  
Bay Area Rapid Transit  
Oakland, CA USA

Tony Anziano  
Corte Madera, CA USA

Akram Atallah  
FTI Consulting Inc.  
Rio de Janeiro, BRAZIL

Kenneth Baker  
Hill International Consulting  
San Diego, CA USA

Maria Barreto  
Estudio Barreto & Asociados / Abogados  
Buenos Aires, ARGENTINA

Rubén Barreto  
Estudio Barreto & Asociados / Abogados  
Buenos Aires, ARGENTINA

Paul Barry  
Paul Barry Consulting Ltd  
London, UK

Andrea Batarce  
Barros y Errázuriz  
Santiago, CHILE

Angelo Bianchi  
Rome, ITALY

Francisco Blavi  
Santiago, CHILE

Svetlana Borisova  
London, UK

Angela Brady  
City of Seattle SDOT/OW  
Seattle, WA USA

Simon Braithwaite  
FTI Consulting & CIOB  
Garden City, NY USA

James Brennan  
NBBJ  
Lakebay, WA USA

Dennis Brewer  
Brewer Advisory  
Fairlight, NSW AUSTRALIA

Tonillas Bruce  
HDR Engineering  
Denver, CO USA

Jeffrey Busch  
Jeffrey S. Busch PMP  
Lake Oswego, OR USA

Gonzalo Bustos  
Chilean Chamber of Commerce  
Santiago, CHILE

Javier Canas Henriquez  
Sacyr Chile SA  
Santiago, CHILE

Guido Canobra  
Rialto Proyectos Ltda, sodo CCHC  
Santiago, CHILE

Bernard Carr  
VIC AUSTRALIA

Derek Case  
WSDOT  
Olympia, WA USA

Jon Clarke  
Cowell Clarke  
Adelaide, SA AUSTRALIA

Paul Clements  
IMCO General Construction  
Mercer Island, WA USA

Earle Cooper  
Clearwater, FL USA



Tania Dallatomasina  
SICIM SpA  
Busseto, PR ITALY

John Daly  
Frankfurt am Main, GERMANY

Mark Dana  
Bay Area Rapid Transit  
Oakland, CA USA

Gary Davis  
Valley Electric  
Everett, WA USA

Myriam Desnus  
Studio Legale De Berti Jacchia Franchini Forlani  
Milan, ITALY

Brian Dobbins  
WSDOT  
Seattle, WA USA

Jim Duncan  
JRD Consulting  
Seattle, WA USA

Tom Dunscombe  
Bay Area Rapid Transit  
Oakland, CA USA

Bob Dyer  
WSDOT/HQ Construction  
Olympia, WA USA

Mohammad Elmasary  
WSL Engineering Consult  
Riyadh, SAUDI ARABIA

Dave Erickson  
WSDOT  
Olympia, WA USA

Ebrahim Esmaeeli Heris  
Tehran, IRAN

José Eyzaguirre Garcia de la Huerta  
Claro & Cia.  
Santiago, CHILE

Henrique Federici  
Plenus Engineering Solutions  
Rio de Janeiro, BRAZIL

Helio Ferraz  
Rio de Janeiro, Brazil

Natalie Findlay  
Quantum Global Solutions  
Doha, QATAR

Charles Fournier  
Long International  
Bellevue, WA USA

Marty Francois  
University of Washington Medical Center  
Seattle, WA USA

Carolina Gajardo  
Baranda y Cia Abogados  
Santiago, CHILE

Jeret Garcia  
Valley Electric  
Everett, WA USA

Sonia Gomez  
LA County Metro Transit Authority  
Los Angeles, CA USA

Qiang Min Gong  
Sinohydro Corporation  
Quito, ECUADOR

Francisco Gonzalez  
Barros Letelier & Gonzalez  
Santiago, CHILE

Alejandro Gonzalez Bustamante  
Sacyr Chile SA  
Santiago, CHILE

Michael Goode  
Telford Consulting  
Fairfax, VA USA

Rodolfo Guerrero  
Guerrero Olivos  
Santiago, CHILE

Felix Guerrero Toro  
Guerrero Iturra Abogados  
Santiago, CHILE

César Guzmán Barrón Sobrevilla  
Pontificia Universidad Católica del Perú  
Lima, PERU

