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

DRBF Forum

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DB Members and National Neutrality

In a multinational dispute, stacking a Dispute Board with members sharing the same nationality as one of the parties can delegitimize the Board and the fruit of its efforts. How is this best avoided?

By Nicholas Brown

Introduction

Working across national borders invariably presents particular challenges for the foreign party, not the least of which is the risk of local institutional protectionism. This takes many forms. It may be systemic – such the requirement for local sponsors, equity or joint venture participation. And it may also be ad hoc, such as when locals are appointed in positions of power – not only in the sphere of public administration but also in business relationships – such as local contract administrators, local dispute resolvers and local courts (through seat selections). All these practices can have the effect of tilting the level 'playing field' in favour of the local developer as regards the foreign contractor.

This article addresses the dangers of composing the majority of a three-member Dispute Board (DB) with local nationals and the appearance of probable bias within the Board that may result from 'stacking' the board in this manner. Those dangers are more profound in the case of a single-member tribunal; however, the dynamics of three-member appointments is thought to be more worthy of particular investigation due to the complexities of three-member board formation.

This article concludes with two broad recommendations aimed at avoiding a

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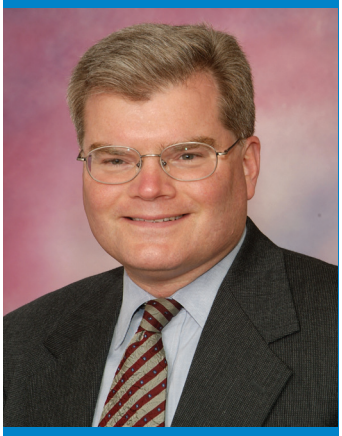
President's Page



Kurt Dettman
President
DRBF Executive Board of Directors

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

I an honored to serve as President of the Dispute Resolution Board Foundation for the next term. My thanks go to the leadership of Ron Finlay during the last term.

As President, my focus is on furthering the important initiatives started by Ron and the Executive Board, and starting some new ones. These include the following:

(a) continuing governance improvements, including implementing a plan for coordination of the Executive Board of Directors with the Regional Boards for better communication and collaboration;
(b) re-invigoration of committees called for by the DRBF bylaws, that is, Finance, Strategic Planning, Publications and Training;
(c) support of the cross-regional Membership and Training committees and establishment of a new cross-regional Outreach committee following a similar model;
(c) developing an action plan to implement the DRBF's 5-Year Strategic Plan adopted in March 2018; and
(d) deploying DRBF staff resources to support the DRBF's mission and these ExBOD initiatives.

I have asked the Region Presidents to review each Region's committee structure and current membership and send a "call for committee members" to assist where needed. The committees are where the work of the DRBF gets done, and it is a great way for members to do networking and burnish their credentials as subject matter experts. I hope that you will respond to the call and work with us to accomplish the DRBF mission.

Reporting on recent events, the DRBF 18th Annual International Conference was held in Tokyo, Japan, with over 130 delegates from over 30 different countries. The organizing committee chaired by Toshihiko Omoto with extensive support from Kunihisa Oba and other members of the local DRBF membership put together an exceptional program with a diverse group of international speakers addressing the latest developments for Dispute Boards worldwide. New this year, the DRBF presented the DRBF Annual Meeting with a financial report to members, and those who were not present could join the meeting via videoconference.

As President, I am always open to "continuous improvement," so I welcome your suggestions on how the DRBF can do things better.

Best regards,

Kurt L. Dettman

Kurt Dettman
President, DRBF

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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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loss of legitimacy in the DB process in a dispute involving local and foreign parties.

Contractual Framework for Composition of a Dispute Board

Typically, the procedure for appointing a three-member DB goes as follows:

1. The parties either appoint the three members of the DB at the early stage of their contractual relationship (in the case of a standing DB) or some specified period after the first dispute between them is formally announced.
2. If the parties fail to jointly appoint the three members of the DB within the specified period, then each party must nominate one member for the approval of the other party. Sometimes, as in the case of FIDIC Books, necessary qualifications are prescribed or representations are deemed.
3. If both parties' nominees are approved, the approved members shall then recommend, and the parties shall agree, upon the third member who will act as chairman.
4. If, however, the members do not recommend the third member, or the parties not agree to the appointment of the person who is recommended within a certain period, a specified appointing authority is empowered, upon the request of either or both of the parties and after due consultation with both parties, to appoint the third member of the DB.
5. Likewise, if either (or both) of the parties fail to nominate a member for the approval of the other party, then the specified appointing authority is empowered to appoint a member (or members) of the DB.

Invariably, the members of the DB must act fairly and impartially as between the parties.

Common Nationality and Apparent Bias

The appointment of a DB member who shares the same nationality as one of the parties can, at least, lend an appearance of a lack of impartiality on the part of the member. And if there are two members, a majority of the DB, then this appearance can be profoundly troubling to the party having a different nationality (i.e. the 'foreign party').

The member or members may not ultimately fail to act fairly and impartially, however, only time will tell. And in the meantime, the foreign party may have reason to doubt the ability of the member or members in question to discharge that solemn obligation. Of itself, this is problematic in light of the DB's mission. After all, the success of the entire DB procedure is predicated on the confidence of both parties in the independence and impartiality of the DB members when conducting their enquiries and reaching a decision on a dispute. The impressions of the parties are paramount in the selection of a DB member. If either party has the perception that a DB member, or the entire Board, is not fully impartial or independent, the entire legitimacy of the DB may be called into question.

The advantages of ensuring 'neutral nationality' are especially apparent when one of the parties is an organ, agent or alter ego of the host state or a powerful local private sector player.

