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By Renata Faria
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Dispute Boards in Brazil *Amendments Suggested to the Brazilian Administrative Bidding and Contract Law by the Arbitration Committee of OAB/MG, the Brazilian BAR Association*

As mentioned in the presentation of DRBF Brazilian representative Fernando Marcondes at the DRBF International Conference held in Madrid in May 2017, I suggested to the Senate of the Brazilian Government five amendments to the Brazilian Administrative Bidding and Contract Law. I made the suggestions as a member of OAB/MG's Arbitration Committee, which is chaired by Mr. Francisco Maia.

These suggestions received a warm welcome as the use of Dispute Boards (DBs) and other means of conflict resolution by the public administration in Brazil are a reality. Recently, the

Federal Justice Council for Extrajudicial Resolution of Conflicts published 87 guidelines regarding the use of DBs, Arbitration and Mediation as a way of stimulating the private and public use of these means of conflict resolution.

The first suggestion was made with the goal of including DBs as a mean to resolve disputes arising out of contracts involving the Brazilian Public Administration.

This suggestion was accepted by the Senate and the new text of the law - which includes the use of DBs in public

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President's Page

Dear DRBF Members, Dispute Board Users and Friends of the DRBF,

Welcome to the first DRBF *Forum* of 2018.

Annual Meeting 2018

In the last edition of the President's Page, I made reference to a proposed strategy of ensuring that DRBF's governance systems, practices and procedures are undertaken in a professional manner consistent with world-class best practice. It was in this context that I recently announced that the Annual Meeting of DRBF will held in conjunction with the DRBF International conference in Tokyo, Japan, on Friday, 25 May 2018. The Annual Meeting will be the occasion for the presentation of DRBF's Annual Report and the 2017 Financial Statements. The DRBF Annual Meeting will also be broadcast by audio-conference, webinar or other electronic means to allow for the widest possible participation.

FIDIC Suite of Contracts 2017

You would be aware that the International Federation of Consulting Engineers (FIDIC) in December 2017 launched its latest suite of standard forms of contract (the Red, Yellow and Silver Books). Each of the FIDIC Contracts contains a standing Dispute Board, now called "Dispute Avoidance/Adjudication Board" and highlights the important function that FIDIC encourages for dispute avoidance for all projects. As Romano Allione pointed out in his letter to the editor in the last edition of the *Forum*, avoiding disputes has been at the forefront of the DRBF movement. Increasing the emphasis on avoidance and implementing a vast range of techniques to assist in avoidance have been features of modern day Dispute Boards.

Canon of Ethics

Assisted by DRBF Members throughout the world, the DRBF Executive Board recently approved the amended and updated wording of DRBF's Canon of Ethics, now named the Code of Ethical Conduct [see page 7]. I encourage all DRBF Members to review the latest version.

With best wishes



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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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contracts - was recently sent to the House of Representatives for approval.

The justifications submitted to the Senators for the inclusion of the DBs in the Brazilian Administrative Bidding and Contract Law and the language of the provision are shared here.

Justifications for the suggestion:

The possibility of using Alternative Means of Conflict Resolution (MESC) such as arbitration, mediation, conciliation, and Dispute Boards by the Public Administration in Brazil is already a reality that permeates the contracts signed between the government and private parties. This is true especially in contracts that have external financing. These contracts have alternative means of dispute resolution incorporated in their clauses in order to comply with the guidelines of financing institutions and with article 42, paragraph 5, of Law 8.666/93.

It is a fact that the Brazilian legislative power has come to recognize the MESC in several legal provisions that regulate the various modalities of contracts signed between individual parties and the Public Administration. For example, the Concessions and Permits Law (Law 8.987 [1995]), the Petroleum Law (Law 9.478 [1997]), and the Public-Private Partnership Law (Law 11.079 [2004]) all include arbitration and/or mediation and/or conciliation as an alternative to resolve any conflicts arising from these contracts. The Brazilian Arbitration Law itself provides in its article 1 paragraph 1 that agencies of the direct and indirect Brazilian Public Administration may act as a party to an arbitral proceeding. Additionally, the New Brazilian Civil Procedure Code, enacted in 2015,

requires compulsory mediation and conciliation at the beginning of judicial proceedings in all civil actions (article 334).

In this context, the work of DBs, which are used in large scale in international engineering contracts, deserves to be emphasized by the Brazilian legislature. Although the Brazilian legal system does not yet expressly include DBs as a mean of dispute resolution, dispute resolution institutions in Brazil already have specific regulations for DBs. These institutions include CBMA in Rio de Janeiro, CAM-CCBC in São Paulo, and CAMARB in Minas Gerais. (The DRBF signed a collaboration agreement with CBMA in September 2016.)

The DBs are boards composed of expert and impartial professionals, who are trained at the beginning of the project to monitor the progress of the works, encourage the prevention of disputes, and assist in resolving any disputes during their execution. DBs can also be assembled on a case by case basis, when the controversy arises, as “ad hoc” boards.

DBs may issue decisions for immediate compliance or recommendations. Although these decisions must be fulfilled by the parties, they can normally be questioned through arbitration or judicial proceedings within a set period of time depending on the contractual provision.

The first experience with DBs in Brazil occurred in 2003, in the contracts for Line 4 of the São Paulo Metro. DB provisions were also included in the contracts for the construction of a highway in the state of São Paulo called Rodoanel. These contracts have a staggered clause for the resolution of conflicts and provide the use of DBs as an amicable solution

View the text of the law at:

http://www.camara.gov.br/proposicoesWeb/prop_mostrarintegra?codteor=1523083&filename=PL+6814/2017

The provision regarding the use of DBs is in Art. 86, §3 of the law text.

before arbitration. All of these contracts received external financing and therefore were required to have DBs clauses, as per the guidelines of the financing institution and article 42, paragraph 5, of Brazilian Law 8.666/93.

