The Dispute Resolution Board Foundation
DRBF
Fostering Common Sense Dispute Resolution Worldwide

DRBF Forum

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Dispute Boards: Is the Current Australian Model Appropriate?

By Barry Tozer, Consulting Engineer, DRB Member and Chartered Arbitrator

INTRODUCTION

To date, there have been some ninety odd infrastructure contracts in New South Wales and Queensland since 1987 where a Dispute Board [DB] has been the primary dispute avoidance and resolution mechanism. On those contracts, the parties and their advisers agreed that a DB is a more proactive way of dealing with issues between the parties when they arise and managing them before they become disputes. And, if the issues become disputes, the DB is available to resolve them in a timely and efficient manner. A DB provides independent specialist services to the parties, identifying issues of concern, promoting discussions between the parties and providing advisory opinions during the course of regular site visits, meetings and joint consultations. These measures enable most issues that arise to be resolved without recourse to the dispute resolution provisions.

For DB dispute avoidance procedures to be effective, there should be flexibility in the conduct of site meetings and joint consultations. The procedures should allow the DB to take the initiative in implementing measures and suggesting options for dealing with any issues as these arise.

THE AVAILABLE 'MODELS'

There are differences in the manner in which the operations of DBs are documented and implemented around the world. Two distinct 'models' have developed and in more recent time, there have been further variants of these models. I will also mention two of the variants currently being promoted by dispute resolution training and appointment bodies for implementation by users worldwide. The terminology may differ in the alternatives but can conveniently be described by reference to the two DB 'models'. These are the Dispute Review Board (DRB) and the Dispute Adjudication Board (DAB).

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President's Page

Dick Appuhn
President
DRBF Executive Board of Directors

Dear Members, Supporters and Friends of the DRBF,

We are fast approaching the 17th Annual International Conference in Madrid on 25 and 26 May where I look forward to meeting all of you. The DRBF is moving forward with creating and developing liaisons with other international professional organizations. Many will be represented at this conference where you will be able to meet and share experiences with representatives of their membership base.

Training has developed into a primary focus for 2017, with new workshops being offered in Latin America, the Caribbean, Africa, Southeast Asia, Australia and the US. DRBF members have been instrumental in helping identify these opportunities and coordinate partnerships in their areas, and our training committees have provided many volunteer hours developing standardized training materials to ensure the DRBF delivers high quality, consistent content on best practices applicable worldwide, while also addressing local context when needed. Apart from the usual introductory event in Madrid, we shall offer an advanced interactive peer group one day workshop to explore and share common problem area issues we all encounter in our DB lives, as well as a new course on the use of DBs for PPP projects.

In addition to the annual US and international conferences, we continue with new regional conferences in Indonesia, Canada, and Mexico. Outreach efforts remain active, with DRBF members representing the Foundation at industry conferences. Presentations are also being made at owner organizations through seminars and meetings being conducted on every continent. Our outreach efforts are enhanced when there are solid facts to share with potential users of the Dispute Board process and to that end, we encourage all members to submit statistical data for inclusion in the DRBF Project Database. That database now contains information on more than 2,800 projects worldwide. We are striving to update that information through direct contacts with the Parties in order to improve its quality and usefulness. Please visit the database at http://drb.org/database_intro.htm.

Finally, I am pleased to report that the membership base is on track to increase during 2017 through diligent work being carried out by regional and inter-regional membership committees.

See you in Madrid.

Warmest regards,

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

A conversation with...

Volker Jurowich

Volker Jurowich
Past President of the DRBF Executive Board of Directors and Al Mathews Award recipient in 2013

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

A I remember very well when I got my first DB member appointment, which was in 2005 on a port project in South Africa. It is more difficult to answer your question as to how did I get it. There is some guessing in my answer. As can be seen from my CV, I have been working with a major international contractor for 35 years until middle of 2003. During that time I had already dealt with Dispute Boards, albeit as a contractor representative. After my retirement it was Gordon Jaynes who convinced me that I was still too young to only play Golf (which I don't do anyway) for the rest of my life, and incited my interest in working as a Dispute Resolver. I will always remain grateful to him to have opened my eyes to this important and satisfying task. I have then, in order to add some academic qualification to my practical experience, set down as a student again and acquired an online diploma in international commercial arbitration and started to participate in DRBF trainings as well as FIDIC trainings and conferences. The news seemed to have spread and I was one day contacted by one of the parties which than led to nomination and appointment by the parties. I was then further fortunate to be member in a DB with Peter Chapman as chair and was therefore well introduced into the operation and functioning of a DB. I also like to mention my second appointment here, which was for a Hotel project in Sudan. This, I believe, was a result of my presence at the 2007 Bucharest conference of the DRBF, where I came into contact with one of the parties of that project for the first time. I therefore would like to recommend to all who seek to become DB member to visit the DRBF conferences. There are always also users on the look-out for potential candidates.

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

A It is difficult to identify one particular situation as extremely difficult; fortunately up to now all went well in the end. However, I like to mention that DBs on contracts, which are financed by developing banks, which oblige their borrowers to install DBs in their construction contracts, in my experience quite often face some initial problems. The borrowers often are not convinced that they need a DB or that is also to their advantage. They simply consider it something which has been forced upon them, which they could do without. It takes therefore time to get their trust and their appreciation of the advantages of having a DB. Sometimes, when presenting their case in a dispute, they have relied on input from international contract advisors. When the DB then comes to a different opinion in its decision, an initial reaction sometimes is that that such decision must be based on bias of the DB. To overcome that is then a difficult, yet in no way impossible task.

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

A Again, to identify a particular DB is difficult. It is most satisfying when with the assistance of the DB through dispute avoidance or recommendations or decisions all disputes come to an end and no further proceeding have been invoked. And further, if the parties as a result will install DBs on their future projects.

Q **Should the DRBF recommend (max. and min.) age limits for DB members?**

A I do not believe that to be a good idea. It is not so much the age that counts, but the experience (regarding the minimum) and health and agility (regarding the maximum). These two criteria vary substantially in individuals. I believe it is more important that the DRBF makes it clear to potential users that the selection of DB members is most important. If a potential DB member is not known by the parties, I recommend, that besides study of the CV's the parties have a face to face interview. That helps in judging a person. Have a look around in the DRBF and its members that are active DB members. Who would you, or could you exclude by age limits?

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

A Again this is a difficult question to clearly answer. The reason is that there is not a similar pattern for all dispute board procedures. Some have regular site visits, some not. Some are only ad hoc dispute boards, only getting busy when there is a dispute. It depends therefore on the number of days a DB member will have to reserve for one particular contract. If that is e.g. three days per month, then six or seven DB's should be the limit.

I cannot speak for the US situation, which has different features from the international DBs. Internationally it may take already two or three days to arrive at the project location. Disputes can be very substantial. Hearings may be required preferably at the project location.

Also one has to consider if serving as DB member is one's exclusive activity. Requests by the DB to the parties for extension of the time limits to give a decision should only be based on the complexity of the dispute and not on non-availability of a member.

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

A I am fortunate, I have no specific regrets. As a general comment I regret that sometimes I have not been able to convince parties to use the DB more and better, in particular for dispute avoidance. Quite often issues come up already as a formal dispute that could have been easily settled by simple advice.

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

A *I* believe that the DRBF and all of those who are interested and fostering the procedure, need to work on convincing users to actually install their DB at the outset of their contracts. In many cases, even in contracts with a standing DB, the DB is actually only installed after years, when disputes have become too big. As a result of this, the DB will only deal with formal disputes until the end of the contracts. The dispute avoidance function or the advisory function of a DB, although foreseen in the contract, has practically become impossible.

I have recommended therefore to FIDIC to include a provision in its standard forms of contract providing that "time for completion" only starts when the DB is formally installed. This obviously requires that there is an "appointing authority "that is authorized to do the installation in case a party should be delaying it beyond a limited period of time.

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

A I have no special program, although I have a little fitness room in my house which I try to use regularly. We have a big garden, in which I can also build up some energy by helping Helene to do some hard job.