The Guidance of Older Modes of Dispute Resolution

In the context of arbitration, there is a ground rule, reflected in most national laws, that any arbitrator 'should not only be subjectively free from bias, but also that there should be nothing in the surrounding circumstances which

objectively gives rise to an appearance of bias'. A leading commentator states that the reason why parties ought not to select members of the tribunal sharing the same nationality with the parties is primarily to reduce the 'risks of partiality of parochial prejudice'.

Almost all leading arbitral institution rules contain limitations on the nationality of arbitrators. These limitations are designed to implement one of the basic objectives of international arbitration – namely, to provide an 'internationally neutral means of resolving disputes between parties from different countries'. In the words of one commentator, 'as a symbol of impartiality, the national neutrality of an arbitrator is a vital factor for the proper functioning of a good arbitral tribunal.'

Similarly, in the context of litigation, consistent with the oft-quoted mantra that 'justice should not only be done, but should manifestly and undoubtedly be seen to be done', the constitutional rules of international courts express due sensitivity to the nationality. For instance, the International Court of Justice shall consist of fifteen members, no two of whom may be nationals of the same state. The national groups of member states of the United Nations who are not represented in the Permanent Court of Arbitration may nominate up to four candidates each for a seat on the court, however, not more than two of the nominees may be of the same nationality as the nominating national group. Similarly, the Assembly of States Parties, the governing body of the International Criminal Court may not elect two judges who are nationals of the same state.

In the context of the International Chamber of Commerce (ICC) Amicable Dispute Resolution ('ADR') Rules, commentators have noted that one of the pertinent qualities that the ICC ADR Secretariat takes into account when appointing a Neutral is the candidate's nationality. Thus 'unless specifically requested by the parties, no Neutral shall be appointed having the nationality of one of the parties.'

This is no cogent reason for applying a lower standard of expectations to adjudication. In practice, however, the appointing authority is often selected by the local employer, and is itself, local and sometimes may have an insufficient level of awareness of the importance of national neutrality. FIDIC indicates a preference for cosmopolitan boards in its Guidelines for DAB Appointments, where it states that in relation to shortlisting candidates for appointment to a DAB:

'The Secretariat, taking due cognisance of restriction (if any) placed on, for example, the nationality or requisite experience of the DAB members as previously agreed by the parties … selects from the President's List a shortlist of at least three persons…'

FIDIC's official position appears to be that the Secretariat's starting point is not restrictive. FIDIC is a transnational association. At the mono-national level, however, this open-mindedness as to nationality is not consistently reflected. Unfortunately, in practice, the local appointing authority may restrict the selection to compatriot professionals whether or not there is an expressed restriction placed on the nationality of the DAB members. As such, in circumstances where the employer prefers the local option when nominating a member, the appointment by the local appointing authority of a local third member will result in a majority of the

DB membership potentially owing their allegiance to the interests of the host nation.

Conclusion and Recommendations

To reiterate, the warnings against the appointment of DB members sharing the same nationality as the local party in a multinational contractual relationship are clear. The DB system is rarely completely involuntary, at least to the extent that a party who is dissatisfied with the adjudication decision may take the dispute on to a final process, usually arbitration.

The DB process will only really be a success if the DB finally resolves the disputed matter to the acceptance of both parties, and this requires trust and confidence in the impartiality, independence; and competency of the board, and thus, a sense of the board's overall legitimacy.

This leads to two broad recommendations. Firstly, a local appointing authority ought to consistently avoid appointing any DB member having the nationality of one of the parties unless specifically requested by both the parties to do so. Secondly, parties who are contemplating appointment of one or more DB members by an appointing authority ought to prefer an appointing authority that has publically committed to national neutrality in the appointment of DB members.

Nicholas Brown can be reached at Nicholas.Brown@pinsentmasons.com

DRBF Representatives Update

In France. The DRBF Region 2 Board of Directors recently re-appointed Marc Frilet to his position as DRBF Country Representative for France. Supporting him is a sub-committee including Frédéric Gillion, François Muller, Jim Perry, Guillaume Sauvaget, and Yann Schneller. Contact Marc Frilet at marc@frilet.com.

In Ecuador. The Region 2 Board also appointed Juan Carlos Mejía as the DRBF Country Representative for Ecuador. Since 2016, Mr. Mejia has acted as a dispute resolution, corporate and contract lawyer at Mejia & Oliva. This is an Ecuadorean legal firm oriented to arbitration, mediation and contractual issues. At Mejia & Oliva, he works specially with international clients and their commercial activities in Ecuador. Also since 2016, he has served as Director of Legal Innovation at Smartech, a tech company devoted to develop tech tools for the legal profession. Previously, he has also served as President of the Arbitration and Mediation Center of the Quito Chamber of Commerce, and Legal Vice-President of the Chamber of Commerce of Quito. There, he was dedicated to developing initiatives for the Ecuadorian business community, including new investment initiatives. Contact Juan Carlos Mejía at mejiajuancarlos2012@gmail.com.

In Uganda. Michael Daka has been appointed as DRBF Representatvie for Uganda. He holds a M Sc. Eng (IHE Delft, The Netherlands); B.Sc. Eng. (Civil) from Makerere University, Uganda; and Advanced Diploma in Hydropower Development and Use –Sida/ Vattenfall Power Consultant AB, Sweden. He is a PRINCE2TM Certified Project Manager. Mr. Daka has 21 years of work experience in project and program management, planning, design, procurement, contract management of various physical infrastructure projects in line with various standards like The World Bank, FIDIC, and Uganda's PPDA Procurement and Contract models. He has successfully engaged in over 50 different infrastructure development projects with a combined value exceeding US$600 million. He is Chairman Emeritus of the Uganda Association of Consulting Engineers, the representatives of FIDIC in Uganda. He is also at the forefront of organizing FIDIC Training in Uganda as well as other technical training programs for Construction professionals in Uganda and in the East African region. He is Managing Director, Proess Limited, Consulting Engineers based in Kampala/Uganda. His work and travel have taken him to Uganda, Kenya, Tanzania, Rwanda, The Netherlands, France, Austria, Switzerland, Germany, Sweden, Estonia, Rwanda, UK, Zambia, Nepal, Ethiopia, Mozambique, Spain, Brasil, South Africa, Burundi, Ghana, UAE, China and Mali. Contact Michael Daka. michael@proess.ug.