It is, thus, clear that these alternative means of dispute resolution are already a beneficial reality—they help to solve conflicts in a short time, saving the parties’ time and money—and have been adopted in Brazil (more recently) and in the world (already since the middle of the last century) for the settlement of

disputes arising from contracts entered into between public and private parties.

Therefore, in an effort to recognize and incentivize the use of DBs in Brazil, the Brazilian Senate has accepted the suggestions below with the goal of keeping Brazilian administrative contracts up to date with international practice and the reality on the ground of Brazilian administrative contracts.

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Chamber of Senates Bill number 559/2013 wording, opinion approved on 11/9/2016 CEDN	Suggestions that were presented by the lawyer members of the Arbitration Committee of OAB/MG	Chamber of Deputies Bill number 6814/2017 current wording
<p>Art. 86. Necessary clauses in every contract are those that establish that:</p> <p>§ 3º If foreseen in the bid notice, the contract may provide alternative means of settling disputes, including issues concerning the economic-financial balance of the contracts being allowed the establishment of arbitration and mediation clause under the terms of Law 9.307, dated September 23, 1996 and Law 13.140, of June 26, 2015.</p>	<p>Art. 86. (...)</p> <p>§ 3º The contract or subsequent instrument concluded between the parties may provide for alternative means of settling disputes, including issues concerning the economic-financial balance of the contracts being allowed arbitration, mediation, conciliation and other alternative dispute resolution means, especially, dispute resolution boards.</p>	<p>Art. 86. Necessary clauses in every contract are those that establish that:</p> <p>§ 3º The contract may provide alternative dispute resolution means, including issues concerning the economic-financial balance of the contract being allowed especially, arbitration, mediation, conciliation and dispute resolution boards.</p>

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DB Groundbreaking Law - São Paulo, Brazil

By Ricardo
Medina Salla

Pleasant news come from the city of São Paulo, South America's most populated town and driving force of the Brazilian economy. The City Mayor has just passed the law 16,873/2018, promoted by Councilman Caio Carneiro and drafted by the DRBF member Ricardo Medina Salla, which recognizes the use of Dispute Boards, in its purest essence, in administrative contracts, public concessions, PPP etc).

The new law of São Paulo has already echoed positively in the various academic and professional forums, which see in the tool an excellent remedy for the overwhelming planning deficiencies that plague contracts of the public administration, especially those involving civil works and infrastructure. Foreign investors and market players are already encouraged by the greater legal certainty that DBs can bring to new national ventures.

This is a pioneering measure. For the first time in the history of the country, the Dispute Boards gain legal recognition. If there was no prior prohibition on the use of the Dispute Boards, it is unquestionable that public agents used to be very reluctant to adopt the mechanism, claiming lack of legal authorization. This shall no longer be a problem as the institute is now legally acknowledged

as a legit tool for solving controversies arising out of administrative contracts.

In fact, the law is quite accurate and concerned to bring comfort to the public agent about the method and its applicability. With even pedagogical characteristics, it recognizes the Dispute Boards in its three modalities: adjudication, review and combined.

The law also deals with the responsibility of members and their competence (technical and legal), requiring them to act impartially, independently and diligently. While regulating remuneration, the law imposes on the contracting parties (owner and contractor) the division of fees.

Inspired by the new legislation, the City of São Paulo has already released privatization packages, containing clauses that provide for the use of Dispute Boards. This is the case of the Santo Amaro Market Concession, released for public consultation on February 24, 2018.

The future looks bright. Citizens, professionals and the market, in general, have shown great optimism with the groundbreaking initiative of the city of São Paulo in the adoption of Dispute Boards.

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 information about Dispute Boards, DRBF members, or an article to share, please let us know! Contact Forum Editor Ann Russo McGough at amcgough@drb.org. Deadline for the next issue:

June 1, 2018

The DRBF Code of Ethical Conduct

Published March 2018

INTRODUCTION

The DRBF has been in the process of updating the *DRBF Practice and Procedures Manual*, expected to publish later this year. As part of that process, the DRBF's Code of Ethical Conduct has been updated to reflect current best practice.

The independent and impartial role of a DB makes it essential that Board members act in a highly ethical manner. For a DB to function effectively, Board members must establish and maintain good working relationships based on trust and integrity, both between the DB members and with the contracting parties.

To this end, DRBF's Code of Ethical Conduct sets out the key aspects of personal conduct to which each Board member must observe throughout the DB process.

The updated Canons received input and approval from all DRBF Regional Boards and they were ratified by the DRBF Executive Board of Directors at their February meeting. They are available for download from the DRBF website, and will be used in DRBF training going forward.

CANON 1 – CONFLICT OF INTEREST AND DISCLOSURE

Board members must avoid the appearance of, or any actual, conflict of interest during the term of the Dispute Board. Board members must disclose, before their appointment, any interest, past or present relationship, or association that could reasonably be considered by a contracting party as likely to affect that member's independence or impartiality. If, during the term of a Dispute Board, a Board member becomes aware of any fact or circumstance that might

reasonably be considered by a contracting party as likely to affect that Board member's independence or impartiality, the Board member must inform the other Board members and disclose the matter to the contracting parties.

