

By
Stephen Callaghan &
Ron Finlay

Ten Steps to Becoming a Dispute Board Member

INTRODUCTION

Members and prospective members of the Dispute Resolution Board Foundation (DRBF) often ask “How do I become a Dispute Board member?”

Dispute Board members are almost always selected by the users (Owners / Clients / Principals and Contractors to the same contract). Because the DRBF does not act as anominating authority the selection of Dispute Board members is made by the users based on their own particular criteria. Those criteria are not always known and are often subjective.

However, from our collective experiences, the following ten steps to becoming a Dispute Board member are relevant:

1. PASSION

Like many things in life, it is easier to achieve an ambition if you have a passion

for the subject matter. Therefore, having or developing a passion for the use and practice of Dispute Boards is a fundamental requirement.

2. TRAINING

It is essential that a practitioner understands both the theory and practice of the operations of a Dispute Board. In the absence of practical experience, this is best achieved by attending one of the Advanced Training Courses for potential Dispute Board members offered by the DRBF.

3. PERSONAL PROFILE

Equally, it is essential for practitioners to have a reasonable profile in the industry in which the practitioner is seeking appointment as a Dispute Board member. Dispute resolution work generally is one way to establish such a profile. If assisting parties in dispute resolution work, it is important not to be

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President's Page

Dear Members, Supporters and Friends of the DRBF,

The DRBF has experienced a very busy period. Recent conferences in Madrid, Spain and Bali, Indonesia set record attendance numbers, attracting participants keenly interested in the use of Dispute Boards. As the Foundation enters the second half of our fiscal year, we have conferences scheduled for Chicago, Vancouver, and Mexico City. These events provide exceptional networking opportunities, and allow us to discuss opportunities and new ideas in the evolving world of Dispute Boards.

Outreach continues to be primary focus. Recently, the DRBF has been in discussions, or finalized agreements with the Construction Institute of the American Society of Civil Engineers, the Design Build Institute, and the Arbitration Institute of the Addis Ababa Chamber of Commerce. DRBF representatives make presentations at industry conferences, meet one-on-one with project owners/employers, and pursue partnerships with other associations who share our interests. DRBF Board members and staff are constantly available to assist with promotional materials or other support for outreach efforts. The DRBF membership is diverse and experienced, and there is usually someone who will ably assist.

Most members have visited the DRBF's new website. I can't emphasize enough the importance of logging in to update your member profile. This expanded resource needs completed data to fulfill its ultimate goal of being a resource for party members to find colleagues, experienced advisors, and capable Dispute Board practitioners to consider for Board appointments. Please take a few moments to update your background, experience, training, special skills, and areas of expertise and interest (both category and geographical). While you are on the site, peruse the library of papers and presentations, another DRBF member benefit (and if you have written an article or read one of interest, please submit it for inclusion).

We thank those members who voted to approve a bylaw revision to allow for cross-regional membership in the Foundation. The intent was to address the interests of some members who work across borders, and may have an interest in the activities of another region, despite the location of their primary residence. This procedure is similar to those in place at other professional associations. The structure should also strengthen the regions, which were established to better serve the diverse interests of our membership and support activities at the local level in a more efficient and effective manner.

Finally, I have thoroughly enjoyed this year "at the helm" and wish to convey sincere thanks both to fellow members of the Executive Board as well as to others in all Regions that have lent support to me. They know who they are.

Warmest regards,




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

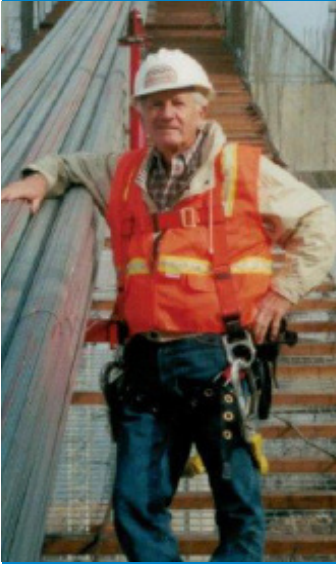
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Dispute Resolution
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A conversation with...

William B. Baker, P.E.



William B.
Baker, P.E.

William B. (Bill) Baker is an Arbitrator, Mediator, and Dispute Resolution Board practitioner based in Napa, California, USA. He has served on nearly 180 DRBs and DRAs, totaling more than US\$11 billion in project value over a 20-year period. He is a Past President of the DRBF, an AI Mathews Award recipient (2007), and Vice President, Emeritus, of the University of California System.