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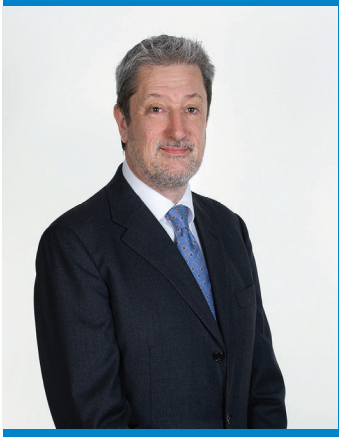
Making an Effective and Persuasive Case to a Dispute Board

Editor's Note: This paper was originally presented at the DRBF International Conference in May 2018. It can be downloaded from the online libraries of the DRBF and HKA websites.



By Simon Longley

This paper is based on my involvement with some 100 referrals made to dispute adjudication boards under the FIDIC forms of Contract and to an adjudicator under the NEC forms of contract. Although dispute adjudication has been around for many years, with the DRBF and FIDIC being the earliest and strongest advocates of this form of alternative dispute resolution (as opposed to arbitration or litigation), it still surprises me how contracting parties often have little apparent understanding of the intents behind dispute boards and contract adjudication, or how these processes can be used to resolve disputes effectively, quickly and inexpensively. As examples, I have come across situations where:

• A contractor has effectively accepted a dispute board panel entirely nominated by an Employer;
• Referrals have been made where the wrong 'dispute' was referred to the dispute board;
• A contractor has simply issued to a dispute board all the correspondence and documents relating to a matter and left it to the dispute board to try to find out from that pile of documents what the dispute was about and what issues needed to be decided;
• A party presented a wholly new and different case to a dispute board from that which had previously been presented to, and rejected by, the other party; and
• Parties have engaged legal counsel to 'run' their disputes, which then perhaps inevitably resulted in the dispute proceedings morphing into quasi-arbitrations, with all the attendant additional time and cost that entailed.

The message I want to convey in this paper is that, used properly and in accordance with designed intents, dispute boards and contract adjudication are very effective and economical means of resolving even the most complex of construction disputes quickly and efficiently, and usually without recourse to arbitration.

The secrets to success, if that is the appropriate expression, rest with the contracting parties:
1. Recognising the significant benefits dispute boards and contract adjudication can provide; and
2. Engaging specialist construction dispute practitioners to lead, administer and draft/advocate party positions.

These secrets form the back-bone of this paper, and are encapsulated in its title "Making an Effective and Persuasive Case to a Dispute Board". My use of the term dispute board in this paper is to be interpreted to refer to contract adjudication as well.

The first matter to consider is what is meant by the terms 'effective' and 'persuasive'. Are they the same thing? In my view, the two terms have different meanings and objectives, but which must nevertheless co-exist if a party is to maximise its chances of succeeding with its case before a dispute board.

An effective case is one in which the following criteria are satisfied:
1. The submission allows the dispute board to decide the dispute as easily as possible, and within the prescribed time frame of the relevant contract provision. This means providing a clear, concise and complete

submission that identifies and addresses each of the issues in dispute with argument and evidence. A failure to comply will likely compromise the dispute board's ability to understand or decide the dispute, resulting in requests for clarification and/or further information, which in turn will likely delay the time for issue of the decision.
2. The referral, including all submissions and hearings (if required), is fully compliant with the applicable dispute adjudication procedure and timescales. Any failure to comply will likely lead to jurisdictional challenges and/or requests for directions. In either event, that party's position will likely be compromised and proceedings delayed.
3. The referral clearly identifies and preferably limits the number of issues in dispute. The more issues there are in dispute, the more arguments, evidence and documents that need to be advanced by the parties and considered by the dispute board. This increases the risks of complexity, confusion and mistakes, as well as likely causing delay to the process.
4. The referral must clearly but succinctly identify and address relevant facts, arguments and issues, preferably in a separate and well-drafted statement of case.
5. An effective dispute referral will be evidenced by the avoidance of multiple party submissions, jurisdictional challenges, requests for directions, and dispute board requests for clarification or further information.

A case can be effective, in that the above criteria are satisfied and a decision is issued within required timescales, but if that decision does not support the outcome the party was seeking under the referral, then that party's case cannot be said to have been persuasive. So to be persuasive, further criteria apply. In my view, these additional criteria are:
1. The statement of case leads to the dispute board giving the decisions sought by a party;
2. The other (losing) party complies with the issued decision; and
3. The dispute board's decision finally decides the dispute.

Although it is very common, under the FIDIC Conditions at least, for a losing party to issue a notice of dissatisfaction with a dispute board decision in order to reserve the right to take the dispute to arbitration, such right is rarely enacted. If the dispute board decision provides clear reasoning, as almost always they do, the decision normally sits as binding, becoming final and binding upon agreement of the final account. Of more common occurrence is the refusal of a losing party to immediately (or at all) comply with a dispute board decision, for which the 1999 editions of the FIDIC forms provide little in the way of salvation (a point of concern specifically addressed in the recent 2017 editions). The enforcement of dispute board decisions however falls outside the scope of this paper.