CANON 2 – CONFIDENTIALITY *Board members must ensure that information acquired during the term of the Dispute Board remains confidential and must not be disclosed, unless such information is already in the public domain. Any such confidential information may only be disclosed if approved by the contracting parties or if compelled by law. Board members must not use such confidential information for any purpose beyond the activities of the Dispute Board.*

CANON 3 – BOARD CONDUCT AND COMMUNICATIONS

Board members must conduct all Board activities in an expeditious, diligent, orderly, and impartial manner. Board members must act honestly, with integrity and without bias. There must be no unilateral communications as between a Board member and a contracting party, except as permitted under the Dispute Board operating procedures.

CANON 4 – BOARD PROCEDURES

All Board meetings and hearings must be conducted in accordance with the applicable contract provisions and operating procedures, in a manner that provides procedural fairness to the contracting parties. Dispute Board recommendations and decisions must be made expeditiously on the basis of the provisions of the contract, the applicable law and the information, facts and circumstances submitted by the contracting parties.



CONTINUED

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Meyer Construction
Consulting, Inc.
Mole Constructors, Inc.
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Cooperation Agreement Signed Between DRBF and Arbitration Institute of Ethiopia

By Michael Gunta
DRBF Representative for Ethiopia

The Dispute Resolution Board Foundation (DRBF), a non-profit organization based in North Carolina (USA), and the Arbitration Institute of the Addis Ababa Chamber of Commerce and Sectoral Associations (AACCSA AI), based in Addis Ababa (Ethiopia) signed a landmark agreement opening up opportunities for extensive cooperation for advancing efforts to address construction disputes utilizing the services of Dispute Board appointed by parties to a contract. The agreement was executed by Mr. Murry Armes, President, Region 2, on behalf of the DRBF, and by Mr. Yohannes Wolde-Gebriel, Director of the Arbitration Institute, on behalf of the Institute with effect as of 20 Oct 2017.

In this agreement, the DRBF and AACCSA AI committed to:

- participate as volunteers in each organization's sponsored workshops, committees, working groups, panels, or boards, to identify future training needs and methods to improve dispute avoidance and resolution,
- organize domestic and international seminars, conferences, symposia, webinars, and meetings in Ethiopia,
- suggest professional practitioners who can act as potential arbitrators, mediators, experts or dispute board members on request by either organization, without any liability on each of the parties.
- facilitate the payments of membership and training courses/seminars/workshop fees.

[Brief on Adjudication & Dispute Review Practices in Ethiopia](#)

In the present article, I briefly discuss Adjudication and Dispute Review Expert (DRE) as used in Ethiopia to resolve construction disputes before either party commences arbitration or court proceedings. Both types have been practiced, distinct to each other in the scope and duration of services provided but resulting in binding decisions unless properly challenged.

The practice of DRE was first imported into Ethiopian contracts approximately 18 years ago in the year 1999 under the federal road construction and rehabilitation projects financed by the World Bank. An elaborate rule describing the functions of DRE, the procedures of appointment and payment for services, among others, formed part of the construction contract. DREs have been appointed jointly by the Employer and the contractor during early or mid stage of the project implementation, and remained in services for the duration of the project/termination of dispute, even after project closure. Though the name of DRE has changed to DRB (Dispute Review Board), only one individual has been appointed on road projects to date regardless of the size and complexity of a project.

Adjudication was first officially introduced into Ethiopia under two contract clauses 11 years ago in the Standard Bidding Documents for the Procurement of Works (Version, January 2006) issued by the Public Procurement Agency, which is accountable to the Ministry of Finance and Economic

Development. Those two contract clauses are quoted below:

“24. Disputes

If the Contractor believes that a decision taken by the Engineer was either outside the authority given to the Engineer by the Contract or that the decision was wrongly taken, the decision shall be referred to the Adjudicator within 14 days of the notification of the Engineer’s decision.

25.1 The Adjudicator shall give a decision in writing within 28 days of receipt of a notification of a dispute.

25.2 The Adjudicator shall be paid by the hour at the rate specified in the Bid Data Sheet and Special Conditions of Contract, together with reimbursable expenses of the types specified in the Special Conditions of Contract, and the cost shall be divided equally between the Employer and the Contractor, whatever decision is reached by the Adjudicator. Either party may refer a decision of the Adjudicator to an Arbitrator within 28 days of the Adjudicator’s written decision. If neither party refers the dispute to arbitration within the above

28 days, the Adjudicator’s decision will be final and binding.

25.3 The arbitration shall be conducted in accordance with the arbitration procedure published by the institution named and in the place shown in the Special Conditions of Contract.”

As defined under Clause 1.1, the “Adjudicator” is the person appointed jointly by the Employer and the Contractor to resolve disputes in the first instance. This definition assumes an adjudicator as one individual.

Under the PPA 2006 version, the Adjudicator stepped in to act only when a dispute had arisen and was called for by the contractor to review a decision taken by the Engineer. In projects where no dispute had arisen, there had been no need to call Adjudicator even if appointed earlier. In real practice, most projects ended up without an Adjudicator being appointed.

I had the opportunities to act in different capacities as an arbitrator, employer’s counsel and contractor’s counsel in arbitrations under PPA 2006



Murray Armes (l) and Michael Gunta (r) sign the agreement at a meeting in Chicago, IL U.S.

version forms but found no adjudicator appointed at all. Among the defects of this version include: lack of compulsive undertaking to appoint an Adjudicator within predetermined time limit, as well as failure to set out remedial measures to circumstances where disputes arise in the absence of adjudicator.