Otherwise I still like to travel around the world, see new places, although I have been travelling a lot through-out my work life until today.

I am getting more and more interested in reading and learning about international politics. Unfortunately one finds a lot of disappointment there.

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

A I feel quite well at home, which is Stuttgart in Germany. I have asked that question myself many times. There were places where as a first reaction I thought that's a place to live, but on second thoughts that first feeling faded away. So the only places which I would really consider, if at all, would be Austria or Switzerland. Both are very beautiful countries. I like to be in the mountains and also family and friends would not be far away.

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

A I think it is important for younger DRBF members that they consider their development as board members a medium term perspective and not a short term perspective. Do not base your future solely on possible dispute board appointments, try to ensure that the decision makers, these are the persons who decide on appointments, are not only aware of your interest, but more importantly, of your qualifications as DB member. Developer extend such qualifications through training.

Volker Jurowich *can be reached at vjurowich@t-online.de*

Letter to the Editor

To the Editor:

I have become aware of criticism of the DRBF Forum for publishing in its November 2016 issue (Volume 20 Issue 2) *To Admit or Not to Admit, Revisited*, an article authored by Kurt Dettman advocating the non-admissibility of DRB recommendations as being contrary to the DRBF's "Best Practices". I was heartened to see Dick Fullerton's article *An Argument for Contract Admissibility* and Bill Baker's Letter to the Editor *Admissibility: A Contrary View*, both published in the February 2017 Forum issue (Volume 21 Issue 1).

My personal views on the Admissibility issue aside, I strongly disagree with the criticism of the Forum or the author for presenting his views, even if considered controversial. I believe that one of the DRBF's great strengths, and particularly that of the Forum, is its welcoming and encouragement of free and open discussion of all viewpoints on DRB practices. This only enhances the DRBF's credibility and reinforces its sustainability.

If on the other hand, the DRBF becomes perceived as a special interest group, advocating single points of view, and intolerant of non-conforming views, the DRBF risks being given short shrift and disregarded. Parochial reaction should be avoided, lest the DRBF's hard earned and well deserved stature be diminished.

The DRBF Forum is lauded for its objectivity, restraint and sensitivity.

Respectfully,

Bob Rubin, P.E., Esq.
DRBF Past President

Forum Newsletter Editorial Deadline

Our readers love to hear Dispute Board success stories and challenges, and the latest industry news and events. If you have new information about Dispute Boards, DRBF members, or an article to share, please let us know! Contact Forum Editor Ann McGough at amcgough@drb.org

Deadline for the next issue: **June 15, 2017**

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Ethics in Today's World of DRBs

Midway through Contractor's Evidence At a Formal Hearing an Admission by Contractor of False Testimony

Jim Phillips Ph.D.
Chair
DRBF Ethics
Committee

The issue raised at the conclusion of my last column in the Forum asks the question: Assume you are a member of a Board listening to the parties' presentations in a Formal Hearing. Toward the end of the contractor's case, the contractor's ranking officer in attendance, requests a recess, and the request is granted. As the Board members are leaving the room, this individual approaches the Board and quietly informs them that he knows for certain that most of the presentation just offered is false and full of fabrications. Our question for discussion is: what action should the Board take at this point?

Surprisingly enough, the DRBF Code of Ethics does not specifically address the question raised. The Code, in Canon 4, does recite that "Board members shall conduct meetings and hearings in an expeditious, diligent, orderly and impartial manner." This language does not, however, address false, misleading, or fabricated statements made at a formal hearing. However, in the situation raised for discussion, this type of conduct cuts at the heart and the spirit of the DRB concept. According to the DRBF Handbook, the DRB process "….emphasizes the maintenance of project relationships, furthers the goal of partnering ……and provides a timely and equitable manner for resolving any resultant Disputes."

I would argue that if this type of conduct occurs during the formal hearing process, the relationships between the parties have deteriorated to that of mistrust, suspicion and doubt, and that an effective DRB process is virtually impossible. Even if the Board's recommendation has been agreed by the parties to be admissible at later proceedings, the work of the Board has been hijacked. Whatever the recommendation, if it's based on false documents, statements, and predicates, it will have no meaning and no bearing to future consideration in other forums of disputes between the parties.

Canon 5 of the Code of Ethics provides that recommendations be based on the provisions of the contract and the "facts of the dispute'. Facts are generally based on testimony or statements that have survived cross examination and introduced according to a set of governing rules. Of course in a DRB formal hearing, there are no rules of evidence and no cross examinations. My point is that facts are based on believable and reliable statements that the decision makers tend to believe. In our case under discussion, the false statements cannot be relied upon during the Board's discussions and deliberations, and in its recommendations regarding the disputes before it.

If I was a Board member in the case in question, I would ask the contractor's officer why he sat through the presentation and/or allowed it to continue. Since it is not within the purview of the Board to decide who the parties choose to make presentations during formal hearings, there is virtually no step the Board might have taken to prevent this incident. I would also think it is appropriate for the

Board to adjourn the hearing and have a caucus to determine next steps. The Board may consider advising the owner of the Project what occurred, with the contractor present, and asking the owner if it chooses to proceed with this hearing, or with the DRB process on this Project.

Whatever the outcome, it is clear that the necessary trust and respect between the parties necessary for a DRB process has been compromised. Unless assurances can be made by the contractor that this is a onetime event by a "loose cannon," and the owner very much wishes to continue having a Board on the Project, it may be difficult for this Board to continue operations and achieve any positive progress toward helping the parties resolve the disputes between them.

Generally, the Board evaluates the believability of any presentation and of any witness, and if it feels the presentation is not believable, the Board can choose to ignore what is said, or give it the weight it believes the information deserves. On Boards on which I have participated, there have been many times where the members have agreed that what is being presented deserves little weight, either because of what is presented or the manner in which the person makes the presentation. In this case, the Board could decide to totally ignore/discount the presentation that the contractor informs them is false, and listen to any further presentations put on by the contractor. However, as I indicated above, the trust between the parties that is necessary for the DRB process to succeed may not be able to be repaired.

I would like to hear from readers if you have any thoughts on this very important issue. It comes up from time to time during formal hearings with respect to the believability of a party's presentations.

ETHICS: FOR NEXT TIME

Assume you have recently been seated as the Chair of a DRB on a complex construction project. Assume also that the Notice to Proceed was issued more than 24 months ago, and the project has fallen significantly behind schedule due to the fact that contractor has not put enough personnel on the project to sufficiently prosecute the work. The reason the parties did not seat the DRB earlier is because there was no interest by the contractor in doing so, and it refused to nominate a representative, despite the owner's insistence that they do so. It was only when it had fallen significantly behind schedule did it decide to agree to setting up a Board.

At the first DRB meeting, the contractor states that they do not wish to participate in the DRB process due to the costs associated, the fact that the owner now was biased against them, and they would not receive a fair consideration of their positions. The contractor's project manager further states that the owner will not cooperate with any efforts undertaken by him to resolve the Project's disputes, which are numerous.

What should the Dispute Board do?

Ethics Commentary or Question?

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(continued from page 1)

The Dispute Review Board (DRB) process as originally conceived provides a flexible and informal approach to the management and handling of issues and for this flexibility to continue even when it becomes necessary for a party to make a formal 'referral' of a dispute to the DRB. This flexibility is reflected in the 'determination' process which provides for a 'recommendation' to the parties for their consideration and agreement.

The other model, the Dispute Adjudication Board (DAB), has been incorporated into the FIDIC (Federation Internationale Des Ingenieurs-Conseils) suite of contract conditions. FIDIC Contracts are used by the Multilateral Development Banks and the international aid agencies on the procurement of infrastructure projects throughout the developing world. Whilst intended to be flexible and requiring the DAB to promote dispute avoidance to the maximum extent possible, FIDIC contracts take a more determinative or adjudicative approach to the final stage of the DB process. In this model, the DAB makes a 'decision' on the dispute which is binding on the parties and unless one of the parties issues a 'notice of dissatisfaction', the decision is to be implemented by the parties in the absence of an amicable settlement.