If the criteria set out above define what the outputs of an effective and persuasive case to a dispute board are, what are the necessary inputs? In my experience, there are eight guiding principles that apply, most of which substantially benefit from being applied by experienced construction dispute practitioners familiar with managing and administering the referral process from start to finish. These eight principles are:
1. Honour the intent of the dispute board provisions.
2. Comply with the applicable procedural rules.
3. Clearly define the dispute.
4. Analyse the dispute.
5. Define dispute strategy.
6. Statements of case.
7. Advocacy of case.
8. Managing perceptions.

I consider each of these guiding principles in turn below.

Honour the intent of the dispute board provisions

The FIDIC Forms of Contract provide for a Dispute Adjudication Board as the first tier of the dispute resolution process. The NEC forms provide for contract adjudication. The dispute board decides disputes arising between parties during the currency of a contract; the purpose being to provide parties with certainty on matters that otherwise may continue to escalate and critically impact successful completion of the project.

Although the FIDIC and NEC dispute resolution procedures are different, they have certain principles in common. Foremost among these is the relatively short timescale in which a dispute referral is to be decided – 84 days under the FIDIC Conditions and eight weeks under the NEC forms (albeit these periods are extendable by agreement with the parties). The clear intent of both suites of contract is for the giving of decisions within a short time-scale in order to resolve, at least on an interim basis, disputes that may materially impact current and ongoing delivery of a project. For example, a dispute over whether a particular material is specified under the Contract or is a Variation has evident commercial and potential time impacts. Of more severity would be a claim for extension of time (under the FIDIC conditions) that goes unanswered by the Engineer or Employer's Representative – is the contractor entitled to an extension or not? The answer to this question will have direct implications on the contractor's planning of ongoing and future works – does it need to accelerate or not? Is time 'at-large'? Is the contractor liable for delay damages or not? By receiving an independent and impartial decision in relation to such matters soon after receiving and considering party positions under a referral would remove uncertainty, allowing the contractor to make informed decisions, rather than speculate at risk, and the employer to make informed decisions and any necessary design and/or budgetary adjustments. It is not difficult to see that dealing with disputes soon after they arise by way of an expedited dispute process can provide these kinds of real benefits to contracting parties.

Given such benefits, why is it the case, at least in my experience, that the prescribed timescales are commonly not met? Or, put another way, why are the prescribed timescales often extended, sometimes by months, thereby significantly delaying issue of the decision? I think there are a number of reasons that explain why:

- Dispute referrals are sometimes not well considered, dealing with too many issues in an attempt to have 'everything answered' in one go.
- Referral documentation sometimes comprises all the correspondence, sub-missions and responses that relate to an issue, with little or no attempt to summarise the key issues or provide focus.
- Dispute referrals sometimes comprise a completely new or re-argued case to that which has been previously considered by and responded to by the other party, and/or decisions are requested for matters that the Engineer/Employer has not had the opportunity to respond to prior to the referral being made.
- Parties often do not fully understand the dispute board process, considering it either (or both), akin to arbitration or to a legal process, resulting in the engagement of external counsel to run, manage and prosecute each dispute referral.
- Dispute board members sometimes do not have sufficient time available to consider referrals or to draft decisions within stated timescales.

Whatever the reason, it goes against the intents of the dispute board provisions to extend the prescribed timescales for the giving of decisions. My first guiding principle is therefore for contracting parties to fully understand the intents and benefits of dispute board provisions, and to then actively work to realise such intents and benefits by ensuring that decisions can be

issued within the 84 days/8 weeks periods identified under the FIDIC and NEC contracts, respectively.

The further guiding principles to be addressed below provide the ways and means for this first principle to be achieved.

Comply with the applicable procedural rules

How parties prepare and present their respective cases to a dispute board is defined by the procedural rules governing the making of referrals.

The procedural rules of the FIDIC Forms of Contract (and to a lesser extent those of the NEC forms) require the dispute board to establish (with the agreement of the parties) the procedures to be applied for deciding a dispute. In this respect, the dispute board is to ensure the procedures to be adopted are suitable to the dispute, avoid unnecessary delay or expense, and give each party reasonable opportunity to put his case and to respond to the other's case.

However, rather than leave it to the dispute board to decide the applicable procedural rules, it is not uncommon for construction contracts to contain their own procedural rules for adoption by the parties and the dispute board. However, contractors especially need to be aware of such rules before they agree to them as procedural rules drafted by employers can often be demanding and highly restrictive, placing limits and constraints on the ability of the contractor to make referrals.

Examples of some of the kinds of 'party' procedural rules that have appeared in contracts I have been engaged on have included:

- Limiting the definition of 'dispute' to make it more difficult to refer certain disputes to the dispute board;
- Requiring certain 'pre-referral' steps to be taken before a 'dispute' is deemed to exist, such as the giving of a 'notice of a disagreement' or for 'senior management negotiations' to be held;
- Requiring the dispute board to decide disputes on the basis of 'documents only';
- Prescribing what documents are to comprise a party submission to a dispute board;
- Prescribing different referral/document procedures for different kinds of dispute (e.g. with respect to Employer's claims as opposed to Contractor's claims, or for disputes that require a determination under the FIDIC conditions as opposed to those that don't etc.);
- Prescribing deadlines and timescales for completion of certain actions, that might constrain the ability to fully address issues;
- Expressly preventing or requiring party legal representation at hearings;
- Preventing or limiting the use of experts; and so on.

Whether such 'party' procedural rules are intended to improve the efficiency of the dispute resolution process or to make the referral of disputes more difficult is often a moot point. But clearly, if a contractor enters into a contract with onerous procedural rules, it is bound by those procedural rules and must comply with them.