In all situations known to me, respondents to arbitration raised preliminary objections resisting commencement of arbitration without Adjudication having been utilized first, while aware that no adjudicator had been in place to see and resolve disputes. In such instances, arbitrators or courts had to spent valuable time in considering such objections which would have otherwise been avoided if the adjudication clause had been properly enforced.

The PPA replaced its 2006 version with 2001 version with a dispute resolution clause stated below:

“26 Settlement of Disputes

26.1 If a dispute arises between the Employer and the Contractor in relation to any matter which cannot be resolved by the Engineer and the Contractor’s Contract Manager either of them may refer such dispute to the procedure described in GCC Sub-Clause 26.4

26.2 In the second instance each of the Employer and the Contractor shall appoint more senior representatives than those referred to in Sub-Clause 26.3 to meet solely in order to resolve the matter in dispute. Such meeting(s) shall be minuted and shall be chaired by the Employer (but the chairman shall not have a casting vote). Such meeting(s) shall be conducted in such manner and at such venue (including a meeting conducted over the telephone) as to promote a consensual resolution of the dispute in question at the discretion of

the chairman.

26.3 If the Parties fail to resolve such a dispute or difference amicably within twenty-eight (28) days from the commencement of such procedure, either party may require that the dispute be referred for resolution through the courts in accordance with Ethiopian Law.

26.4 Only those Public Bodies that are allowed by law to proceed to arbitration can do so.”

Clause 2.1 (d) of the same General Conditions of Contract defined the Contract Manager as “a person designated as such by the Contractor from time to time as notified in writing to the Employer to act as the duly authorized representative of the Contractor for all purposes connected with the Contract, including any authorized representative of such person.”

It is very strange to find in the construction industry such a unique method of dispute resolution which is neither Adjudication nor Dispute Review Expert. If attempt for settlement failed or a decision by the Adjudication or Dispute Review Expert were rejected, either the employer or the contractor would be at liberty to refer disputes to courts. But, public bodies are not allowed to settle their disputes in arbitration unless specifically so authorized by law. Very few public bodies are permitted to resolve their disputes in arbitration.

If taken as is without amendment under the Special Conditions of Contract, disputes arising in connection with contracts financed by public bodies would never enjoy the benefit of referral to Adjudication or Dispute Review Board and arbitration. Since it is only employers that determine contents of the contract documents in advance,



Signing ceremony at the AACCSA AI in Addis Ababa, Ethiopia.

contractors would have no choice except bidding on the basis of the documents issued by the employers without amendment, or propose amendment during the bidding process or withdraw from the bid, loosing opportunities to get work in a competitive market. In my opinion, Version 2011 of the PPA Bidding Documents demonstrates that the Ministry of Finance lacked capacity to review current global experience and trends in relation to various alternative methods of dispute resolution and avoidance.

Concluding Remarks

Adjudication and DRE are different in some respects, but the effects of their decision are similar. No statistical data is available on the number of projects using a DRE on Ethiopian contracts, international or domestic. Likewise, I have not heard if DREs have been used outside the federal road projects.

The Cooperation Agreement came into effect at a moment when dispute adjudication is experiencing practical problems in the construction industry. In fact, both Adjudication and Dispute Review Expert have been in use on limited projects for over a decade, but none of them received warm welcome to date either by project owners or by contractors simply because they are

incorrectly viewed (in my opinion) as additional expenses to both sides with no guaranteed benefits.

In several contracts to which I have had access, the Addis Ababa Arbitration Institute has been named under Special Conditions of Contracts as an organization whose arbitration rule was to apply, and as an arbitrator-appointing authority for disputes unresolved by Adjudication or otherwise. In addition, it has become common practice to designate the Arbitration Institute as appointing body of adjudicator as well.

Based on the most recent statistics, Adjudication in all of its forms have been successful on unimaginable scale by avoiding more than 80 % of construction disputes worldwide which would have otherwise been referred to courts or arbitration. It is my hope that the Cooperation Agreement signed between the Ethiopian Arbitration Institute and the DRBF would make significant contributions by promoting the capacities of Ethiopian engineers and lawyers through their participation in various workshops, seminars, conferences, symposia and webinars.

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ACCEPT OR REJECT - WHY?

INTRODUCTION

Many Dispute Board (DB) specifications (including the DRBF's Guide Specification) provide that the parties must advise whether they accept or reject the DB recommendation or decision (DB report) within a certain number of days. This article explores whether this standard requirement should be reconsidered and/or modified so that parties have maximum opportunities to resolve disputes without further legal proceedings after the formal DB process.

BACKGROUND

By way of example, DRBF Guide Specification Section G.5 provides as follows:

5. Acceptance:

a. The OWNER and the CONTRACTOR shall submit their written acceptance or rejection of the report concurrently to the other party and to the DRB within 14 days of receipt of the report or following receipt of responses to requests for clarification or reconsideration.

b. Failure by either party to accept or reject within the specified period shall be construed as acceptance of the report by that party.

c. Acceptance by the OWNER of a report on entitlement only, or on entitlement with guidelines for quantum, does not obligate the OWNER to any particular quantum amount.

It is perfectly logical—and standard practice—for the parties to indicate to the DB (and each other) whether they agree or disagree with the DB's report. Otherwise, how would the process move to the next step (typically arbitration or litigation), if there is not some finality to the DB formal dispute process?

This rationale was questioned at one of our DRBF training sessions: “Why do we require parties to accept or reject recommendations?” I gave the standard answer: “The purpose of this step is to

bring finality to the DB process.” But I was challenged again: “Why? Doesn't this force the parties to ‘take a position’ rather than further exploring whether the dispute can still be resolved?” This is a good question which prompts consideration of an alternative approach.