Sandrine Habra  
Montreal, QC CANADA

## DRBF CONTRIBUTORS

### Sustaining

Romano Allione  
Richard Appuhn  
Barnard Construction  
Beale & Company  
Corman Construction  
The De Moya Group, Inc.  
Diablo Contractors Inc.  
James Donaldson  
Graham Easton  
Robert M. Fitzgerald  
Gcila  
Hatch Mott McDonald  
Don Henderson  
Doug Holen  
Jacobs Associates  
Volker Jurowich  
Frank McDonough P.E.  
Harold McKittrick P.E.  
MC2 Modern Construction  
Gwyn Owen  
Tom Peterson  
Pinsent Masons LLP  
Robert J. Smith  
Paul Taggart  
Barry Tozer



C.J. Handforth  
IMCO General Construction  
Ferndale, WA USA

David Hardiman  
Driver Trett (Australia) Pty Ltd  
Bonogin, QLD AUSTRALIA

Guy Harris  
Meridian, CA USA

Hamid Hosseinzadeh  
Tehran, IRAN

Gregg Hutt  
Trenam Law  
Tampa, FL USA

Melissa Insua  
Santiago, Ica PERU

Chidi Izuwah  
Abuja, FCT NIGERIA

Tony Johnson  
Johnson Construction & Consulting  
Seattle, WA USA

Mauricio Josse da Silva Almeida  
ABECOON  
Rio de Janeiro, Brazil

Yadeta Kajela  
Ministry of Water, Irrigation and Electricity  
Addis Ababa, ETHIOPIA

Oji Kanu  
Bay Area Rapid Transit  
Oakland, CA USA

Ekrem Kaya  
Hill International  
Istanbul, Turkey

Jorge Kettlun  
Bechtel Chile Ltda.  
Santiago, CHILE

Henry Koffman  
University of Southern California  
Los Angeles, CA USA

Macarena Laso  
Morales & Besa Ltda.  
Santiago, CHILE

Richard Lehman  
Lehman Business Services LLC  
Brooksville, FL USA

Leon Lopez Aviles  
LLV Consultores SAC  
Lima, PERU

Edward Luke  
Luke & Associates  
Tlokweng, BOTSWANA

Bwalya Lumbwe  
Incipio Construction Auditing  
Lusaka, ZAMBIA

Warren MacGregor  
Everything Infrastructure Group  
North Sydney, NSW AUSTRALIA

Victor Madeira Filho  
Madeira Valentim & Alem Advogados  
Sao Paulo, SP BRAZIL

Eric McArthur  
UW Capital Planning Development  
Seattle, WA USA

Patrick McCann  
McCann DRB Services Inc.  
Pompano Beach, FL USA

Horacio Mendoza Benavente  
Aylwin Mendoza Luksic & Valencia  
Santiago, CHILE

Elina Mereminskaya  
Bofill Mir & Alvarez Jana Abogados  
Santiago, CHILE

Boyana Milcheva  
Dimitrov, Petrov & Co. Law Firm  
Sofia, BULGARIA

Nicola Monticelli  
SLM-Monticelli Law Firm  
Rome, ITALY

Michael Morris  
Sellen Construction  
Seattle, WA USA

Francisco Muñoz  
Rattagan, Macchiavello, Arocena & Peña  
Robirosa  
Buenos Aires, ARGENTINA