Regardless of what procedural rules are applicable, a party must know, understand and comply with the prevailing procedural rules if it is to have any chance of making an effective and persuasive case to a dispute board. Any lack of understanding or failure to comply with the applicable procedural rules will likely compromise that party's case, perhaps fatally, and may lead to jurisdictional challenges being raised by the other party, which could result in the dispute board deciding it has no jurisdiction to act. At the very least, a failure to comply will probably result in a delay in proceedings. It is for these types of reasons why the engagement of experienced construction dispute practitioners to lead and administer dispute board proceedings is usually to be recommended. It is easy to trip up on procedural compliance, especially for the novice practitioner.

Clearly define the dispute

Perhaps an obvious point, but a referral to a dispute board cannot legitimately be made unless a dispute actually exists between the parties.

Sometimes it is not easy to divine from a referral what the dispute actually is. This is particularly the case where a party's referral effectively advances a completely revised or new position to the one previously considered and responded to by the other party or a party simply submits all the correspondence relating to a matter with no overarching document to highlight the key issues. I have also encountered situations where the 'wrong' dispute was referred, which led to the referral having to be withdrawn (a contractor referred a claim to a dispute board for decision on quantum when in fact the true dispute was the Engineer's failure to issue a determination in respect of that claim. In another instance, an employer sought to refer a dispute concerning a matter that had already become final and binding under an earlier referral, rendering the subsequent referral of no standing).

As these examples indicate, it is essential to ensure that a dispute actually exists between the parties, and to know what that dispute is, prior to making any referral to a dispute board. In this respect I have found that issuing a formal 'notice of dispute' to the other party prior to the instigation of dispute proceedings is helpful, since it informs that a dispute is considered to exist between the parties with respect to a matter. Although not conclusive, the notice will serve as persuasive evidence of the existence of a dispute if the other party does not respond to deny or reject the declaration.

Even if a dispute does exist between the parties, it may still not be appropriate to refer it to the dispute board. The applicable procedural rules need to be checked to see whether there are any 'pre-referral' steps that need to be taken first, such as for the dispute to firstly be considered by senior management of the parties.

Analyse the dispute

Even though a dispute may exist between the parties, this does not always mean that a referral to the dispute board will or should be made. The decision to proceed with making a referral or not requires careful consideration of several issues, including:

- What is the strength of case? This question is answered by undertaking a close examination of the dispute by reference to the respective cases of the parties, the facts and the evidence. Such examination is best undertaken by experienced construction dispute practitioners so as to provide a realistic and considered evaluation of the relative strengths and weaknesses of the case, and to provide an evaluation of the prospect of success.
- The importance/value of the dispute and the investment/degree of effort that will need to be expended.
- Whether the dispute might be resolvable in another way (e.g. by commercial agreement or 'trade-off').
- If the matter is referred and a decision is awarded in the referring party's favour, can the other party be relied on to comply with that decision?
- Has the dispute board previously issued any decisions that may relate to the case and, if so, what impact might that have on the prospects of success?

The outcome of such a review might suggest that further work should be undertaken to improve the strength of the case and for this to then be resubmitted to the other party for further consideration. Following the further response, a dispute may no longer exist between the parties, meaning the matter is resolved. But if a dispute does still remain, the case should be stronger than it was before and therefore have a higher prospect of success.

Define dispute strategy

Assuming that a dispute exists which the referring party considers from its review has

reasonable or strong prospects of success, what should that party do to maximise its chances of achieving success?

To begin formulating an effective case it is necessary to clearly and precisely identify and define all the issues considered to be in dispute, as well as the facts and evidence that support (but also undermine) those issues. This step will inform a number of key decisions such as:

- The issue(s) to be referred (in other words, the scope of the dispute);
- The key themes/arguments/evidence to be advanced and relied on to support the case being made and to undermine the case of the other party;
- The decisions and relief to be sought from the dispute board.

Once these key elements have been decided, it is then necessary to give consideration to other matters, such as:

- Identifying the procedural requirements for the making of the referral;
- Deciding whether any specialist legal or expert advice or evidence is required to support the case;
- Deciding whether any witness statements will be required to support the case;
- Making an assessment of the time likely to be required to reach a written decision by the dispute board, if expert evidence and a hearing are anticipated;
- Liaising as necessary with the other party and the dispute board to address any matters of procedure.

Key decisions have to be made. For example, if expert evidence is considered necessary (in most cases expert evidence is not necessary and in any event undermines the intents and benefits of the short timescales for the giving of decisions), should this form part of the referral documentation or come later? Experts need to be identified, assessed and selected. They will require a clearly defined brief and adequate time to collect, analyse and consider relevant information and prepare reports. This all takes time.

Similar considerations will apply to the engagement of legal counsel to administer the dispute board referral process. I have been engaged on dispute referrals led and managed by legal counsel who adopted the approach of treating the dispute board process as a quasi-arbitration, with all the associated steps and stages of pleadings, defences, replies, rejoinders, expert evidence, witness statements, submissions and so on, and with a heavy focus on contractual and legal matters, even though the issues in dispute largely related to the quanta of extensions of time and additional cost. But this approach resulted in the dispute board timescales for referrals extending well beyond the 84 days set out in the relevant contract to nearly two years. At the conclusion of the referrals counsel recommended that the dispute board process should be abandoned in favour of the direct reference of disputes to arbitration, because of the time and expense that had been incurred and because the decisions were considered unsatisfactory!

Not only is treating a dispute board or contract adjudication process as a quasi-arbitration contrary to the intents and benefits of the FIDIC and NEC dispute provisions, it renders decisions too time-distant from the occurrence of the dispute to have any meaningful impact on project delivery or programming. Any party considering engaging legal counsel to run their referrals please take heed!

Statements of Case

The statement of case is the most critical document under a referral. It sets out details of the dispute, the party's position in respect of that dispute, identifies the arguments and evidence relied on to support the case being made (and to undermine the case of the other party), and clearly identifies to the dispute board the decisions and relief being sought.