ANALYSIS

The fundamental purpose of the DB formal hearing process is to assist the parties in resolving the dispute, with the advice of the DB after hearing all arguments. The question is whether requiring parties to accept or reject can lead to unintended consequences, such as the following:

1. “Accepting or rejecting” forces the parties to analyze the DB's report with a critical eye—often asking the wrong question: “Did we win or lose?” The typical responses are: “If we ‘won,’ we of course accept” or “If we ‘lost,’ we of course reject.” This is not consistent with one of the principles of the DB process, which is to bring the parties together on a resolution of a dispute, not drive them further apart.

2. Requiring an “accept or reject” decision sets it up as an adversarial issue rather than a path to resolution: first, the parties have to make one of two choices, accept or reject; second, each party has to analyze the DB report or decision in light of the consequences of moving to the next step, which may entail formal legal proceedings; third, each party has to tell the other party (with the bad feelings that may result). For example, one key player—the lawyers—often look at the potential response from a tactical standpoint: how will our position on the DB recommendation/decision affect our position on the next step of the process (arbitration or litigation)? This is particularly germane if the DB recommendation or decision is admissible in later legal proceedings.

3. These factors are exacerbated by some DB specifications providing that the failure to accept timely constitutes acceptance. This again forces the parties to look at the report



By Kurt Dettman

as a “do or die” proposition. Some may question whether this type of “fear factor” should be the overriding consideration in the DB process: “If I don’t do something, I will lose, so better to reject and preserve my options”.

4. Finally, some parties may “reject” a DB report for strategic reasons—to buy more time, or force it to the next stage which may inflict (monetary) pain on the other party, or worse, use a strategy of sending all rejected recommendations/decisions to the end of project in the hopes that the other party will be more motivated to bargain down when closing out the project. Thus, rejection becomes a negotiating weapon as opposed to a principled position.

RECOMMENDATIONS

I am not proposing that the “accept or reject” choice be completely deleted, since there does need to be finality to the DB process, especially where it triggers further legal proceedings. I am, however, proposing that it be changed as follows to bring it more in line with its intended purpose: help the parties do a collaborative risk assessment and use the DB recommendation or decision as a basis for resolving the dispute.

1. Within 30 days after receipt of the DB recommendation/decision, the parties would be obligated to convene an in-person meeting of principals to review and discuss the DB recommendation/decision (which could be extended, by agreement). This could include exchange of a summary of areas of agreement and disagreement. The parties could jointly agree to ask the DB for clarification if that would help them better understand the DB recommendation or decision. Hopefully, these discussions would lead to a negotiated resolution based on party discussions of risk/reward in continuing to the next step.

2. A variation on this process could be used on partnered projects. The partnering facilitator could be activated to facilitate the parties’ resolution discussions. For example, California Department of Transportation (Caltrans), in its “Field Guide to Partnering,”

(http://www.dot.ca.gov/hq/construc/partnering/documents/Field_Guide_to_Partnering_on_Caltrans_Construction_Projects_final.pdf) allows the partnering facilitator to conduct what is referred to as “facilitated dispute resolution.” Facilitated dispute resolution, therefore could be used after receiving a DB recommendation/decision but before the parties decide whether they have to accept or reject. As another example, the author is advised that on some Australian projects the DB can be asked to assist the parties’ principals in resolving the dispute, taking into account what the DB concluded on the merits of the dispute.

3. After the parties discuss the recommendation at this meeting or otherwise, but no later than agreed upon time period after receipt of the DB report, they would inform the DB whether or not they had been able to reach resolution of the dispute. The parties also would be obligated in their notice to the DB to explain the basis for their position vis-à-vis what the DB had recommended. Thus, the parties’ notice becomes “we did not reach a resolution.” Implicit in this notice is “rejection” of the DB recommendation/decision, since it did not lead to resolution of the dispute, but it is not “rejection” in the binary “accept or reject” choice under current practice. After this notice to the DB, the parties would be free to pursue the next steps in their process, reserving their positions including formal legal proceedings.

CONCLUSION

A challenging question led to consideration about whether it is time to re-think what parties are asked to do after receipt of the DB’s report after a formal hearing. The approach proposed is to turn the DB report into something that the parties, together, are obliged to consider before moving to formal legal proceedings.

Kurt L. Dettman is President-Elect of the DRBF Executive Board of Directors and serves on the Manual Update Committee. He can be reached by email at kdettman@c-adr.com.



The issue raised in this article is being evaluated by the committee updating the DRBF Manual. Comments on the topic are welcome; send to Ann Russo McGough at amcgough@drb.org.

DRBF Representative for Japan: Takashi Okamoto

In 2016, Takashi Okamoto was appointed as the DRBF Representative for Japan. Since then, he has actively organized periodic meetings and seminars with relevant organizations. He works for JICA, Japan International Cooperation Agency, as a senior advisor. He is a civil engineer, MSc of Engineering, adjudicator Japan National List, Member of ECFA, SCL and ACI Arb. Using his considerable experience, Takashi shares below some examples and lessons learned about the role of Dispute Boards. He can be reached at Okamoto.Takashi@jica.go.jp.



Takashi
Okamoto

DRBF
Representative
for Japan

One day a project owner argued whether he could directly manage the project without employing a supervision consultant. He had never been satisfied with consultant's performance and asserted that the consultant was not only unreliable, but even deceitful. He also said that sufficient consultation had never been made before issuing instructions or variations. The owner complained and demanded that he would terminate the construction contract during the middle of the project. The reasons he gave were that the contractor considerably delayed without excusable causes, and that the project manager was not capable. Having discussed the issues further, it appeared that the owner, the contractor and the consultants were all distrusting of the others, and reliable communication systems seemed to have never been established.