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

A It was in 1998. The project was the Golden Gate Bridge Seismic Retrofit. The contract did not include a DRB. The contractor wanted to include a DRB by Change Order. A consultant I know referred me to the Bridge District, and I gave a seminar to the District Engineers and their attorneys. (I had not yet served on a DRB, and scarcely knew much about them. My friend, Jim Donaldson, helped me out.) The District bought the concept and, to my surprise, nominated me to serve on the DRB. Two fellow AI Mathews Award winners, Jack Feller and John Nichols, served with me.

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

A I chaired a DRB when, after the owner's nominee had been terminated without cause, his replacement evidenced a strong bias in favor of the owner and the contractor's nominee held an equally strong bias in favor of the contractor. Adding further complications, unrelated to the bias issues, attorneys became heavily involved, changing the collaborative nature of the process. As Chair, it became a nightmare to manage the process.

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

A I have been on many satisfying Boards. Success and satisfaction always have to do with communication. When the parties communicate openly and freely, with the assistance of the DRB, projects are claim free. Dispute avoidance means a successful DRB and a successful project.

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

A I find that to be a rather irrelevant question. Of course, experience and ability are what's required for successful DRBs. Age has nothing to do with it.

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

A I am always surprised to hear of DRBF members who believe there should be a limit. Typically Boards meet every three months, so, if one serves on 20 Boards, that is only 80 days a year, with some additional time for dispute hearings. I have served on as many as 28 Boards at one time, and still managed an active arbitration/mediation practice with plenty of time for about 10 weeks of holiday travel.

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

A I have very few regrets, with the exception of the occasional Board member with a strong bias or parties who don't communicate.

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

A I would like to see contractual language which prevents last minute meeting cancellations.

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

A To feel fit and healthy, I have a regular exercise program, and I don't drink cheap wine. For relaxation, I read, follow sports and travel with my wife.

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

A Ireland. My wife has dual Irish/US citizenship and we always feel at home

in Ireland. And, I could have my own "local."

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

A When I served as DRBF President in 2001, how to get a DRB appointment was the most frequently asked question, as it is today. In fact, I wrote in "The President's Message" a piece about networking. (Forum Volume 5 Issue 2 April 2001, available in the DRBF online library). People ask me about my marketing plan and I respond, "When the phone rings, I say 'hello.'" I did a lot of training (as trainer) for the AAA, Caltrans, and the San Francisco Public Utilities Commission, so I had a lot of face time. I also have been active in the DRBF. It is all about networking.

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After nearly 20 years of DRB service and nearly 180 DRBs and DRAs, Bill's wife calls herself a "DRB Wida," derived from the popular "Golf Widow" term, so he had this license plate frame made for her car.

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Ethics in Today's World of DRBs

At an initial DB meeting on a project, the contractor states that he will not participate in the DB process because of owner bias.



James D. 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 the Chair of a Dispute Board that has just convened its first meeting, 24 months after the Notice to Proceed. At the beginning of the meeting, the contractor announces that his company does not want to proceed with a DB process because of the bias on the owner, and that the owner has not been cooperating with the contractor in trying to resolve disputes on the project. What should the Chair do?

This issue speaks to several issues. The first is the timeliness of convening a Board. Typically, the Specification to empanel a Board is found in the project's contract documents. Some contracts provide a timeline for convening a Board, either within the first 3-6 months of the Notice to Proceed (NTP), or another time frame, but many are silent as to the time a Board should be established. Obviously, the sooner the better after the NTP has been sent out, so that the parties become accustomed to the process, and even more importantly, so that disputes do not remain unresolved for significant periods of time.

One of the many benefits to having a Board on a project is that it can keep relationships between the parties positive and engaged in productive communications. In the case under discussion, it took the parties two years to establish a Board, an extremely long period of time during the life of a project. This is enough time for the parties, as

is the case here, to doubt each other's veracity, and to begin to posture, in the case of a contractor, toward preparation of a claim, and in the owner's case, to begin to entertain taking steps like imposing liquidated damages or other measures. One thing is certain, two years is long enough to develop many unproductive practices that will impact the schedule and budget.

Another obvious issue in this case is that the contractor is intentionally breaching the terms of the contract. As indicated, Boards are established because of the requirements of the contract documents. It is unknown why it took the parties so long to establish the Board in question. In my experience, most often, the parties do not, in the rush of mobilization and the commencement of the work, consider the Board to be a high priority, especially on complex projects where many Boards are implemented. Along with this, parties think that because they have worked together in the past with no issues or disputes, that they most likely will not have any problems on the present project. Unfortunately, this is, in many cases, wishful thinking. The best practice is, if there is a contract specification that calls for a Board, shortly after the Notice to Proceed, one should be established.