Given the importance of the statement of case, it is remarkable how little thought and attention is often given to its preparation.

Sometimes the referral consists of a simple letter stating that a dispute exists, with attachments comprising all the correspondence, submissions and responses extant in relation to that dispute. Pity the poor dispute board given the task of wading through such a volume of documentation! Where effort has been made to provide a statement of case, sometimes this contains little more than bare allegations and denials; again this is of limited assistance to the dispute board. Usually, poor quality submissions such as these have been prepared by contract administration or project controls staff with limited or no experience of dispute resolution procedures or any real understanding of the standards and burden of proof required. For these kinds of reasons, I strongly recommend that parties should always consider engaging experienced construction dispute resolution practitioners to draft high quality and persuasive statements of case. This is the document that will have the most impact on the dispute board and the outcome of the case. Given the high value and criticality of most disputes, investment in the engagement of experienced construction dispute practitioners to lead and manage the referral process should really not be an issue.

What then should a statement of case address? In my view, the statement of case needs to clearly and precisely set out for a dispute board:

- The nature and scope of the dispute;
- The contractual (and sometimes legal) basis of the dispute;
- The specific issues in disputes;
- The facts, and to the extent necessary, relevant background and context;
- The arguments, contentions and evidence upon which the party relies;
- Any specialist or expert advice or evidence being relied upon and any witnesses of fact;
- The decisions the party seeks from the dispute board; and
- The remedies and/or relief sought.

A well-drafted, clear, logical and precise document needs to be prepared. The dispute board will not have anywhere near the detailed or comprehensive knowledge or understanding of the dispute as the parties. Therefore, the statement of case needs to set out in clear and concise terms the nature of the dispute and demonstrate why a party's case should be preferred over the other party's case. Understanding is best conveyed by the drafter of the statement of case:

- Focusing on the facts;
- Focusing on relevance; and
- Focusing on evidence.

This means there is no need to rehearse and repeat everything that has already been set out in the correspondence, claims and responses previously exchanged between the parties, especially as these documents will generally form part of the bundle of material that supports the referral. Instead, relevant elements and extracts of such documents can simply be cited or referenced in the statement of case by way of footnoting.

Most disputes succeed or fail on the facts. Therefore, the factual situation must be brought to the fore in any statement of case.

Relevance should always be borne in mind, as the temptation is to include as much detail as possible. But having said that, the statement of case must deal with all the issues and bases of entitlement/defence, even if these are in the alternative. Any issues or matters that are excluded from the referral should be clearly identified; for example, if the referral is limited to the principle of entitlement only, an express statement that quantum is not to be considered by the dispute board should be included.

Again, compliance with the applicable procedural rules is essential. If the rules set out limitations on, for example, the length of documents or what types of document can or cannot be included etc., then these limitations need to be honoured.

In the absence of any 'agreed procedure', both the FIDIC and NEC forms of contract envisage a single submission from the referring party; the intent being that the dispute board adjudicates a dispute on the basis of the positions of the parties at the time the relevant dispute crystallised, not against any later revised or updated positions of the parties. However, in practice, this is rarely the case. Instead, each party normally submits at least one statement of case in relation to a dispute for consideration by the dispute board, usually containing additional arguments and evidence to that previously pleaded or considered by the parties.

Subject to the agreement of the parties or at the express request of the dispute board, further submissions might be made. But bearing in mind the intents and benefits of decisions being given within stated timescales, it is recommended that parties be limited to a single and complete submission of its respective case, with any clarifications or requests for further information being limited to those sought by the dispute board.

From the feedback I have received, dispute board members generally think too many submissions and too much information and documentation is issued by parties in relation to disputes. Perhaps if parties recognised that, in essence, most disputes are decided on quite narrow issues, facts and evidence, concise and tightly drafted single submissions of statements of case should ordinarily suffice, since dispute boards will invariably request for clarification of any matter that is unclear or uncertain. However, if parties insist upon making further submissions and submitting further evidence, there is little the dispute board can do without potentially providing the basis for an allegation of denying a party the opportunity to make its case as fully as it wishes to. If parties put more trust and belief in the ability of dispute boards to determine what is relevant and what is not, decisions will be issued far more in line with stated timescales than they perhaps are now.

Advocacy of Case

After submissions have been made by the parties, either they or the dispute board will decide whether a hearing of the dispute is required or not.

In the event a hearing is considered necessary, the parties should seek to agree the agenda, with the dispute board issuing directions if they cannot agree. Party preparations for the hearing should include:

- nomination of a principal spokesperson to lead the presentation of submissions and the making of responses (most dispute boards prefer for the spokesperson to be personally and directly involved in the performance of the project rather than a professional advocate);
- arranging for the attendance of any necessary witnesses and experts; and
- being clear on the focus of the submissions and the points to be made. To be avoided is the raising of new evidence or arguments for the first time or the re-stating of what has already been said in the statements of case. The hearing is for the principal benefit of the dispute board to hear the key points and contentions of each party and then to ask any questions it feels may assist in their consideration of the dispute. If experts have been engaged by the parties, then some form of questioning of the experts or 'hot tubbing' can be expected to be directed for by the dispute board.

A hearing often commences with the referring party giving a presentation on its case, followed by a presentation by the other party of its case. Questions may be asked by the dispute board at the end of each presentation and the other party may be asked whether it has any comments. Following the completion of this part of the hearing, the dispute board may ask specific questions to either or both parties, or stimulate a debate on certain matters to

better understand or clarify a point. The dispute board may request either or both parties to further consider a particular point and to respond later in the hearing. Given these potential demands, it is essential that the party representative is fully in control of the facts and arguments in order to be able to respond promptly to issues arising and to avoid any inadvertent misleading of the dispute board. Again, the benefits of having an experienced construction dispute practitioner acting as party representative cannot be overstated. Lastly, it is also essential that each party has in attendance somebody with authority to make decisions.