Kristina Nelson  
Kitsap County DPW  
Port Orchard, WA USA

Steve Nichols  
Kitsap County DPW  
Port Orchard, WA USA

Per Nielson  
Uppsala, SWEDEN

Vicki Noetzel  
Bay Area Rapid Transit  
Oakland, CA USA

Cristian Novales  
Novales Abogados/Construlegal  
GUATEMALA

Garry Nunes  
Parsons Brinckerhoff  
New York, NY USA

Shingo Ohno  
Systech International  
Yokohama, Kanagawa JAPAN

Alessandro Olmo  
SICIM SpA  
Busseto, ITALY

Kimberly Ong  
LA County Metro Transit Authority  
Los Angeles, CA USA

Randall Over  
Ohio Dept. of Transportation  
Garfield Heights, OH USA

Dumitru Palada  
Palacons SRL  
Carcea, ROMANIA

Roberto Panetta  
Bocconi University  
Milan, ITALY

Jonathan Parker  
Qugg Golden Ltd  
London, UK

Raymond Pascual  
Bay Area Rapid Transit  
Oakland, CA USA

Alfonso Pelosi  
IRD Engineering  
Rome, ITALY

Gudmundur Petursson  
Landsvirkjun Power  
Reykjavik, Iceland

Carlos Piaggio  
Chilean Chamber of Commerce  
Santiago, CHILE

Massimiliano Piermattei  
Spea Engineering  
Rome, ITALY

Jaime Pino  
Central Frontera  
Santiago, CHILE

Juan Portaro  
JJC  
Lima, PERU

Michael Radbill  
Hill International Inc. & Widener University  
Philadelphia, PA USA

Jose Ramos  
Estudio Barreto & Asociados / Abogados  
Buenos Aires, ARGENTINA

Ric Rattray  
Bay Area Rapid Transit  
Oakland, CA USA

Andrew Rhodes  
The Rhodes Group  
Pittsburgh, PA USA

Brian Rich  
Richaven PLLC  
Seattle, WA USA

David Robinson  
East Melbourne, AUSTRALIA

Mario Rognoni  
Bonatti SpA  
Parma, ITALY

Jose Ramiro Salazar  
Bay Area Rapid Transit  
Oakland, CA USA



Fernando Samaniego  
Prieto y Cia.  
Santiago, CHILE

Kevin Sanderson  
Bay Area Rapid Transit  
Oakland, CA USA

Bill Schubert  
Universidad de Chile / Heidelberg University  
Naperville, IL USA

Kenon Shattuck  
St. Cloud, FL USA

Helen Shawcroft  
Seattle, WA USA

Shahin Shiralian  
Bay Area Rapid Transit

Oakland, CA USA  
Luca Sommariva  
Gattai, Minoli, Agostinelli & Partners Studio Legale  
Milan, ITALY

Eng(Maj Gen)SAG Sooriyaarachchi  
Columbo, SRI LANKA

Valentin Stoica  
Techno Engineering & Associates  
Bucharest, ROMANIA

Neal Sweeney  
Jones Walker LLP  
Atlanta, GA USA

Denys Tak  
WSDOT  
Olympia, WA USA

Scott Thomas  
Port of Seattle  
Seattle, WA USA

Leroy Trimbath  
The Rhodes Group  
Pittsburgh, PA USA

Luis Ulloa  
Energia Llaima  
Santiago, CHILE

Claudio Undurraga  
Prieto y Cia.  
Santiago, CHILE

Nicola Valiante  
Salini-Impregilo SpA  
Milano, ITALY

Scott VanDusra  
Bay Area Rapid Transit  
Oakland, CA USA

Mehmet Sina Velioglu  
Ankara, TURKEY

Catalina Vial  
University of Melbourne  
Melbourne, AUSTRALIA

Eugenio Voticky  
Poch  
Santiago, CHILE

William Waddell  
Bonifay, FL USA

William Waddingham  
Perth, AUSTRALIA

Carl Webber  
Webber Law Offices PC  
Champaign, IL USA

Michael Wellman  
Rapid City, SD USA

Dick Wieczdorf  
Bay Area Rapid Transit  
Oakland, CA USA

Christopher Wright  
Twickenham, Middlesex UK

Sebastian Yanine  
Bofill Escobar Abogados  
Santiago, CHILE

Thomas Young  
Fenwick Elliott LLP  
London, UK

Janice Zahn  
Port of Seattle  
SeaTac, WA USA

Valeria Zayat  
Buenos Aires, ARGENTINA

Claudia Zuccarella  
Salini-Impregilo  
Santiago, CHILE

## DRBF Membership Committee Launches Users Forum in US and Canada

The DRBF has formed Membership Committees in each region, with a focus on promoting and advancing the Foundation's programs and practices together with its membership benefits to its constituents. The Region 1 (US and Canada) committee includes individuals representing contractors, owners, practitioners, and DRBF staff. The committee has outlined a list of membership benefits and is distributing this information to the industry. A number of these benefits are specific to contractors and owners as "users" of the DRBF's programs and the DRB process.