The Dispute Board Rules of the Chartered Institute of Arbitrators ('CIArb Rules') is a recent addition to the available DB documents that may be included in contracts as a dispute avoidance and resolution procedure. The CIArb Rules include provisions for the use of either model by selection of the relevant clauses (Article 3 or Article 4). However, the parties must decide at the outset which of the two DB models is to be used in the contract between them. The CIArb Rules make the distinctions clear in the guidance notes but do not provide any assistance to parties on which may be the more appropriate alternative.

The other variant worthy of mention is the International Chamber of Commerce Dispute Board Rules ('ICC Rules'). The ICC Rules, in addition to providing both DRB and DAB options to users, allow the parties to defer making an election between the 'recommendation' and 'decision' alternatives until there is a 'referral' to the DB. The ICC Rules include this option by having a Combined Dispute Board ('CDB') (Article 6) in addition to the usual DRB or DAB rules. The CDB has authority following a referral to make a 'determination' in the form of either a 'Recommendation' or a 'Decision' depending on the submissions of the referring party and the circumstances.

Interestingly, notwithstanding that the parties may elect to request a 'recommendation' from the CDB, under the ICC Rules, that recommendation may become 'final and binding' on the parties after a period of time in the absence of the issue of a 'notice of dissatisfaction' by one of the parties or an 'amicable settlement' of the dispute. On the other hand, where the parties opt for a DRB at commencement of the contract, the CIArb Rules do not make provision for the 'recommendation' to become binding on the parties with lapse of time or absence of objection, although the parties may 'voluntarily' comply with a DRB's recommendation.

In summary, although there are the two distinct models, either of which may be included in a contract for the final phase of dispute resolution by a DB, it is ultimately the choice of the parties whether they accept the 'decision' or the 'recommendation' of the DB. Both processes provide for rejection of the 'determination' and continuation of the dispute in another forum such as arbitration or litigation.

Both models include provision for 'amicable settlement of the dispute' following the DB process of choice. There is obviously some sense in this approach. For example, the parties may not agree wholeheartedly with a determination of the DB but may accept and adopt a recommendation or decision in part and then negotiate other terms to achieve final resolution.

The DRBF provides for a further iteration of the DRB process if new evidence is presented by a party which might lead to a need for reconsideration. There is also provision

for clarification of a recommendation if the intent of a 'recommendation' is unclear to the parties. Thus, the dialogue with the DRB may continue after the recommendation is made. Opportunities for discussion between the parties with a view to settlement of the dispute should continue to be available until one party elects to proceed to arbitration (or litigation).

THE CURRENT AUSTRALIAN MODEL

The Australian model as it is currently operating in New South Wales comprises a comprehensive dispute avoidance scheme and a dispute resolution process which provides for a 'decision' in a manner similar to the FIDIC DAB Rules. The emphasis on dispute avoidance is highlighted by the name adopted for the acronym DAB, it is a Dispute Avoidance Board. The DAB agreements vary slightly in detail from client to client but generally provide for similar arrangements to the models identified above, for selection of the DAB members and the role which the DAB members are expected to play during the execution of work under the contract. Dispute avoidance measures in the Australian model are more extensive than in the DRBF or FIDIC rules described above. This model is arguably world best practice in dispute avoidance procedures.

DISPUTE AVOIDANCE ROLE

The general operating procedures for the DAB place considerable emphasis on the dispute avoidance role which the DAB is intended to provide under the contract. First and foremost, the DAB is required to provide advice on dispute avoidance. To facilitate this process, the DAB members must be well informed on the progress of the Contract and be alert at all times to any differences which may arise between the parties. An essential element of the procedures is the regular site visits and joint meetings of the DAB with the parties and the 'frank and confidential' nature of these meetings with the DAB. These interchanges are intended to identify and place any current issues or potential issues on the table for discussion.

Apart from the provision of project documents at regular intervals, communications between the parties and the DAB members is confined to these meetings and visits when both parties and all DAB members are present. Otherwise, any communications with the Board are confined to the Chair of the DAB only. To ensure that the DAB has the attention of senior representatives of the parties throughout the contract, the procedures requires the off-site manager to whom the most senior on-site project representative reports, to attend the regular DAB Meetings.

If the parties wish to get a preliminary view of the DAB on an issue where the parties have differing views, there is provision for the DAB to provide an informal advisory opinion following a joint request.

I mention these normal operating procedures to illustrate the environment in which the DAB operates. There is wide-ranging informal discussion with the parties in these joint sessions. There may be some social interaction associated with the site visits but it is always with representatives of both parties in attendance. Whilst the DAB members are treated with respect for their experience, they are also highly regarded for their independence and impartiality when requested to become involved in specific issues.

DISPUTE RESOLUTION

However, the decision-making role of the DAB is the main focus of this article. Decision making by the DAB is not intended to be arbitration or expert determination in the sense that the legal profession understands these alternative dispute resolution processes. However, several features of the 'Appendix B' procedures most widely used in Australia at the present time have some of those characteristics (See Annexure 1). I compare this current Australian model with the other models below.

REFERRAL OF A DISPUTE

The DB decision making process is initiated in a similar manner in all forms of the process. An issue in dispute between the parties is referred by one party to the DB for a 'determination'. This 'determination' may be in the form of a 'decision' or a 'recommendation' depending on the model in the particular contract. The 'referral' process is

common to both models. Referral of a dispute may require certain pre-requisites to be met by the initiating party under the respective contract and alleged non-compliance with one or more of the pre-requisites may become an issue for determination in the DB process.

THE INITIAL STEPS IN THE DECISION-MAKING PROCESS

Under the current Australian model, the process is to obtain a 'decision' from the DAB. The initial steps in the written procedure do not provide for involvement of the DAB in the written submissions and documentation process undertaken by the parties at the commencement of this process. Both parties must provide all of their evidence in writing in advance of any action on the part of the DAB. The clauses provide for initial submissions by the party requesting a 'decision' complete with all materials within 7 days of the 'referral' followed by a response from the other party including all materials, within a further 14 days.

If this situation is not addressed, the party initiating the referral has time to prepare prior to 'hitting the start button' and the 14 days for the response is rarely adequate to provide 'all materials' and there is often a request for additional time to provide this response. Unfortunately, that may not be the end of submissions because the response is often accompanied by new arguments and new material to which the initiating party requests an opportunity to reply. This may prompt a further request by the other party to respond to this second tranche of material. The process may become protracted and unmanageable. It may also not produce a 'decision' which addresses the key issues in contention because of the numerous peripheral arguments that are raised. The time for the DAB decision making process may also be prolonged due to these peripheral matters.

By contrast, the DRBF recommends only that 'concise written position statements … be prepared by both parties, with page number references to any supporting documentation" prior to the hearing of the dispute. The parties are required to prepare a common bundle of documents which shall be "a single and complete compilation of supporting documentation with pages consecutively numbered for ease of reference" and furthermore, "the parties shall cooperate in compiling and submitting this documentation". The initiating party is required to provide its 'position statement' first but there is no fixed time frame for either position statement.

This process discourages parties from unilaterally preparing long submissions responding to every single point. The DRBF encourages cooperation without the need for the DRB to act. Often, as a result of that cooperation, there is some consolidation or reduction of the issues finally brought to the DRB for consideration and 'determination'.

The FIDIC DAB Rules do not require an adversarial confrontation between the parties either. The FIDIC DAB process allows written documentation to be provided to the DAB as late as the date of the hearing where appropriate. There is no requirement for written material from each party to be provided consecutively and indeed concurrent submissions may well be appropriate.

With the Australian model, if the DAB does not intervene immediately the referral is initiated, a typical expert determination procedure is likely to unfold. In my view, the DAB should be proactive and meet with the parties immediately there is a referral by one of the parties. The issue which has been referred to the DAB should be discussed with the parties. It may not be the right question or it may be a question which cannot readily be answered. It is important that each issue is properly articulated, discussed and agreed before the DAB is required to participate in a hearing and provide a decision on the issues. The process as presently documented in the Australian model requires some procedural changes to allow this intervention.