Once the parties have completed making their written and oral submissions, the dispute board will deliberate and prepare a decision report which they will issue to the parties, hopefully within the time period allowed by the contract or as otherwise agreed with the parties. Normally, the decision will be given with reasons. The decision is binding on the parties until and unless a notice of dissatisfaction is issued by a party within prescribed time limits and the decision is superseded either by the amicable agreement of the parties or by arbitral award.

Perception

The seven guiding principles I have identified above go to the core of making an effective and persuasive case to a dispute board. As should be evident, these principles come together as a holistic set of principles for maximising the chance of securing the decisions sought from the dispute board. But in my mind there is also an eighth principle, which is intangible in terms of the extent to which it may or may not affect the outcome of a referral. This eighth principle is perception: to what extent, if any, does the manner in which a party or the parties conduct themselves influence the outcome of a referral?

Clearly, acting all times calmly, politely and professionally will stand any party in credit. But what if a party makes constant challenges to a referral to delay and disrupt proceedings? Or make unnecessary and critical comments during the making of a presentation by the other party? Or talk over the other party when that other party is addressing the dispute board? Of what if both parties cannot agree on even the smallest detail of procedure and constantly require the dispute board to issue directions? Or else just generally act unreasonably and unprofessionally? Would a dispute board simply ignore such antics and decide the dispute based on the facts and the evidence alone? Can the dispute board ignore such antics? This would make an interesting study but my feeling, having been in hearings where such antics have occurred, is that a dispute board may find more reason to find in favour of a party, intentionally or not, because of the antics of the other party.

But rather than test this theory in practice, surely it is better for all if a party at all times:

- Was professional in its submissions and in its approach;
- Assisted the dispute board wherever possible;
- Avoided making jurisdictional challenges or requests for directions and instead seek to reach agreement with the other party; and
- Always acts reasonably.

Conclusions

These then are my eight guiding principles for the making of an effective and persuasive case to a dispute board. Many of these points will resonate with both dispute board practitioners and parties that have been engaged in dispute board or contract adjudication proceedings.

In summary, each dispute is unique in its facts, context and issues. Making an effective and persuasive case to a dispute board requires a holistic approach: adopting the procedural rules as the framework for the referral; identifying the issues in dispute; developing the theory of the case;

identifying the arguments, contentions and evidence, including expert evidence (if required); drafting of clear, precise and focused statements of case based on the facts; and providing clear and concise presentations at the hearing.

The FIDIC and NEC forms of contract set out clear provisions for the resolution of disputes within a short period of time. My plea to all parties and practitioners is to give effect to these provisions and avoid causing delay to the giving of decisions. Early decisions lead to certainty going forward, and take disputes off the table. What can anybody consider bad about that?

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ICC and DRBF Regional Conference: Practical Issues in Construction Dispute Resolution and Dispute Avoidance

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International Chamber of Commerce (ICC) and Dispute Resolution Board Foundation (DRBF) join forces to provide insights by some of the best experts in construction disputes. The conference offers seminars on Dispute Boards and a mock construction dispute involving experienced speakers who will talk about various mechanisms and techniques for dispute resolution and dispute avoidance. The event will be focused on practical knowledge on the various stages of a construction dispute.

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Event Details:

Thursday, 27 September: Half-day Dispute Board Workshop, a Delay & Disruption Workshop, the opening of the Regional Conference, and a Welcome Reception.

Friday 28 September: ICC and DRBF Regional Conference - Full day of presentations and panel discussions and a mock hearing.

Complete conference details and registration is available at **www.icc-bulgaria.bg**

The Use of Audits in Dispute Avoidance

By Roger Ribeiro, Msc, MCiarb

Introduction

In the article published in the *DRBF Forum* Volume 17 Issue 3 September 2013, I wrote on the benefits of performing audits during the tender stage in public sector. From my experience, when a preferred tender procedure for a construction project has been selected, a contract evaluation is needed to determine how the contract can be implemented. Unfortunately, many clients are in a rush to start project(s) even if basic conditions are not met.

Recently, I conducted audits for employers in Africa and Eastern Europe during contract implementation which have been of benefit for each project.

Obviously, there are different types of audits: contractual and/or technical and/or financial and/or legal. In the field of construction most Employers want to know if their project goes according to the contract, relying most of the time on the Engineer/Project Manager who is responsible for the contract administration.

The aim of this article is twofold:
(1) to analyze how the topic of audits has been incorporated in different books since FIDIC form of contracts are well spread all around the world.
(2) to provide valuable insights on the appropriate use of audits as a tool for dispute avoidance during the project implementation.

Conducting contractual audits all along the project life cycle is a good contractual practice for the benefit of all parties. The following comments will reflect my own experience on sites.

Audits in FIDIC Forms of Contract

In the different FIDIC Forms of Contract the notion of 'auditing body' is introduced with different attributes. Let's review:

The FIDIC *Conditions of Contract for Design, Build and Operate* (Gold book 2008 edition) describes an ''auditing body'' (subclause 1.1.4) appointed to conduct an independance compliance audit (subclause 10.3). According to subclause 1.1.4, the auditing body should be ''independent and impartial''.

The FIDIC *Conditions of Contract for Construction (Multilateral Development Bank Harmonised Ed.* (2010) specifies (subclause 1.15):

"The Contractor shall permit the Bank and/or persons appointed by the Bank to inspect the Site and/or the Contractor's accounts and records relating to the performance of the Contract and to have such accounts and records audited by auditors appointed by the Bank if required by the Bank".

According to my experience, such audits conducted by the internationa funding institutions (IFIs) are not frequent on infrastructure projects.