One of these benefits includes the establishment of a "Users Forum" whereby the DRBF facilitates conversations with contractors and owners discussing their perspectives on a variety of issues, including the DRBF Manual. This forum is available to solicit feedback and input from these user groups as the DRBF continues to update its Manual, website, and training programs.

In May 2016, Kurt Dettman and Eric Kerness facilitated a "Transit Owners" tele-conference that included representatives from New York Metropolitan Transportation Association, Los Angeles County Metropolitan Transportation Association) San Diego Association of Governments, San Bay Area Rapid Transit and Sound Transit. In June, a "Transportation Owners" teleconference included department of transportation representatives from California, Colorado, Ohio, and Nevada.

Both events followed the same general agenda. The participants are encouraged to express their viewpoints regarding their experience with the DRBF's programs and the DRB process. It is recognized that a number of the participants are actively engaged in the implementation of a variety of alternative project delivery methods including Design-Build, general contractor/construction manager [GC/CM] (equivalent to CM-at-risk), and public-private partnerships (P3).

Based on these initial conversations, there are several common observations that generate the following comments.

- There is a need for the DRBF to continue to train Board members and users (especially with expansion in the use of alternative project delivery methods).
- There is a need for more newly-trained DRBF members to serve on Boards.
- The DRB members should clearly understand from both parties how the contract provisions regarding partnering and the DRB process work together especially related to change and claims management.
- There is a need for users to better understand and participate in the dispute avoidance process with DRB members (not just dispute review and resolution).
- If there is a dispute to review, then the DRB's recommendation (per the contract) must be constrained to the question(s) submitted by the parties.
- The DRB members must always strive for timeliness in rendering their recommendations.
- If there are disputes contained in a contractor's cumulative impact claim, the DRB members must clearly communicate with the parties to understand how the process will be implemented.

Going forward, this committee will continue to facilitate further conversations with these owners. The goal is to expand owner participation and pursue opportunities to facilitate teleconferences with owners from different industries.

Concurrent with working with owners, committee members are also planning similar teleconferences with contractors, and a joint discussion between owners and contractors in the near future.

*Region 1 Board and Membership committee member **Joe Gildner** can be reached at [joseph.gildner@soundtransit.org](mailto:joseph.gildner@soundtransit.org).*





## DRBF Forum

Dispute Resolution Board Foundation  
3440 Toringdon Way, Suite 205  
Charlotte, NC 29277 USA

## DRBF 17th Annual Meeting & Conference

May 24-26, 2017

The Westin Palace Hotel Madrid, Spain

Join us as we “Grab the Bull by the Horns!”  
How to Face, Avoid, and Solve Project Disputes Early

The DRBF 17th 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 2017, the conference will be hosted for the first time in Spain.

Enjoy interactive workshops and conference sessions focused on best practices shared by top international practitioners. Topics will include Dispute Avoidance, the Role of DBs on PPP Projects, Legislative Developments and more.

- May 24 **Dispute Board Workshops** - Choose from three options, the Administration & Practice workshop, an advanced level workshop for experienced users and practitioners, and a new workshop on how to use DBs for Public Private Partnership projects. Earn continuing education credits!
- May 25 & 26 **Annual Conference** - Presentations and panel discussions on the latest developments in Dispute Board application.
- May 24 **Welcome Reception** and May 25 **Gala Dinner** - Enjoy socializing with conference delegates, speakers and guests.

Hotel Registration Website Open ~ Event Registration Opening Soon  
Visit [www.drbf.org](http://www.drbf.org) for Details