I note that by the time that a matter gets to the 'Notice of Dispute' stage, the arguments and issues have often been addressed by both parties over a period of time and the main differences between them articulated in correspondence and rebutted more than once. It should be possible to prepare a position paper stating the major points of contention for

discussion within a short time frame (as parties often do in preparation for a mediation).

HEARING OF THE DISPUTE

The Australian Model makes no express provision for a 'hearing' of the dispute. The 'Appendix B' procedure allows for a 'conference' if either party makes a request in writing. The Chairman of the DAB may convene a conference, if the DAB considers it appropriate. In either case, the agenda for the 'conference' is provided 5 days before the conference and is limited to matters that a party (or the DAB) considers should be included. An important matter raised during such a conference may be precluded from discussion if it was 'not on the agenda'. Clearly, the present model does nothing to encourage the parties to meet with the DAB to formulate the questions to be determined.

By contrast, the 'hearing' is the primary means of informing the DRB of the details of the dispute. As soon as the matter is referred to the DRB, a hearing date is planned either as part of the regular meeting schedule or as a separate meeting to address the dispute. The parties make their presentations serially and alternately. The DRB ask questions, requests clarification and may require additional data. Further successive rebuttals takes place until both parties are satisfied that all aspects of the dispute have been fully covered. The parties are entitled to present all their evidence, documentation and witnesses. Additional meetings may be necessary in difficult or complex cases to facilitate full consideration and understanding of the evidence presented by both parties.

Similarly, in the FIDIC DAB process, although the rules state that a 'hearing' may take place, the emphasis in all other respects is on a 'hearing' of the dispute by the DAB members. The FIDIC DAB 'hearing' procedure is also flexible. There is no express restriction on the subject matter presented at the hearing although it may be constrained by the 'position statement' presented by the initiating party and the response to that statement. The procedure is influenced by the 'civil law' tradition where the DAB conduct the hearing using an inquisitorial procedure rather than the 'adversarial' procedure adopted in a DRB 'hearing'. In my experience, most senior FIDIC DAB members are persons with international arbitration (three person tribunal) experience or training.

Mediations involve a hearing at which parties commence (at least outwardly) with completely opposing views on a dispute. However, after both parties have presented their cases, there is often a realisation by one or both of them that the case as originally presented has flaws and is not as certain as it may have appeared without that full understanding of the opposing view. There is no reason why the parties cannot adjourn a hearing and quietly discuss the issue with a view to an amicable settlement. In my view, the prospects of this occurring whilst the DAB is quietly reading, considering and deciding on the merits of written submissions is far more remote.

The potential for interaction with both parties, the immediacy of responses from the other party and the opportunity to pass through several iterations or exchanges of view in a short time at a 'hearing' provides a completely different dynamic from the many pages of detailed facts and reasoned legal arguments submitted by the parties in writing in an expert determination. In my view, the DAB becomes much better informed on the details of the dispute by conducting a 'meeting' in which the parties are directly involved. A 'meeting' with the parties enables the DAB to obtain information first hand which will assist it to understand the arguments both for and against the position which each party advocates. This may not be the case with written submissions, often prepared by persons not previously involved with the project.

In my view, it is far more likely that the DAB will uncover the relevant facts during presentations and questioning of the parties' representatives in a hearing. In most disputes, the legal issues to be determined will depend on the facts as found by the DAB. The legal issues are often relatively straightforward although the parties may well have a different interpretation of the contract provisions or the risk allocation.

In summary, as presently documented, the Australian model may not work well unless the DAB seizes the initiative and drive the process immediately the 'notice of dispute' is issued. Dispute avoidance processes must to be encouraged in the dispute resolution phase as often a matter may be resolved by further discussion and negotiation without a formal 'decision'.

RECOMMENDATION V DECISION

The current Australian model provides for a 'decision' by the DAB. What are the advantages and disadvantages of a providing a 'decision' when compared with a 'recommendation' to the parties? Superficially, there may ultimately be no difference in the outcome. However, the manner in which the parties deal with the two options may be completely different.

A 'recommendation' is a firm proposal to the parties by the DRB on the manner in which it may resolve the dispute. It is not necessarily the complete or totally correct solution but one which three experienced minds have addressed after being provided with all the relevant factual information, expert opinions and legal precedents. It should inform the 'decision' of the parties. It is up to the parties to consider and either accept or reject it.

On the other hand, a 'decision' is a direction from the DAB to the parties on how the dispute is to be resolved by the parties. It may have been prepared by three experienced minds but it may not be accepted. It is imposed by the terms of the contract unless rejected by a 'notice of dissatisfaction' issued by one of the parties.

There is the possibility that, if the DAB has been proactive in the conduct of the process and undertaken steps not included in the procedure in arriving at its 'decision', one of the parties who is dissatisfied with the result, may seek to have the 'decision' overturned by the Court because the DAB did not undertake the process in accordance with the current documented procedure. To be valid, an expert determination process must be conducted in accordance with the terms specified in the agreement between the experts and the parties.

RELATIONSHIP WITH THE PARTIES

If the DRB makes a 'recommendation', there is no threat to party autonomy or compulsion to act which may prompt a defensive reaction. The relationship between the parties and the DB is maintained because the actions of the DRB are persuasive only and binding only if accepted by both parties. It is an 'opt-in' situation.

Where the DAB provides a 'decision', a party is required to 'opt out' of the binding decision. The future relationship between the 'losing party' and the DAB may be affected where that party loses confidence in the ability of the DAB to 'get it right'. A party may get the perception (almost certainly wrongly) that the DAB is biased and that it may not get a 'fair' decision on any further issue or dispute which it may wish to have discussed or even decided by the DAB under the dispute resolution provisions of the contract.

In my view, the effectiveness of the DAB as a dispute avoidance panel in the ongoing relationship with the parties may be severely constrained by an adverse reaction to a decision by one of the parties. Unlike the persons providing the decision in an expert determination or an arbitration or even an 'ad hoc' DAB, where the adjudicators are 'functus officio' after providing the decision, the parties have an on-going relationship with the DAB members at further site visits and meetings until the end of the contract. There must be no question of lack of impartiality, freedom from bias or independence in that role.

Thus, whilst the result may not have any practical difference in the overall scheme of the dispute resolution process, there may be real benefit in the DAB providing a 'recommendation' instead of a 'decision'. It may be the case that the best option is for the DAB to provide either a 'decision' or 'recommendation' at the request of one or both of the parties as discussed above in relation to the procedures for a CDB under the ICC Rules.

CONCLUSION

I have identified some provisions in the Australian model for DBs which may be worthy of further consideration by the parties and those drafting DB clauses on their behalf.

In my view, the effectiveness of the current Australian model is constrained by the prescriptive language of some of the contract clauses. Very formal prescriptive clauses prevent the adoption of innovative solutions to a wide range of issues likely to develop into disputes. An essential component of the DB process is the informality and flexibility with which dispute avoidance can be undertaken, even at the final stage.

As I have indicated, it is easier for a dialogue to remain open between the parties if there is contact between them during the process and the opportunity for further communication throughout. Whatever the final outcome, a 'decision' is a determinative process with a 'winner' and a 'loser'. Even if the determination is easily rejected by a notice and of no effect, it is still a 'decision' which went against a party. The same stigma is not attached to a 'recommendation' even if it exactly the same result as the 'decision', because a party has an option to be cooperative and accept it or not. In my view, there is more likely to be discussion about it.

I believe the current Australian model needs some review and modification. There is a contrary view which cannot be discounted. Contracting parties have indicated to me on several occasions that the mere 'threat' of a binding determination by the DAB is a strong incentive for them to pursue an amicable settlement without recourse to the process. Indeed, the parties to one project stated that it was a project objective to resolve all issues cooperatively to avoid any referrals to the DAB.

The final specification for the rules and procedures in Australia will only evolve if the current process and procedures are discussed and more widely used. There needs to be an acknowledgement by those drafting the relevant contract clauses that there is scope for innovation or modification. Improvements in the process will lead to greater use of DBs on contracts.