Since I started working for JICA, similar incidents as described above have frequently occurred, and it is easy to imagine that it is far too difficult to keep reliable and efficient communications among the parties through a long project term regardless of whether all persons in the project practice good communications.

Most problems and disputes originate from disruptive communications. Once party

members begin to stick to their beliefs, it is really hard for them to resolve the dispute only by themselves. Only a Dispute Adjudication Board can facilitate resolution of such situations through providing continuous managerial and contractual support. The new edition of FIDIC Conditions 2017 renamed Dispute Boards as DAABs, Dispute Avoidance and Adjudication Boards, which aims obviously to strengthen dispute avoidance functions and expects smooth reliable communications among the contractual parties.

DRBF members in Japan hold periodic meetings, inviting people from related industries such as law firms, construction companies, consultants, insurance companies, trading companies, plant manufacturers, etc. Topics addressed are quite diversified and might include Dispute Board rules, examples of Dispute Board decisions, PI insurance, open-book contract, etc., and in March 2018, we discussed the new FIDIC DAAB rules. We also have a connection with the Japanese construction companies' association (OCAJI), the consultants' association (ECFA) and the engineering companies' association (ENAA), and are promoting Dispute Boards in the projects funded by JICA.

In most Asian countries, standing Dispute Boards have rarely been adopted. Many project owners believe that Dispute Boards are too expensive, that they are not permitted by their governments and that any payments to the Dispute Boards are not permissible until an occurrence of dispute. We, as the members of DRBF in Japan, must keep talking with all relevant people and make them realize that Dispute Board costs are an indispensable element of the project cost if they want the project to be successful.

2017 Al Mathews Award Recipient:

Douglas J. Holen



Each year, the Dispute Resolution Board Foundation presents the prestigious Al Mathews Award to a DRBF member who has given exemplary service in advancing the use of the Dispute Board concepts and the DRBF. Nominations are solicited from members and the Executive Board of Directors. The award is presented at a dinner hosted in conjunction with the DRBF Annual Meeting & Conference, held in 2017 at Harry Caray’s Steakhouse in Chicago, Illinois.

Congratulations to this year’s recipient, Doug Holen.

Doug Holen has an impressive career as a professional engineer spanning 48 years. He is the former Director of Capital Projects–South at the University of Washington in Seattle, Wash., U.S. While at the University, Mr. Holen was responsible for the planning, design and construction for facilities for the Academic Medical Centers at the University, and for facilities for the School of Medicine and Health Sciences and the branch campus in Tacoma. He served as the Governor’s appointee representing higher education on the Alternate Public Works Oversight Committee in Washington State for five years, advising the Governor and

Legislature on alternative Public Works Contracts matters including GC/CM.

He currently serves as a consultant to several public owners utilizing alternate public works procurement processes (GC/CM, CMAR, Design-Build) and is the chair or member of Dispute Resolution Boards for building, transportation and heavy construction projects in California and Washington State. He is also on the DRBF roster of public owners in Colorado.

Mr. Holen is a member of the AAA Construction Panel, the Design-Build Institute of American, and the Society of College and University Planners. He served two years as chair of the Northwest Construction Consumer Council.

For the DRBF, Mr. Holen has served in several leadership positions including President of the Region 1 (US and Canada) Board of Directors in 2011-12 and President of the Executive Board in 2015-16. He is active in numerous committees, including Outreach, Training, and Manual/Publications, and he steered the recent development of the DRBF’s Policy and Administrative Procedures Handbook.

21st Annual Conference in Chicago

The DRBF is grateful to the following conference sponsors:

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The DRBF's 21st Annual Meeting & Conference took place in the "Windy City" in September 2017 at the Westin Chicago River North. The event started Thursday with educational workshops. Schiff Hardin hosted a welcome reception for guests at the Metropolitan Club located in the Willis Tower, and cocktails, appetizers, and spectacular views were enjoyed by all.

The theme of the conference was "Improving the DRB Process" with an emphasis in the various sessions on how to improve the DRB process through better oral and written communication, avoiding cost and schedule pitfalls, and making informal hearings effective.

The conference was opened by David Reifman, Commissioner of the Department of Planning and Development, City of Chicago. He is a strong infrastructure advocate and spoke about the current and planned infrastructure projects that mayor Rahm Emmanuel has planned for Chicago.

One of the country's top mediators, Eric D. Green of RESOLUTIONS, LLC, kicked off the first session "How to Effectively Communicate Difficult Positions." Prof. Green highlighted a series of difficult positions and topics that he has confronted throughout his career and how he has effectively communicated tough messages. He gave the DRBF an insider's look at how he choreographs a series of meetings and messages to ensure participants fully understand not only their position, but just as importantly, their opponents' position. This insider's look at how one of the country's best mediators communicates difficult messages should help all DRBF members in future meetings.

Larry McEnerney, Director of the Writing Program at the University of Chicago addressed "The Keys to Writing a More Effective Opinion." Larry highlighted that writers must write from the reader's perspective and that writings should be

simple and to the point. His presentation was a big hit with the vast majority of attendees, with many wishing they could have had another hour of Larry's insights on how to write a more effective opinion.

After lunch, Deborah Bovarnick Mastin chaired the session on "How to Write a More Effective DB Opinion from the End-User's Position." Panelists included Sam Hadley, Tina Millan, Thomas Shelby, and Ken Smith. It was an eye-opening presentation given that in many cases, the true decision makers are not in the DRB hearings. It reemphasized the importance of writing an effective opinion and understanding the audience when writing that opinion.