There may be a remedy the owner has under the contract for intentional breach, and eventually, one may be imposed in our case. With respect to what action the Chair of the Board should take, there is a lot to consider. Obviously any

Board member may not force the parties to implement or continue to operate a Board, as the members serve at the pleasure of the parties. However, this might be a teachable moment. In my experience, the reason Boards do not work or the parties give up on them is that they do not understand the process.

Both owners and contractors need to thoroughly understand what a Board actually is before they embark upon both, putting one into a specification or, setting one up. A Board is not an arbitration panel. A Board is not mediation. A Board is not about disrupting the project work, or forcing the parties to generate unnecessary documents, or having extra meetings. A Board is a tool to assist the parties to communicate directly, to attempt to build respect and trust on the project, and to assist, if asked to do so, with problem solving, dispute avoidance and, if possible, recommending an outcome to the dispute voluntarily brought to it by one of the parties.

The operation of a Board is a project expense, which many do not want to bear, thinking that it's a waste of time and resources, both human and financial. The problem with that thinking is that a project does not miss a Board, until it can benefit from one. This is somewhat like trying to prove the dog did not bark. Boards can save millions in resources, legal fees, and expenses. Boards can avoid the mega claim at the end of a project. Boards can keep the project on time and under budget. It is clear to me that on the project in the question, the parties did not want to have a Board, and did not understand its function. The Chair can point this out to these parties and recite all the reasons to have one, but at the end of the day, it's the parties' choice and they can waive the contract requirements.

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,



CONTINUED

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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 DB 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 DB 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 DB 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 DB meeting, the contractor states that they do not wish to participate in the DB 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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DRBF Western Canada Regional Conference & Workshop

26 - 27 October 2017
The Four Seasons Hotel
Vancouver, BC Canada



Dispute Boards: A Bridge Over Troubled Waters **Innovative Ways to Avoid Construction Disputes -** **Dispute Boards and Their Application**

The DRBF is pleased to present an educational conference and workshop focused on the application of Dispute Boards as well as best practices for the first time in Vancouver. Day one of conference will cover the use of DBs in Canada, and how they compare to other forms of ADR, best practice for setting up a DB, practical experiences from the owner, contractor and legal perspective, and more. The engaging presentations and panel discussions will include the latest developments and issues facing the alternative dispute resolution community worldwide, with emphasis on early resolution of disputes and keeping major projects on schedule and on budget. Day two offers an optional one day training workshop on DB Administration & Practice. This workshop is designed for project owners, contractors, and those wishing to serve as Dispute Board practitioners to gain insight on how Boards operate most effectively.



Event
details
at
[www.
drb.org](http://www.drb.org)



By
Stephen Callaghan &



Ron Finlay

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seen to be a “contractor’s adviser” or “client adviser”. Even-handedness is an important attribute. Experience as an expert determiner adjudicator, arbitrator or mediator will often balance such a perception.

A positive reputation as an open, honest communicator, who can provide constructive timely suggestions for the benefit of the parties and the project, is important.

Other ways include being known to various industry sector players, such as Owners / Clients / Principals and Contractors. If you are not known to the industry sector players, then it will be quite difficult to be appointed.

One way to build your profile is to market one’s self with various Owners / Clients / Principals and Contractors within the particular industry. This may be done by attending or presenting in seminars, workshops, presentations, breakfast meetings, industry networking meetings and the like or indeed offering to give such presentations on Dispute Board topics. Most of the large law firms often run such events quite regularly and it is relatively easy to request to be on their mailing lists.

Other ways of raising your profile could include writing and publishing conference papers, articles in industry publications, websites and the like.

4. MARKETING DISPUTE BOARDS

If you are a passionate supporter of Dispute Boards and wish to become a Dispute Board member it is important to market the role and benefits of Dispute Boards so as to get more and more Owners / Clients / Principals and Contractors interested in the process. In simple terms, the more Dispute Boards there are, the more Dispute Board member appointments and opportunities will be created.

It is strongly suggested that marketing should also be directed to those who influence the decisions of Owners / Clients / Principals – such as procurement advisers, lawyers, project directors, and the like.

If you identify an industry association, Owner / Client / Principal or procurement adviser who may be interested in using Dispute Boards and want some help in marketing Dispute Boards (such as collaterals), please contact DRBF or your local DRBF Representative for assistance.

5. INDEPENDENCE AND IMPARTIALITY

As both the reality and perception of independence and impartiality are key attributes to becoming a Dispute Board member, it is most important that you consider whether you are “truly independent” and that there are no actual or perceived conflicts of interest.