DBs are already a proven means of dispute avoidance worldwide. Australia may still have something to learn from other jurisdictions on the most appropriate model (or models) for implementation of this unique dispute avoidance and resolution process.

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Note from the editor: This paper was presented to the Resolution Institute Congress and previously published in the Australian Construction Law Newsletter.

The Annexure 1, "Rules for Dispute Avoidance Board decisions (the Australian Model)." is available in the DRBF online library or by request from the editor.

Upcoming DRBF Events

The DRBF has a number of upcoming events in 2017, including training workshops, regional conferences, and the popular annual conferences. Information can be found on the DRBF website: www.drb.org

The Use of BIM in Dispute Avoidance: From Design to Operation

By Roger Ribeiro and Dr. Charles-Edouard Tolmer

BACKGROUND

Experience on projects located in Eastern Europe, the Middle East, Africa, and South America leads us to believe that the construction industry is still suffering a lot with claims and disputes. Building Information Modeling (BIM) can be a tool in construction dispute prevention as it has been demonstrated in a few projects in France.

Today, many definitions of BIM exist. They depend, among other things, on the structuring of the construction industry, the markets, and the stakeholders' maturity about BIM. From our experience on projects and in the standardization organizations (CEN, ISO) and engineering unions (Syntec engineering in France, European Federation of Engineering Consultations Associations (EFCA) in Europe), we define BIM as:

- a set of technical and business processes
- an information consolidation approach to improve both value and quality

To summarize, it has to be considered as a new paradigm in information management.

As demonstrated in "The Uses of BIM: Classifying and Using BIM Uses", BIM is concerned with communication (information management), technical design, and the structuring of this information. BIM invites explicit consideration of the precision or accuracy, the level of validation, and therefore the confidence that we can have in this information.

The main advantages of the BIM generally mentioned are the prevention of problems at the earliest opportunity and a good understanding of the project by all the parties. Thus, the question of the prevention of disputes is fully considered in BIM. In principle only, because the definition of BIM processes and the structuring of related information do not currently consider these benefits sufficiently in terms of decreasing claims and disputes.

This article aims to provide insight into the use of BIM and its impact on claims and disputes, based on our experiments on different types of projects. In this context, we identify three questions that are not addressed in the text of a BIM Execution Plan (BEP):[1]

1. How does BIM impact the number of disputes and addendum requests?

2. How does BIM impact disputes management in terms of quantity, type of resolution, and impact on project?

3. How does the disputes management (and the aim to reduce them) impact BIM?

This last point refers to the contractual impacts on BEP and Project Management Plan (PMP): responsibilities definition, intellectual property, quality process, etc.

The following elements come from our various BIM experiences on infrastructure and building projects. One part is based on projects: urban motorways, airports, express roads, industrial buildings, etc. The other part is based on experiments in the national research project MINnD (Interoperable Information Modeling for sustainable Infrastructures) as project review for instance, inspired by aeronautics documents such as BNAE, 2005, an industry with numerous quality and monitoring procedures for the prevention of loss of optimization due to conflicts (lean management[2]). The sensitivity of certain issues makes it impossible for us to cite these projects explicitly.

It is worthwhile to note that BIM is not currently perceived as a tool to prevent claims and disputes. With regards to the scheme presented below, visualization and clash detection seems to be the most frequent factors justifying the use of BIM.

However, we will see that the implementation of BIM can greatly contribute to the reduction of disputes and make it possible to solve the remaining ones more easily.

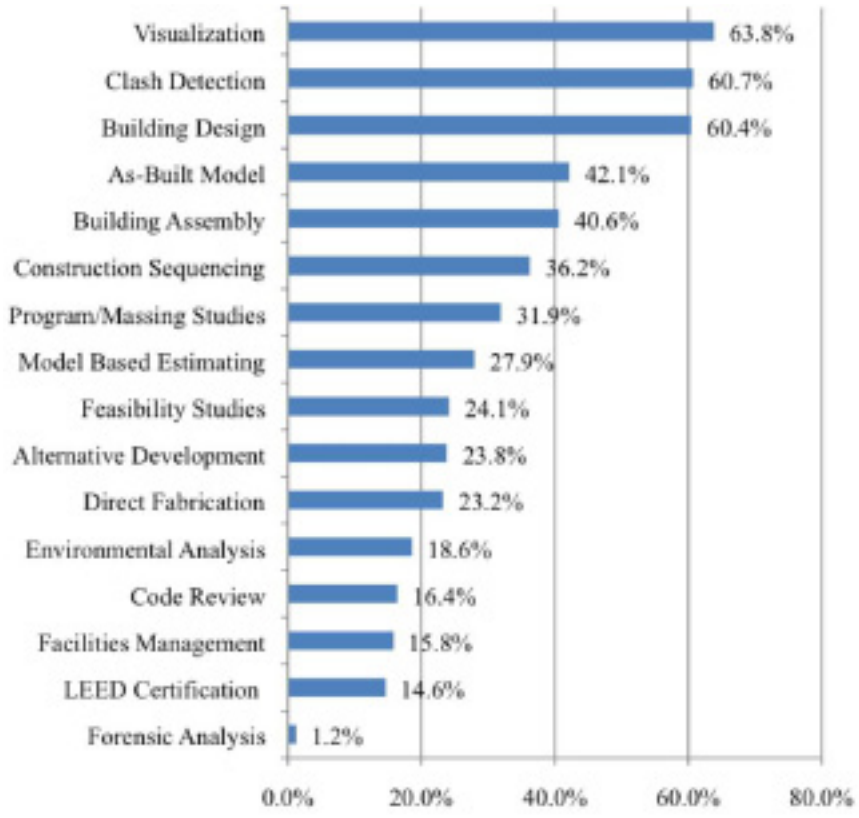

Figure 1: Tasks the BIM is used for (Burcin & Rice, 2010)

CONSTRUCTION DISPUTES

First, it is important to point out that the nature of projects in the construction industry is diverse and all construction projects are unique. It is clear that the specific and unique exercise to identify potential disputes should be done from the beginning of the project at the procurement stage because this will allow more effective dispute avoidance. This is one of the prime objectives of BIM. The following table shows an attempt from different authors to define the causes of disputes.

Table 1: Causes of disputes

Authors	Causes of Disputes
Bristow and Vasilopoulous, 1995	Unrealistic expectations on areas: contract documents, communication, lack of team spirit and change.
Heath et al., 1994	Six areas: contract terms, payment, variation, time nomination, re-nomination and information.
Hewit, 1991	Six areas: change of scope, change conditions, delay, disruption, acceleration, and termination.
Kululanga et al.	Four sources of dispute: (1) errors, defects and omissions in the contract documents (2) underestimating the real cost of the project in the beginning (3) changed conditions and (4) stakeholders involved in the project.
Madden, 2005	Three categories: legal, technical and quantum.
Rhys Jones, 1994	Ten areas: management, culture, communication, design, economics, tendering pressures, law, unrealistic expectations, contracts and workmanship.
Sykes, 1996	Two areas: misunderstandings and unpredictability

1 BEP: BIM Execution Plan. This document completes the Project Management Plan and concerns exclusively BIM process.
2 Lean is a method for the elimination of losses during the production process.

From the author's experience, the following items define the causes of disputes in most construction projects:

- Communication problem (loss of information, error of interpretation, misunderstanding regarding procedures and processes, etc.)
- Payment delay
- Delay
- Errors, defects and omissions in the contract documents
- Unpredictability
- Law

Today, in most construction projects, technical risks are almost controlled: risks arise mainly from margins and errors, information quality and management, which are all the backbone of the technique and quality design. The aim is to prevent disputes by BIM and thus to seek a better management of information.

BIM IN FRANCE

For the purpose of our article, project L2 Marseille can be taken as an example. Currently, this project is the most important infrastructure construction site in France. Registration of the project on the zoning map of Marseille was done in 1933. On October 7th, 2013 a Public Private Partnership was signed with the company SRL2 for a total of 624 million euros. The part financed by the Government amounts to 150.6 million euros over five years. The part financed by the French State amounts to 150.6 million euros over five years. The L2 bypass should be delivered in 2017, and the East part has already been opened.