Chicago is one of the few cities with dispute resolution programs at top law schools and this panel concentrated on the "Academic Perspective of what Works in DBs: How to Effectively Get Your Point Across." This session was moderated by Adrian Bastianelli, III and panelists included Stan Sklar, Teresa Frisbie, and Alyson Carrel. The panelists provided a perspective on how decisions are made from a scientific perspective based on recent studies of decision making and reinforced that those who teach ADR in law schools are unaware of the DRB process.

Harold McKittrick led the final session of the day "How to Make Informal Hearings Effective" with a panel that included Warren Bullock, Pete Douglass, and Jim Haggins. They gave an insightful analysis based on its years of experience as to how informal hearings can improve the DRB process.

The Al Mathews Award dinner was held Friday evening at Harry Caray's Italian Steakhouse. The Al Mathews Award winner was Doug Holen. Awards were then presented to projects that best used DBs in 2017. The projects were:

Interstate Highway Reconstruction Project ALL-75-0.2; Ohio Department

of Transportation and Beaver Excavating Company and **Eastbound George V. Voinovich Bridge-CCG2**; Ohio Department of Transportation and Turnbull-Great Lakes-Ruhlin, JV.

Harold McKittrick moderated Saturday's first session "Round Robin of Hot Topics," followed by "Avoiding Pitfalls on Cost and Scheduling Presentations to Dispute Boards" moderated by Ken Roberts. Panelists included Toshikazu Dezaki, Ron Grant, Scott Lowe, and William D. Guerier. This panel of top cost and scheduling experts discussed from an expert's perspective what third-parties get wrong when listening to expert witnesses as it relates to both cost and schedule.

The final panel, chaired by Murray Armes,

and consisting of Romano Allione, Dick Appuhn, and Thiago Fernando spoke of their "Experiences from International Dispute Boards." After lunch, a group of about 20 delegates and guests were led on a site tour of the Chicago Riverwalk by Oswaldo Chaves, a civil engineer with the Chicago Department of Transportation.

The conference workshops and programs were very successful and well received. The DRBF is grateful to the conference planning committee members, Ken Roberts (chair), Hal McKittrick, Matt Michalak, Adrian Bastianelli, III, Val McWhorter, and Executive Director Ann Russo McGough and her staff. See you at the next annual conference in Charlotte, NC, U.S.!

Jimmy Lairscey Inducted into 2018 Florida Transportation Builders Association Hall of Fame

Longtime DRBF member and Recipient of the DRBF Al Mathews Award in 2003, Jimmy Lairscey was recently recognized by the Florida Transportation Association Builders' (FTBA) annual awards dinner when he was inducted into the organization's Hall of Fame. Following is a summary from the awards program.

Jimmy Lairscey's career began working with the State of Florida as a Rodman on the Survey Party at the Resident Office in Safety Harbor in 1956. That was a different era though. There were no interstate miles, no cross-state toll road, no major four lane divided highway. Jimmy watched and was a part of the changing landscape of the State Road Department for the next 30 years.

From the technician ranks to the professional engineering field, Jimmy worked on all of the major bridge projects including the Sunshine Skyway. He was there, as a Project Engineer, when the bridge became a four-lane span. With both his experience, and from attending night school for his Associate's degree, he was able to sit for and pass the Engineering License Examination.

Instead of retiring in 1986, he was appointed to the newly formed District 7 Construction Engineer position. Jimmy improved relations between the Department of Transportation and contractors by inviting contractors to attend monthly Project Engineering meetings and take an active role in the discussions. He also, with Bob Burseson, set up the FDOT/FTBA conference

that is held every year, with DOT employees, consultants and contractors.

In 1990 Jimmy was appointed as the Director of the Office of Construction in Tallahassee, providing an avenue in which he could change the dispute resolution process from within. As a member of the Dispute Resolution Board Foundation, he created a dispute review process in Florida comprised of a three-person team which makes recommendations so issues are resolved before a court case is needed. This foresight earned Jimmy the 'Al Matthews Award' at a national conference, the highest award given by the DRBF.

He set up a Contingency Fund in every contract to empower the Project Engineers and Superintendents and a method of determining the amount of Quantum justified. The bidding process and final estimates moved to the districts, streamlining the final payment process.

Congratulations Jimmy Lairscey on being inducted into the 2018 Florida Transportation Builders' Association's Hall of Fame!



View the Hall of Fame video at <https://youtu.be/S97Y0pGonqY>

DRBF Paris 2018

From Grand Paris to Olympic Size Projects: Use Dispute Boards to Keep the Work Moving Forward

23 March 2018

SUMMARY REPORT

“I love Paris in the Spring time...” and the transport strikes the day before failed to prevent a good turnout of familiar and new faces to this DRBF event. The speaker line-up surely was a large factor in that, crossing as it did from practitioner to user and back again with some holistic overview thrown in for good measure.

With six sessions there was something in the day for everyone. After a quick catch up with friends old and new over a coffee and registration we were straight into the day with **addresses** from Michel Démarre of the French International Contractors Association and Frédéric Gillion of Pinsent Masons opening the conference with comments on the importance of standing Dispute Boards and though Dispute Boards generally are little used in France how that may change with the new FIDIC forms particularly with the scale of Grand Paris where the employer is currently mandating the use of Dispute Boards.