If you are an employer or employee of a large organisation such as a consulting services practice, law firm or engineering practice, it may be quite difficult to maintain the level of independence that is required of a Dispute Board member so as to avoid actual and “commercial” conflicts of interest.

It is unfortunate that too often a presumption is made that intellectual and professional independence is not possible, when those who have worked as an independent know that intellectual and professional independence is regularly practised.

Most Dispute Board declarations require you, as a potential member, to declare both your present employment and often your past employment or consulting assignments over the previous three years. You may also be required to declare any work or other services that you may have provided to the contracting parties or their related entities.

The obligation to be independent and conflict-free is a continuing obligation that requires continuing disclosure if you become a Dispute Board member. If you are an employer or employee of an organisation that obligation may require you to disclose the fact that one of your partners or employees has taken on an assignment that is in direct conflict with one of the contracting parties, that will be perceived as impacting upon your Dispute Board role.

6. INDUSTRY EXPERIENCE

Experience in the particular industry (be it as an engineer, contractor, construction lawyer or the like), demonstrated by a relevantly tailored CV, is a very important factor. It is also important to be well respected by Owners / Clients / Principals and Contractors when they are choosing candidates for their Dispute Boards. Another significant factor is experience in a senior management or governance role.

7. KNOW YOUR INDUSTRY SECTOR

It is important to know and understand the industry sector or sectors in which you plan to become involved and to seek Dispute Board appointments. Therefore, knowing what projects are underway, what projects have or have had Dispute Boards, what projects are being planned for the future and the potential participants in these projects, all have the potential to open up opportunities for you to become involved and to assist in the promotion and use of Dispute Boards.

8. DRBF INVOLVEMENT

Getting involved with your local DRBF group/chapter is very important, both to understand the opportunities that might exist and to help increase your profile. You can volunteer to be on committees, to provide one-off assistance in particular projects and otherwise make yourself known and available.

Contact your local DRBF Representative to find out ways that you can become involved.

9. NOMINATION BY DISPUTE BOARD NOMINEES

One of the ways that DRBF (Region 3) has found to be successful in having practitioners appointed to a Dispute Board is in situations where an Owner / Client / Principal nominates one experienced Dispute Board practitioner, the Contractor nominates the second experienced Dispute Board practitioner and the rules require those two nominees to nominate a third nominee.

The two nominees may themselves then nominate a well-known, trained, independent but inexperienced Dispute Board practitioner as the third member, especially with complementary skills to the first two nominees, with one of the first two nominees being appointed as Chair. With careful promotion of this concept to the contracting parties, it is our experience that this appointment process is usually successful and assists in expanding the pool of experienced Dispute Board members. This practice should be encouraged.

10. RIGHT TIME, RIGHT PLACE

If a Dispute Board practitioner follows the nine steps above, there is still an element of luck in obtaining an appointment, being in the right place at the right time and being available to respond to opportunities, often at short notice.

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FIDIC Multi-Tier Dispute Resolution Clauses



By Boyana
Milcheva &



Martin Zahariev

The FIDIC forms of contracts (FIDIC forms) constitute a comprehensive set of rules applied worldwide in complicated construction projects. The FIDIC forms contain a multi-tier dispute resolution mechanism – depending on the type of a Book, they provide for consideration of disputes (1) by an Engineer (an Employer's agent managing the construction project), (2) by an Engineer and a Dispute Adjudication Board (DAB – a private independent panel consisting of one or three experts who consider a dispute and issue a decision binding for the parties under certain conditions), (3) through an amicable settlement, (4) and by an arbitral tribunal/court (depending on the specific agreement between the parties, as stated in the Particular Conditions of the respective contract).

A widely-accepted view among scholars and practitioners is that all tiers should be exhausted, i.e. each of the steps is a precondition for admissibility to the other. So, normally the parties to FIDIC based contracts *use all the tiers as provided*. This being the case, normally a dispute resolution procedure takes a considerable amount of time. Therefore, for the parties involved in respective projects (and related disputes) it is crucial whether this multi-tier mechanism is compatible with the law governing the contract. In other words, are these multi-tier mechanism provisions enforceable and could arbitral awards resolving such disputes be enforced in the respective jurisdiction. As the number of FIDIC based contracts in Bulgaria increases, this question is a very much valid for the country.

Currently, there are two contradicting views in the Bulgarian court and arbi-

tration practice on the FIDIC multi-tier dispute resolution mechanism and its enforceability.