The objective of using BIM in this project was mainly to:

- Provide communication support
- Coordinate the disciplines
- Control the consistency of the design and project requirements
- Control the consistency of the data, considering the building and operation phase
- Determine the construction stage

On the L2 Marseille project, BIM has been used to facilitate preparation for the safety audit and support for claims for exemption. It was also a tool to help coordination in design and phasing civil works in this urban constrained environment (see Figure 2 and Figure 3). We can also mention the control of continuity between the retaining walls and the tunnels.

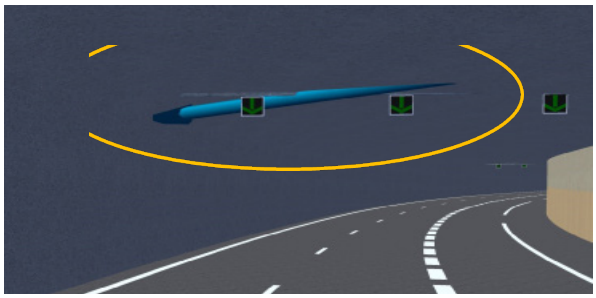

Figure 1 (left): Coordination between existing networks and tunnel

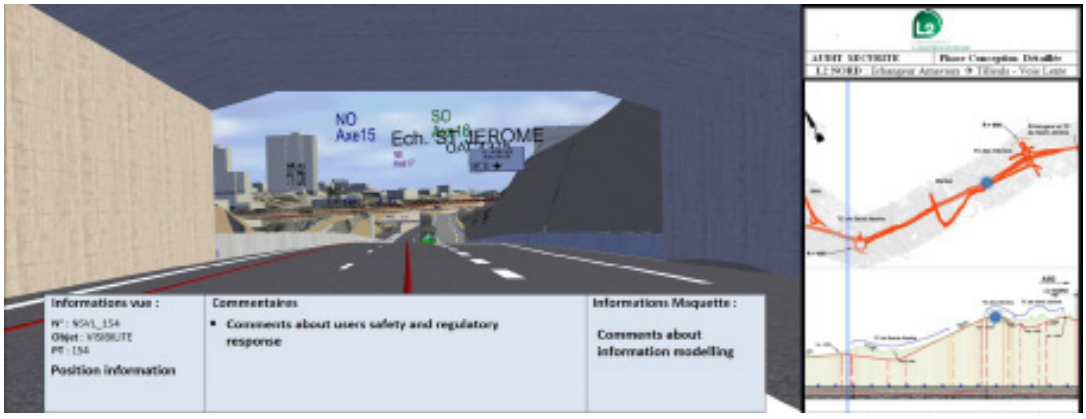

Figure 2 (below): Comments for safety audit preparation

On a complex industrial project which cannot be named, all the actors must participate in the project reviews with BIM and digital models and resolve conflicts that fall within the deadlines because of traceability of the information relative to these conflicts. This is allowed by the development of processes and structuring of information especially through the concept of Level Of Detail, badly understood, mastered and implemented today (C.-E. Tolmer & Castaing, 2016).

In building projects, more numerous than infrastructure projects, our experience shows that the atmosphere on project teams is positively impacted by the use of BIM in conflicts resolution, in particular through a better atmosphere among the teams and a true collaborative attitude. This makes it possible to resolve conflicts more gently and consensually. One cannot generalize because many criteria have an influence, but the writing of rules on structuring and exchange of information in the BEP necessarily contributes.

BIM AS DISPUTE PREVENTOR

Dispute may be that the project does not satisfy product requirements or expected contractual performance, has poor management interfaces, is impossible to build, etc. Disputes also consider production processes and modeling requirements for the control and the validation of the product requirements (product requirements concern the performance of the systems and components of a project). BIM is concerned with quality processes and satisfying product requirements.

BIM aims to reduce the assumption of responsibilities (Bellanger & Blandin, 2016). The writing of the BEP requires explicit allocation of responsibilities. This way, disputes can be reduced if the BEP is correctly drafted. On the other hand, poor preparation of the BEP can increase the number of disputes.

The BEP must be part of a contract in order to guarantee its effectiveness and that of the BIM, and consequently the effectiveness for dispute avoidance. However, given the recent introduction of BEP in projects, it is an evolving document. It allows a permanent readjustment of the responsibilities and optimization of production processes and the exchange of relevant and understandable information. This way, it leaves less unsolved topics that may give rise to conflicts and disputes. On the other hand, a poor BEP updating process (which doesn't take into account the evolution of needs from the point of view of the BIM) may also increase disputes.

In fact, a better confidence in information can reduce the vigilance on the problems of losses or unprofitable transformation of the information, inherent to the computer processes. The quality processes defined in the BEP but also in the PMP must consider this element to reduce disputes.

Finally, the concept of "level of detail" is now considered to be crucial in the definition of information exchange requirements. It is related to both the project information organization and the definition of the contractual level of information in exchange requirements. This type of work is currently done in international standardization. On the other hand, there is no standardized definition of the level of detail, neither in its content nor in its use (Bolpagni, Luigi, & Ciribini, 2016). The current definitions are not relevant (C. Tolmer, 2016). A working group at the European level (CEN TC442 WG02 TG01) is working to standardize this concept. The standardization of such a concept allows a consensual definition of the exchange requirement and facilitates the agreement between partners of a project to facilitate the collaborative work and thus, dispute avoidance.

CONCLUSION

BIM does not change the content of missions, but the way to respond to them. It forces the parties to be more explicit about roles, responsibilities, and information traceability in order to increase its quality and therefore its value. As explained, these precautions allow for the avoidance of disputes.

A few authorities (such as Dubai, UK, Finland, and Hong Kong) have already included BIM in their legislation. Actual protocols such CIC BIM, AIA Doc E202, ConsensusDocs 301 are good guidelines for those who are drafting tenders/contracts.

Obviously, BIM will have impact on legisla-

tion and contracts (definitions, responsibilities and obligations of the parties, liability, priority of documents, confidentiality, privacy, insurances, etc.).

Financial Institutions such as The World Bank, European Union, and the European Bank for Reconstruction and Development may have to take BIM as a priority. The question of BIM in public sector projects regarding competitiveness between candidates is still an open question without a clear answer.

Nowadays, it seems that to avoid and resolve disputes a cultural change is needed. Without this cultural change, the construction industry will continue to suffer. Making this cultural change is not easy, of course, but it is still achievable. That is a real challenge for the leaders and those who want to see changes. Can BIM help? The different infrastructure and building projects we considered in this paper have shown that BIM is an important element in project management and dispute avoidance. It is worth to note that a good BEP is needed to achieve this goal.

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Welcome to New DRBF Members

Isameldin Abbas
Doha, Qatar

Mitch Ball
Fairfax, VA USA

Petya Bobeva
Sofia, Bulgaria

John Boknecht
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Mychal Brosamer

Dale Butler
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Keith Flaherty
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Mohammed Hashim
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Chino Hills, CA USA

Reiner Solis Villanueva
Lima, Peru

Tom Stratford
Conifer, CO USA

Edward Takahashi
Monterey Park, CA USA

Steve Wood
Alameda, CA USA

DRBF 21st Annual Meeting & Conference

Save the Date!
September 14-16, 2017
Westin Chicago River North Hotel • Chicago, IL USA

Join top dispoute avoidance and resolution experts for the latest in best practices for the implementation of Dispute Boards for complex projects and effective skills development and techniques for DB practitioners.

- September 14 **Dispute Board Workshops** - Full-day Administration & Practice workshop and an advanced level workshop for experienced users and practioners. Earn continuing education credits!
- September 14 **Welcome Reception**
- September 15 & 16 **Annual Meeting & Conference** - Presentations and panel discussions on the latest developments in Dispute Board application and best practices.
- September 15 **Al Mathews Award Dinner** - Enjoy socializing with conference delegates, speakers and guests at the popular Al Mathews Award dinner at Chicago's popular Harry Carey's Italian Steakhouse.