The **first panel session** was, almost inevitably, a review of FIDIC but also looking at its inter-relationship with the ICC and its renewed and ongoing support of the Dispute Board process. Clearly the focus of the new FIDIC forms is avoidance rather than resolution; prevention rather than cure and the role of the Dispute Board has been aligned to that approach.

The **second session** was really focused on user experience with Laurent Gaultier of Alstom first presenting the results of his internal questioning. This was a fascinating user view of first-hand experiences around the globe: APAC was not successful (actually made matters worse!), Middle East not really used, Europe was used successfully, South America was difficult with public sector as they needed a “decision” and North America it was rarely used with a preference for direct negotiation. Sebastian Hoek then gave some insight from a German perspective noting that Boards were only really used there in an off-shore wind context. As with the majority of speakers he stressed the value of early appointment and engagement. Hervé Chambon then gave the perspective of Vinci Grand Projects. Hervé’s concern was around visibility of cost of the process so that others (particularly board directors) can understand the benefit. He also explained that across the Dispute Board process he has been involved in over the last 15 years daily fees had risen, on average, 73% and monthly costs by 116%.

The **third session** moved on to look at a couple of major projects in France; CERN (the Hadron Collider) and ITER (the fusion reactor). The projects both had Boards as part of the process and had to address further complexities where the projects run for longer than the working life of a typical Dispute Board member.

By Rob Horne

The **fourth session** highlighted some of the issues with the use of Dispute Boards in France, in particular the availability of CCRA which is, in many ways, a similar concept albeit limited to use in public works contracts. Despite this, the panel felt there was no reason why Boards could not be utilised and there really was a choice to be made and France was at a tipping point.

The **last two sessions** provided an interesting contrast between the successful use of Boards for the London and Rio Olympics and then the future use and adoption of Boards. Christine Guerrier of Thales gave interesting

views on the use of Boards outside its core of construction, looking at Defense, Transport and Aeronautics.

Overall a fascinating range of speakers covering many different perspectives and views in a wide range of different situations and jurisdictions. An excellent and very informative day in Paris.

DRBF Member Rob Horne (rob.horne@osborneclarke.com) shares his full notes of each session in a report posted in the Library on the DRBF website www.drb.org. Conference presentations and papers are also available for download.



Session 2 speakers Hervé Chambon, Conference Chair Frédéric Gillion, Laurent Gaultier, and Sebastian Hök on the topic of “The User’s Perspective: Dispute Boards for Complex Projects.”

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Save the Dates!



Charlotte, NC USA

DRBF 22nd Annual Conference & Workshops
17-19 October 2018

The organizing committee is already hard at work to make this an engaging and memorable conference in Charlotte, which happens to be the location of DRBF headquarters.

Learn more about the city [here!](#) Conference Co-chairs: [Leland Caldwell](#) and [Jim Cotton](#)



Geneva, Switzerland

**Regional Conference
& Workshop**
Hotel President Wilson
14-16 November 2018

Conference Chair:
[Michel Nardin](#)

New Events in Development:

Conference in Sofia, in partnership with ICC Bulgaria on 27 & 28 September; and Conferences and/or Workshops in Chile, Indonesia, and Ethiopia

Watch for details!

What's New in the Library?

The DRBF gathers a wide variety of papers, journals, conference presentations, articles, and other publications all written by DB professionals who hold industry ethics and topics in the highest regards. All material submitted is in support of the education and professional development of the DB community. From lessons learned on recent projects, developments in DB procedures, legislative developments, and more, the DRBF has created a robust toolbox of resources for you.

New Library Additions:

Article on the Effective Use of DBs on Major Construction Projects

Author: Roger J. Peters, Esq.

The American Journal of Construction Arbitration & ADR Article on The Effective Use of Dispute Boards on Major Construction Projects

Dispute Boards, el nuevo seguro contra controversias

Author: Cristián Novales

Represent ante de DRBF en Guatemala, Cristián Novales, Distributed: February 2018

Recommended Best Practices for Use of Dispute Review Boards (DRBs) on Public Private Partnerships Projects in the U.S. and Canada

Authors: DRBF PPP Task Force

The Expansion of the Panama Canal and its Ruling International Contract: A Mega-Project Sailing in Troubled Waters?

Author: Irene Nuviala Lapieza

Papers and Presentations from DRBF conferences in Chicago and Paris

Do you have an article or presentation to submit the DRBF Library?

Email us at home@drb.org.



Seattle, Washington USA

Northwest Regional Conference:

May 31-June 1, 2018

Thursday, May 31 - Workshop

Friday, June 1 - Conference

Event Website:

<http://bit.ly/DRBFSeattle18>

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DRBF Forum

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DRBF INTERNATIONAL CONFERENCE GALA DINNER TOKYO BAY CRUISE



A popular event offered during the **DRBF 18th Annual International Conference**, the gala dinner will find us aboard a luxury yacht for a 2.5-hour tour of the Tokyo Bay and skyline lit up at night. We'll enjoy the city lights and beautiful landmarks from the huge picture windows in the spacious dining room. Or you can step onto the deck for even more fantastic views of the sights:

- We'll pass beneath the stunning Rainbow Bridge. This 2,618-foot (798m) long bridge includes a collection of white towers that mimic the city skyline.
- Keep an eye out for nearby Tokyo Disneyland, visible in the distance.
- We'll also see the illuminated Tokyo Skytree, which reaches a height of 2,080 feet (634m), along with Hamarikyu Gardens, and the shoreline of Odaiba, an island neighborhood that lines the bay.

Bring friends or family, or simply join colleagues for a fantastic evening. Business casual attire.

More details about the 18th Annual International Conference at www.drb.org