According to the first view, the referral of a dispute to an Engineer/DAB is a precondition for filing an admissible claim (i.e. the mechanism is recognized as a valid agreement as well as its role as a precondition for approaching a court or arbitration). Such interpretation has its foundations in the party autonomy established in Article 9 of the Bulgarian Obligations and Contracts Act (OCA). Its only limitations are the mandatory rules of the legislation and good morals. Hence, the parties are free to agree on whatever procedure they deem suitable and subsequently should comply with it. At the same time, an arbitral tribunal is obligated to follow the procedure agreed by the parties, and if the tribunal does not give due consideration to this procedure, the award may be set aside or have its enforcement refused. Thus, arbitral tribunals should consider only disputes that were duly referred to an Engineer/DAB.

This interpretation was adopted by *an arbitral tribunal of the Bulgarian Chamber of Commerce and Industry in a case decided in 2012* (one of the very few cases related to FIDIC contracts). The case concerned the FIDIC Yellow Book 1999 (providing for a 28-day term to refer disputes to an Engineer – Sub-Clause 20.1). The dispute related to the nature of the obligation for a timely referral of the dispute to an Engineer. The claimant argued that the term under Sub-Clause 20.1 constituted a preliminary waiver of rights, which is void under Bulgarian law. According to the respondent, the clause established a clear mechanism for

avoidance of bad faith conduct and for timely referral of disputes for consideration. The arbitral tribunal sustained the respondent's interpretation – the mechanism under the FIDIC forms was not a waiver of rights, but a contractual provision for referral and timely consideration of disputes on major investment projects.

A similar approach was followed by some Bulgarian courts as well. In the *Decision No. 1966 of 13.10.2015 in the commercial case No. 4069/2014, Appellate Court – Sofia, Commercial Division*, affirmed a decision of the Sofia City Court [*Decision No. 867 of 11.06.2014 of the Sofia City Court, Commercial Division, 2nd Chamber under commercial case No. 6378/2012*] which granted enforcement of a foreign arbitration award rendered in an ICC arbitration proceeding under the FIDIC Red Book 1992. In the award, the arbitral tribunal refused to consider counterclaims filed by the Contractor directly before the tribunal, but not referred to an Engineer beforehand. The Contractor argued that Sub-Clause 67.3 (which is similar to Sub-Clause 20.1. cited above) contradicts Bulgarian mandatory procedural rules and Bulgarian public order, and is therefore void. Two instances rejected this argument and granted enforcement of the award. Two things should be noted regarding these decisions: First, both instances did not deal with the matter in detail, stating only that the Sub-Clause providing for a prior referral of a dispute to an Engineer was severable from the arbitration clause. Thus, even if the Sub-Clause was deemed void (which the courts did not examine), it does not lead to the voidness of the arbitration clause *per se*. Second, the decision of the Appellate Court was signed with a dissenting opinion enclosed.

This dissenting opinion introduces the second view on FIDIC's multi-tier mechanism: referral of a dispute to an Engineer/DAB as a precondition for filing an admissible claim is void due to contradiction with mandatory Bulgarian legislation. This interpretation derives from the requirement for ensuring equality and competitive conditions for parties in judicial proceedings (Article 121, Paragraph 1 of the Bulgarian Constitution). In addition, the court should provide the parties with an equal opportunity to exercise the rights conferred on them (Article 9 of the Bulgarian Civil Procedure Code). The court (and by analogy, an arbitral tribunal) should apply the law equally in respect of all parties concerned. Therefore, by creating contractual preconditions for filing a claim, the parties violate these mandatory rules as they limit their contractual freedom. According to the dissenting judge, the non-consideration of a claim due to the non-referral to an Engineer constituted impossibility for the aggrieved party to present its case and violated Bulgarian public order.

The decision on the case was appealed before the Bulgarian Supreme Court of Cassation, which rejected the admissibility of the appeal [*Court Ruling No. 59 of 03.02.2017 under case No. 788/2016 of the Supreme Court of Cassation, I Commercial Division*]. The cassation appeal in Bulgaria is restricted and it is subject to special criteria for admissibility. The Supreme Court of Cassation found that the questions concerning the Engineer's role in the dispute resolution mechanism do not justify the admissibility of the appeal. According to the court, the Engineer's decision is not *per se* enforceable if a party refuses to voluntarily perform it. If a party does not agree to the decision, it is entitled to file a claim before an arbitral tribunal/state

court under Sub-Clause 67.3. In such a case, Sub-Clauses 67.1 and 67.2 shall not apply. Thus, according to the Supreme Court of Cassation, Sub-Clause 67, which regulates the procedure for handling claims and disputes by the Engineer, is not void. The Supreme Court of Cassation, however, did not examine in detail whether the Engineer's decision is a pre-condition for filing a claim. This is unfortunate considering the limited court and arbitration practice on the matter. The eventual interpretation on FIDIC dispute-resolution mechanism given by the highest court in Bulgaria would have created predictability and legal certainty for all stakeholders using FIDIC forms. Unfortunately, the Supreme Court did not admit the appeal.