Information at www.drb.org

Astride the "See-Saw"

DRBF post-conference event in Sofia focuses on DB "Informal Advice"

Adriana Spassova
DRBF Representative for Bulgaria

In November 2016 Sofia hosted the DRBF Regional Conference "Dispute Boards as Lifeboats to the Project Ship". The conference attracted more than 100 experts from 18 jurisdictions. On 1st March 2017 DRBF organised a post-conference event in Sofia, Bulgaria for the Bulgarian participants of the successful conference.

The founders of the new Macedonian Society of Construction Law attended the event. Since there are no DRBF members in the former Yugoslavian countries, we are trying to promote DRBF among construction law experts from FYROM, Montenegro and Serbia.

The team of the Sofia district heating company Toplofikacia Sofia EAD was among our guests. The company is going to use FIDIC for the first time. This team is preparing tender documents with FIDIC Yellow Book Conditions of Contract for a project, financed by the EBRD and EIB. Our target was to persuade them to substitute the ad-hoc DAB with a standing DAB, in order to use its benefits for dispute avoidance. The standing DAB is already a fact in the 2017 Edition of the Yellow Book.

1st March greeting

All participants were welcomed with a traditional Marteniza for the wrist. "Grandma March Day" is a holiday celebrated in Bulgaria March 1st. Martenitsas are worn through March, symbolizing the coming of spring, warmer weather and wellbeing. Once the stork or blooming tree appears, the Martenitsa is taken off and hung on a tree.

Introduction: development of the informal advice procedure in the FIDIC Books

The event began with a review of the development of the preventive role of the DB within the ambit of the FIDIC Conditions of Contract. The seventh paragraph of Sub-Clause 20.2 of the 1999 Red Book introduced the concept of Dispute Boards giving "informal advice".

We followed up the further development of the DB preventive function in the 2006 Pink Book and later in the 2008 Gold Book. Using the special pre-release version of the Yellow Book Second Edition, we analysed the new Sub-Clause 21.3 [Avoidance of Disputes]:

"If the Parties so agree, they may jointly refer a matter to the DAB in writing (with a copy to the Engineer) with a request to provide assistance and/or informally discuss and attempt to resolve any issue or disagreement that may have arisen between them during the performance of the Contract. If the DAB becomes aware of an issue or disagreement, it may invite the Parties to make such a joint referral.

Such joint referral may be made at any time, except during the period that the Engineer is carrying out his duties under Sub-Clause 3.7 [Agreement or Determination] unless the parties agree otherwise.

Such informal assistance may take place during any meeting, Site visit or otherwise. However, unless the Parties agree otherwise, both Parties shall be present at such discussions. The Parties are not bound to act on any advice given during such informal meetings, and the DAB shall not be bound in any future Dispute resolution process or decision by any views given during the informal assistance process, whether provided orally or in writing."

The new SC 21.3 developed the DAB informal advice procedure from one paragraph in the Red / Pink Books into 3 paragraphs, incorporating important texts, previously contained on page 308 of the FIDIC Guide. The first sentence and the last paragraph of the new Sub-Clause copy the Gold Book Sub-Clause 20.5 [Avoidance of Disputes]. While under the Red/Pink Books the parties refer a matter to the DB for it to give its opinion, in the Gold Book the wording is different, emphasizing the non-binding character of the procedure: the Parties jointly refer a matter

to the DAB with a "*request to provide assistance and/or informally discuss and attempt to resolve disagreement*". The new Yellow Book Edition uses the same wording, but the highlighted text "*any issue*" is added to the disagreement, thus strengthening the preventive function of the DB, which is not waiting the issues to escalate into disagreements.

The new second sentence in the 2017 Edition gives opportunity to the DB to **be proactive:** it may invite the Parties to make a joint referral, if necessary to avoid future disputes.

The workshop

After the introduction, the participants examined nine "scenarios" (based on actual DB experience) prepared by our esteemed guru Gordon L. Jaynes and discussed how the DB should proceed. All participants had received in advance the material for the workshop and we very active in the informal discussion.

As always, Gordon made the topic very attractive:

"In giving "informal advice" the DB is exploring, discussing, and persuading, but not deciding. Especially in a three-person DB, the DB brings to the disagreement many decades of relevant experience with similar or comparable problems, and that experience can be deployed to assist in resolving the problem amicably.

Like riding a see-saw well, the DB should move smoothly, without "bumping the ground" with either end of the seesaw, or losing balance while astride it."

During the informal discussion of the problematic situations, the participants explored the contractual framework for the DB informal advice. Besides the seventh paragraph of Sub-Clause 20.2, items 4(f) and 4 (k) of the Appendix [*General Conditions of Dispute Adjudication Agreement*] define when the DB may give informal advice in accordance with the procedural rules.

The scenarios gave us an excellent opportunity to share experience, related to the site visits and site reports, which may be used by the DB to give informal advice in writing, in case of referral by both parties. The DB persuasive and inquisitorial skills are of upmost importance for the dispute avoidance.

DRBF Promotion

The event was held at Sofia Hotel Balkan (the 2016 November Conference venue) in the evening. Within the planned 3 hours we had a workshop and after that we had time for networking and relaxing with some wine and cheese.

The event was free, but for a small budget, with volunteer efforts, DRBF achieved a lot:

- We attracted several new members in Bulgaria;
- We promoted DRBF to Macedonia (FYROM), Serbia and Montenegro. We expect some of the guests from Macedonia to join DRBF and participate in the Madrid Conference in May 2017. We shall pursue further promotion of DRBF on the FIDIC-ACES-EFCA Regional Conference (9-10 March 2017 Belgrade), targeting the participants in the FIDIC Module 3 accredited training "*Understanding DABs: Enabling parties, their representatives, Engineers and Dispute Board members to understand and manage the DAB process"*;
- Most of the Bulgarian participants are members of the BSCL, which is an ESCL member. BSCL supported the founding of the Macedonian SCL. The DRBF networking with our neighbours was extremely useful. The Sofia Conference attracted the ESCL as a supporting organisation and the partnering shall continue on the coming Annual Conference in Madrid;
- The need for future trainings was identified: in-house trainings for the employer and international trainings in the former Yugoslavian countries.

All participants were satisfied with the event and we decided to organise another event or regional conference in Macedonia in the end of 2017.We feel that similar low budget well organised events may benefit the development of adjudication and lead to the expansion of DRBF in new regions.

Adriana Spassova *can be reached by email aks@eqe.bg.*

The Development of Dispute Board on Construction Services Contracts in Indonesia

Sarwono Hardjomuljadi
DRBF Representative for Indonesia

Disputes are inevitable, cannot be avoided and occur no matter what effort is done by the parties. Parties will stand strictly in their standing position, with the employer wanting to avoid cost overruns, and the contractor seeking to raise additional costs as high as possible, either for reducing loss or whenever possible, obtaining additional profits.

In Indonesia, Law no 18 Year 1999 regarding Construction Services juncto Government Regulation No 29 Year 2000 provides for some alternative dispute resolution methods to be chosen, i.e. mediation, conciliation, and arbitration. This law was then changed by the introduction of Law no 2 Year 2017, where the use of Dispute board is added.

By using the FIDIC Conditions of Contract which has been translated to Indonesia by Hardjomuljadi et al (2008) under license of FIDIC, using a Dispute Board as an alternative dispute resolution prior to arbitration proceeding already exists. Because there are none of the so called "law shelters" in Indonesia, the usage of Dispute Boards in Indonesia is still not as popular as expected, especially by government institutions. There is an opinion that the existence of a Dispute Board only lengthens the time for the dispute resolution process, because the decision still can be challenged in arbitration, and arbitration still can be challenged in the court, as stated in the Law No 30 Year 1999.

It should be understood that there are four main decision factors in choosing a dispute resolution method to resolve disputes, which are: cost; time; legal certainty; and maintaining a good relationship between the parties.

Arbitration proceedings in Indonesia, take 184 days, with no time limit for mediation, conciliation and expert determination. For Dispute Boards there is a time limit of 84 days for a decision to be issued, according to Dispute Resolution Board Foundation (DRBF) Practices and Procedures, and also in procedural manuals by other institutions.