In conclusion, the lack of clear view on the compatibility of the FIDIC mechanism with Bulgarian legislation creates serious uncertainties for domestic and foreign investors in Bulgaria. Moreover, if it is accepted that the FIDIC mechanism is void under Bulgarian law, the enforceability of awards on sometimes multimillion disputes could be seriously jeopardized.

Bulgarian legislation provides sufficient grounds for making an in-depth analysis of the matter and justifying each of the respective positions. For example, the currently prevailing position that recognizes the mechanism could be further elaborated: if the freedom of contract is not a convincing basis for the FIDIC mechanism to be recognized, other possibilities could also be used. An Engineer/DAB decision can be qualified, for example, as a third-party determination. Under Article 299 of the Bulgarian Commercial Act it is recognized that if the parties agree that a third party shall determine certain terms and conditions of the contract, such determination shall be-

come binding only in case the third party has determined them in compliance with *(1) the objectives of the contract, (2) the other provisions of the contract, and (3) the commercial custom*. Courts should examine any decision of the Engineer/DAB in the light of the said criteria. Should the decision contradict the latter, either of the parties is entitled to contest it before a court, and thus it has a mechanism available to defend its rights. This qualification has already been supported by some scholars, but has not been confirmed in practice thus far.

Considering the fact that some jurisdictions have already introduced specific legislation regarding the mandatory use of dispute boards, it is about time for both Bulgarian legal doctrine and the Supreme Court to intervene on that matter (regardless of which view will be adopted and on what grounds) in order to create legal certainty for all stakeholders willing to use the FIDIC forms in Bulgaria.

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DRBF Conference & Workshop: Mexico City



How DBs Reduce Costs and Save Money

15 & 16 November 2017

Radisson Paraiso Hotel • Mexico City, Mexico

Explore how Dispute Boards have become a best practice to avoid disputes and resolve them early--all to keep major projects on schedule and on budget. This event is especially relevant this year as Mexico explores the high value DBs bring to projects. During the conference and workshop, experienced practitioners will share their insight on best practices and lessons learned. Delegates will have ample time to share, learn and network.

On day one is an optional training workshop offered in Spanish and hosted at the Mexican Chamber of the Construction Industry - Cámara Mexicana de la Industria de la Construcción (CMIC). The conference is presented in English by international experts and features engaging presentations and lively panel discussions on the latest developments from the dispute resolution community worldwide.

- November 15 **Dispute Board Administration & Practice Workshop** - Full-day introductory course, in Spanish
- November 15 **Welcome Reception**
- November 16 **DRBF Conference** - Full-day of presentations and panel discussions with international experts, in English
- November 16 **Networking Dinner**



Event
details
at
[www.
drbf.org](http://www.drbf.org)

DRBF 17th Annual International Conference “Grab the Bull by the Horns” in Madrid

The DRBF hosted a record-breaking 185 delegates and 45 guests during the successful 17th Annual International Conference event in Madrid, 24-26 May 2017. Delegates took part in sold-out sessions, excellent education and wonderful networking. They enjoyed four interactive workshops and a conference covering 1 1/2 days in historic Madrid! Our theme, “Grab the Bull by the Horns! How To Face, Avoid And Solve Project Disputes Early.” Madrid Conference Chair Pablo Laorden and his team made sure the event ran smoothly, and supported the efforts of everyone involved.

Making this event possible was the strong support of the conference sponsors:

Platinum: Salini Impregilo and PowerChina International

Welcome Reception: Sense Studio Limited

Gold Level: Quantum Global Solutions

Silver Level: Fenwick Elliott, Gcila: Global Construction & Infrastructure Legal Alliance, Techno Engineering & Associates, Leach Group

Bronze Level: MC2 Modern, Pinsent Masons, PDS North America, CAA: Contract Administration Associates

Two New Workshops—Sold Out Sessions

The event started off with four well-attended workshops, including the popular full-day introductory Dispute Board Administration & Practice Workshop. We thank tutors Yasemin Çetinel, Jon Coates, Mark Entwistle, Jeremy Glover, Simon Fegen, Pablo Laorden and Nigel Grout for their work on that one.

The DRBF also debuted two new full-day workshops in Madrid. The Advanced Workshop with Peer Review, where tutors explored the finer points of DBs, was so popular that we had to add a second session. Both



Keynote speaker Pablo Bueno (left), immediate Past-President of FIDIC and President & CEO of TYP SA and DRBF International Conference Committee Chair Pablo Laorden.

sold out. We appreciate the efforts of Romano Allione, Richard Appuhn, Murray Armes, Nicholas Gould, Jaime Gray, Leo Grutters and Christopher Miers who were tutors for the sessions.

The second new workshop focused on Public-Private Partnership (PPP) models and how Dispute Boards help prevent disputes. Tutors Lindy Patterson, Serge Bodart and Arent van Wassenaeer led this half-day workshop.

The Conference, Day 1

We started the day with a keynote address by Pablo Bueno, immediate past-president of FIDIC, and the president and CEO of TYPSA, a global consulting engineering group with headquarters in Spain and 47 offices across the world.

Following these opening remarks were six sessions:

Dispute Avoidance & Real-Life Strategies for Managing Successful DBs, was moderated by Levent Irmak, managing director of MC2 Modern Construction Consulting and then-president of the DRBF Region 2. He and speakers Nicholas Gould, Partner, Fenwick Elliot, LLP, and Florin Niculescu, Principal, SC Ab Initio SRL, focused on best practices for avoiding disputes and included an interactive role-play.

Session 2 explored **Legislative Support of Dispute Boards in Latin America**. Moderator Fernando Marcondes, Founder and President, Brazilian Institute of Construction Law (IBDiC) and speakers: Marco Borgan, Executive Director of Investments / Cuenta del Desafío del Milen-

io – Honduras; Jaime Gray, Founding Partner, Navarro Sologuren, Paredes, Gray Abogados (Peru); and Marcela Radovic, Director and Partner of Radovic & Asociados and Founder/Director of the Chilean Construction Law Society, Master in Regulation, London School of Economics (Chile).

Two Tracks: Advanced and Introductory

A special feature for the next sessions was that they were divided into two tracks: one group for more advanced practitioners and one for those newer to DBs.

On the advanced track was **Cost Overruns And Their Impact On The Use Of DBs**, with moderator James Perry, Partner, PS Consulting, and speakers Giovanni Di Folco, President and Senior Partner, Techno Engineering & Associates Group; Leo Grutters, Civil Engineer and Dispute Resolution Expert; and John Livengood, Managing Director, Navigator's Global Construction Practice.

The second session in this track was **Launching DBs in New Regions** with moderator Christopher Miers, Managing Director, Probyn Miers. Speakers were DRBF Representatives from several countries: Sarwono Hardjomuljadi (Indonesia), Secretary General, BADAPSKI (Indonesian Centre of Arbitration and Alternative Dispute Resolution for Construction); Paul Karekezi (Kenya), Managing Director, GIBB Africa Limited; Lukáš Klee (Czech Republic), Advisor, Klee Consulting; and Pablo Laorden (Spain), Managing Partner, Lámbal Abogados.

The first session on the introductory

track was **The Role of DBs for PPP Projects Worldwide**, with moderator Lindy Patterson, QC, 39 Essex Chambers and speakers Ron Finlay, Principal and Chief Executive, Finlay Consulting; and Professor Steven van Garsse, Flemish PPP Knowledge Centre.

The second session on this track was **Getting Your First Appointment: Beginner's Luck or Good Marketing?** Sharing practical tips and experiences were speakers: Lev-ent Irmak, Managing Director, MC2 Modern Construction Consulting; Florin Niculescu, Owner and Dispute Board Member, SC Ab Initio SRL; and Geoffrey Smith, Partner, PS Consulting.

Conference Day 2

Three additional sessions rounded out a busy two and a half days in Madrid. The first session of the day was **The Construction Lawyer and DBs: Source of a Problem or a Solution?**, where experienced professionals explored the various roles lawyers play, serving on DBs and representing the parties, and how the role changes depending on the life cycle of the board. Moderator was Bernardo Cremades (Spain), Senior Partner, B. Cremades y Asociados;

and speakers Graham Easton (Australia), M.Eng.Sc., LL.B., Arbitrator and Mediator, G.R. Easton Pty Limited; Roberto Hernández (Mexico), Managing Director, COMAD, S.C. Law Firm; Roger Peters (USA), Attorney, Mediator, Arbitrator and Dispute Board Member for projects worldwide; and Ana Armesto (Spain), Attorney and Advisor, expert in arbitration and mediation.

The session on **Views from Funding Agencies and Institutional Updates** offered insight from Geoffrey Smith, Partner, PS Consulting; Abdoulaye Diarra, Project Manager, Millennium Challenge Account—Sénégal; and Giorgiana Tecuci-Păltineanu, lawyer specialized in Construction Law and FIDIC-accredited trainer.