Most of the proceedings of an arbitration tribunal have two main problems: the first is that the unsatisfied party will submit an appeal to the court, and the second is the proceeding would not be able to be implemented because it does not meet other regulations which are also in force.

Based on the facts above, studies have been made regarding the implementation of the alternative dispute resolution under Law No 2 Year 2017 which are arbitration, mediation, conciliation and Dispute Board. DBs are in the standard conditions of contract published by Fédération Internationale Des Ingénieurs-Conseils (FIDIC) and used in Indonesia.

In 2016, I studied 70 cases which are related to construction services in which the Indonesian Supreme Court made decisions (available for download at putusan.mahkamahagung.go.id). This sample consists of appeals on the decisions of the arbitration court, even though in international best practice, the decision of the arbitration tribunal should be final and binding as stipulated in Law No 30 Year 1999 Article 60 [5].

The research showed that most of the construction disputes formerly filed in an arbitration tribunal were then filed as an appeal petition to the high court, some of them even directly filed as cassation to the Supreme Court. Some of them filed the case to the district court with other lawsuits, even if it is very clear that the decision of the arbitration tribunal is final and binding and it is outside of the jurisdiction of the district court.

In Indonesia there is a law stating that the court may not refuse any accusations by citizens. So it is a dilemma for the court, even if they know that they have no right to hear the cases which has been decided by the arbitration tribunal, the request to set aside the decision of arbitration tribunal and/or create another case. Usually the contractor will file the case based on unfair and incorrect information by the employer or even for evidences suspected to be fraudulent.

Dispute Resolution through Arbitration

Another way to resolve the dispute is through the arbitration body. In conducting the study on the arbitration processes, the writer faced some difficulties, because the process of the arbitration and also the decision is not allowed to be disclosed to public, it could only be opened under the consent from the parties. In order to get the data, the writer visited the website of the Supreme Court, and looked for the decisions of the Supreme Court, which also describes the process of the cases, which include the arbitration processes.

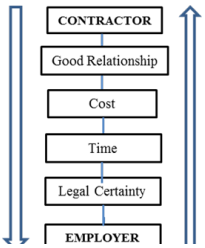
Using this dispute resolution method through arbitration, the action of the losing party will be similar to those in the dispute resolution through the litigation, where the losing party (formerly the defendant) will submit the appeal to the higher institution in order to have a new decision in favor to them. The case of PT Angkasa Pura I vs PT Hutama Karya on the Runway and Supporting Facilities of the Lombok International Airport Project which is from the first time the plaintiff filed the case in the district court until the issuance of the decision of supreme court, takes about 20 months. Such case could be seen as the three step case, "arbitration- district court - supreme court." There were several examples of this in the research.

In 2017, I conducted a study and distributed a questionnaire to both employers' and contractors' (60 people), who have some experience being engaged on an international project utilizing the Dispute Board as the alternative dispute resolution. The Relative Importance Index (RII) result, shows what are the causal factors causing a reluctancy to use the Dispute Board in construction services contracts in Indonesia. The dominant factors are: lack of understanding about the function of Dispute Board; hesitation to have early expenses before disputes have occurred; the cost of Dispute Board is considered expensive; no "legal shelter" and/or law stating the use of Dispute Board; and the decision of a Dispute Board is not final and mostly challenged in arbitration.

The figure below shows that there are differences on the opinion of Employer and Contractor - both of them have a different point of view, depending on their own needs.

	RII	
Requirements	Employer	Contractor
Cost	0,820	0,920
Time	0,860	0,840
Legal certainty	0,940	0,680
Good relationship	0,660	0,940

The next figure shows that there are different expectations between the Employer, particularly government institutions, and the contractor on the usage of Dispute Board, where the contractor's expectations start from legal certainty, time, cost and the most expected is to maintain good relationships. On the contrary, the employer's expectations start with good relationship, cost, time and the most expected is the legal certainty.



In Indonesia specifically, people have difficulties accepting a decision by other parties, and people mostly will appeal to the higher institution. In more than 90 % of the samples taken from the decision of Supreme Court of Indonesia, it could be found that most of the construction projects were filed to the court, even if it had been decided previously by the arbitration tribunal. People are more than happy if they can do the agreement by themselves, so the final goal is an agreement instead of punishment from the institution from the court or arbitration tribunal.

That is why, on resolving the disputes, contractor thinks that the good relationship is the most important, since the contractor expects project continuity or a new project from the employer. Whilst the employer side thinks that the legal certainty is the most important, particularly if the employer is the government institution, because in the Indonesia's present conditions, the

committee for eradication of corruption is very strict.

Conclusion

- Since in the Indonesian culture it is difficult to accept decisions made by the third party, a new concept on the Dispute Board (DB) should be considered.
- The existing Dispute Board (DB) as an Alternative Dispute Resolution (ADR) consists of three types: a final and binding decision, a recommendation, and a combination between recommendation and decision. Following the expectation of the parties, and considering the Indonesian culture, I believe the best ADR choice is the Dispute Board (DB) and it's dispute avoidance function. When issues are aired early it can convince the parties to come to an agreement and avoid formal proceedings.
- It is important to disseminate the Dispute Board process to the higher level officials and decision makers in Indonesia.
- Training and workshops on best practice and procedure for the implementation of Dispute Boards should be conducted.
- The DRBF as the foundation should continue to foster common sense dispute resolution worldwide.

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DRBF Representative for Chile - Eduardo Sanhueza

Eduardo Sanhueza has been DRBF's Chile Representative for three years. Many members of the DRBF know Eduardo from the 16th Annual International Conference, which he organized in Santiago, Chile in 2016.

Eduardo is a Civil Engineer and has earned a master's degree in business administration. He acts as an expert witness and provides expert opinions and advice for owners, builders and court proceedings, for projects of US$ 1 billion. Projects that he has participated on include ports, tunnels, highway, buildings and industrial buildings. He has been actively involved in the submission and settlement of US$ 20 million worth of disputes to Dispute Adjudication for ICC DB rules. For a recent project, he also acted as a mediator.

Below, we learn of Eduardo's perspective on Dispute Boards based on his history in the field and the specific challenges of using Dispute Boards in Chile.

It is a reality that construction projects are complex and involve different actors with different interests. Conflicts are present in most of them. And what happens in these projects? Productivity decreases, which affects all players in this field. In most of these projects, various systems are implemented to address conflicts. Managers have very high expertise, but problems persist. So, what then is missing in these projects? One answer: trust among the participants. I am a firm believer that Dispute Boards (DBs) contribute directly to building trust, which becomes a key factor in the success of a project.

Trust in projects is particularly relevant today, where the level of conflict is becoming higher and where it is becoming more difficult to establish and maintain long-term relationships. We are currently facing a crisis of confidence in the region, and consequently, the level of productivity is decreasing more and more every day.

Dispute Boards have proven to be a very effective tool when it comes to avoid and to resolve disputes in a timely manner, ensuring higher levels of quality, fairness and compliance in such projects.

In Chile, over the past three years the DRBF has positioned DBs in the construction market, obtaining important achievements at the local level: DBs have been introduced as an alternative for early resolution of controversies. We have supported The Santiago Arbitration and Mediation Centre of the Santiago Chamber of Commerce so that today in Chile, we have DB rules with their respective clauses used in contracts. We also have conducted training courses for DB members. The challenges we face are that DBs are used in construction contracts and that we, the DRBF, can carry out an intensive training and assessment program to develop skilled DB practitioners in the region.

Eduardo Sanhueza *invites you to contact him: esanhueza@varela-cia.cl.*

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The DRBF's Northwest Regional Conference is an annual gathering of DRB users and practitioners in the Northwest Region who meet to discuss best practices, ethics, challenges and solutions. Registration begins at 7:30 am with continental breakfast served. The event starts at 8:00 am and lasts until 5:00 pm, with morning and afternoon breaks and catered lunch from 12:30 - 1:30 pm for all participants.

Register at www.drb.org