The final session of the conference offered an interesting **Profile of a Successful DB Project**, with moderator Frédéric Gillion, Partner, Pin-sent Masons, Paris; and speakers, Mark Bendelow, Commercial Director, BAM International, Holland; and Jesús Esparza Torrecilla, Director of Contract Management, Isolux Cor-san, Spain.

The Conference Chair, Pablo Laorden, as well as DRBF Executive





Enjoying the welcome reception (left to right): William Buyse, Ron Finlay and Gerlando Butera, Sarwono Hardjomuljadi, and Xavier Leynaud

Board of Directors and Region 2 Board express sincere appreciation for the work of all speakers and workshop tutors, as well as members of the planning committee and staff.

Other Memorable Parts of the Event

The host hotel, The Palace Hotel Madrid, was a beautiful venue in the middle of the city, and a close walk to the area's fabulous art museums and shopping.

Bonus networking time for speakers, delegates and guests included the Welcome Cocktail Reception, sponsored by Sense Studios Limited, at

the nearby Palacio de Santoña. This is an historic venue and beautiful setting where delegates and guests met and enjoyed light hors d'oeuvres. The always popular Gala Dinner was at the Casino de Madrid, a more formal affair that was also sold out.

Guests also enjoyed an unusual tourism option, traditional Spanish cooking lessons, plus a full-day walking tour of Madrid.

To see the gallery of over 100 photos from the conference, workshops and networking events, visit <http://bit.ly/2v6ovUP>.

Save the Date!

**DRBF 18th Annual International Conference
23 - 25 May 2018
Park Hyatt Hotel
Tokyo, Japan**

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Forum Newsletter Editorial Deadline: 15 October 2017

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@drbf.org

DRBF Representative for South Africa - Anton van Langelaar Self-proclaimed “DB covert”

Anton van Langelaar has been the DRBF Representative for South Africa since 2012. In addition to attending and taking part in DRBF regional conferences in Africa, he and his wife, Sue, attend the annual DRBF conferences. Anton and Sue are particularly looking forward to the DRBF 18th Annual International Conference in Japan in 2018.

Anton is a civil engineer (BEng Hons / PrEng), project manager (MSc / PMP®) and arbitrator converted to Dispute Board member. His “conversion,” he reports, was the result of his first-hand experiences of unnecessary and wasteful disputes on international large projects, while residing abroad for some 14 years. He is a CEDR accredited commercial mediator, a Member of the Chartered Institute of Arbitrators and Fellow of the Association of Arbitrators (SA) and listed on several mediation and adjudication panels, including the FIDIC President’s List of Approved Dispute Adjudicators.

His focus and passion is first and foremost dispute avoidance. He gives effect to this passion, inter alia (“among other things”), by lecturing and tutoring post-graduate students and delegates from the construction industry as visiting lecturer at three South African universities and as external examiner-the most notable program being the Construction Management Program for middle management. He believes that the delegates at these programs have a receptive ear for new concepts and approaches such as dispute avoidance and standing DBs. He also tutors at DRBF workshops for experienced users. In addition to teaching, Anton is the author of several articles on DBs, published predominantly in the South

African Civil Engineering magazine. Some of his articles, including a synopsis of his MSc thesis on DBs in Southern Africa, have also appeared in Arbitration, the Chartered Institute of Arbitrators’ International Journal of Arbitration, Mediation and Dispute Management.

In practice, Anton embraces and strongly advocates the principles of dispute avoidance as practicing DB member and contracts specialist. He has worked as dispute avoidance and resolution practitioner in arbitration, conciliation and adjudication in Asia, Europe and Africa. The bulk of his current DB engagements are abroad in civil and common law jurisdictions, and he is privileged to have served / be serving with prominent international DB practitioners.

In days gone by, Anton was an avid skydiver and is still a keen scuba diver when the opportunity arises. He reports that he is contemplating renewing his private pilot’s license but is currently prioritizing 4x4 travel in Africa and Central Asia and mountain biking. He also dabbles in wildlife photography (all with Sue), electric skateboards and quadcopters. Anton and Sue also contribute to the relocation of wildlife between game reserves, with recent relocations being lions and wild dogs.

Anton and Sue have two daughters, one a jewellery designer in Cape Town, South Africa, and the other presently undertaking a research PhD in the Netherlands, where she has settled.

Anton van Langelaar invites you to contact him at antonvl@mcwap.co.za



Anton van
Langelaar
DRBF
Representative
for South Africa

Welcome to New DRBF Members

*The DRBF
welcomes over
100 new
members who
joined in the
past quarter!*

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***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) or contact the main office for details and a membership form.