The FIDIC Red, Yellow, and Silver 1999 edition books include in the subclause 4.9 (Quality Assurance) the following:

FIDIC Red, Yellow book 1999 edition: "The system shall be in accordance with the details stated in the Contract. The Engineer shall be entitled to audit any aspect of the system''.

FIDIC Silver book 1999 edition: ''The Employer shall be entitled to audit any

aspect of the system".

The new FIDIC 2017 edition suite of contracts includes the subclause 4.9.1 (Quality Management System) related to audits.

FIDIC Red, Yellow, and Silver books 2017 edition states the contractor has the obligation to carry out internal audits of the QM system.

In light with the above, it appears that different interesting audits could be done by different players.

Constructive audits for the project could be launched by the Engineer, the Dispute Adjudication Board (1999 edition) / Dispute Avoidance and Adjudication Board (2017) or someone appointed by the bank. They should be made in a fairly, neutral manner in order to avoid claims and disputes.

Qualification of auditor(s)

It may happen that the auditor(s) are seen on site as policemen, but his/her role is not to decide who is right and who is wrong regarding the issues on site. The primary auditor's task is to identity the actual situation on site and propose an action plan of improvement.

During the course of the audits, the auditor(s) can help the parties in dispute to resolve their problem unless otherwise agreed. The auditor should be impartial and should not take sides. The parties in dispute are responsible for deciding how to resolve the dispute, not the auditor(s) unless otherwise agreed.

Audits should have the following elements in common:

- It is voluntary - the parties choose to answer auditor's questions or not
- It is private and confidential
- The parties are free to agree to the action plan proposed by the auditor(s) or not

The auditor(s) appointed by the Employer and/ or the contractor should have qualities as following:

Experience:
The auditor(s) should be experienced and have professional technical, managerial or legal qualifications. A minimum of 20 years of experience is usually required in a senior position level to consider the auditor(s) as experienced.

It is important that the auditor(s) has experience in the field in which the audit will be performed, in order to have a better understanding of the solutions that have to be implemented if necessary.

The auditor(s) should have good communication skills. This cannot be learnt from the books and/or obtained through academic degrees, but it can be obtained by experience.

Knowledge of the reference:
The auditor (s) should have understanding and access to the contract, norm or law considered as the reference.

In a case of legal matters, auditor(s) with legal and construction background, may be appointed for a specific situation.

Availability:
The auditor(s) might have to be available for site visits whenever it is scheduled. One of the functions of an auditor is to provide a pragmatic action plan if required to do so.

The site visit may sometimes have to be done in difficult conditions. To be in a two to three day trip to reach the site in the desert or jungle may not be an easy

task for an auditor.

Neutral:
A new concept of "neutrality" has been introduced in the FIDIC contracts issued in 2017. Under Sub-Clause 3.7 (Agreement or Determination) of the 2017 Red and Yellow books, the Engineer must act "neutrally when exercising its duties under this Sub-Clause".

The meaning of neutrality is not expressly specified. The Guidance to the 2017 Yellow book suggests that "...when acting under this Sub-Clause the Engineer treats both parties even-handedly, in a fair-minded and unbiased manner". Furthermore, to reinforce the whole concept, it is expressly stated that the Engineer is not required to obtain the employer's consent before it exercises its authority under Sub-Clause 3.7 (Agreement or Determination).

This concept of neutrality can also be applied for auditor(s).

Preparation of "Constructive audits"

First the framework of the audit(s) should be well-defined by the originator, which could be one of the parties (the employer or the contractor). It could be both jointly in order to avoid grey areas and misunderstanding regarding the results of the audits and role/responsibilities of the auditor or panel of auditors.

In a recent project in Central Asia, the author has audited a project ordered by the employer concerning the delays on site and to audit different contractual documents (addendums to the contracts, IPC, variations, works progress report, etc.). Before my intervention, a letter to the contractor was sent informing him of my presence on site. It is worthwhile to note that the Engineer was nominated by the employer but no DAB had been appointed by the parties at that time.

In order to clearly understand the originator's demand, it is recommended to have preliminary meeting(s) and to define a reference.

Is this reference the construction contract, a norm, a law or another documents? The auditor has to compare the reality of the construction project with what reference?

It is understood that construction projects is unique and therefore, every audit has a peculiar character.

The auditor(s) has to prepare an audit plan which is a guidance for the conduct of the audit. It is a tool to acquaint relevant information for the events and avoid misunderstandings with the originator.

The first questions coming up from the audit plan are:

- Why the auditor (s) has to perform an audit?
- What are the purposes of it?
- Who are the participants on these audits?
- Which form and contents should have the audit reports and action plan?

The first meeting has the purpose to present the scope of the audit, to listen and question the parties and define the content of the report.

Then, the auditor(s) may turn the site with the parties. Those visits might help the auditor to appreciate the progress of works, the critical construction events, the equipment, the staff, the physical conditions, etc.

A few steps that the auditor has to do or

not:

- To prepare one agenda for the auditing sessions
- To request a list of participants in advance
- To make sure that the insurances are in place / what happens in case of an accident?
- To lead and chair the meetings
- Do not express any opinion rather ask questions
- Do not give advice on technical issues unless otherwise agreed
- Ask for additional documents if needed
- Ask for additional clarifications if needed
- Do not record or take pictures, videos on site without prior permission of the parties

Audit report

After the questions and answers sessions, the auditor (s) has to produce and submit a report to the originator of the audit(s). Depending on the project and the demand, the report may be quite long. The language of the report is mainly the language of the contract. Translation of these reports may be needed and could take time.

During the course of the audit, a questionnaire could be used with straight forward comments. Every event or answer submitted to the auditor should be categorized into three sections: Conformity. Improvement Needed, or Non-conformity.

It is important to mention that the format and content of the audit report should be agreed with the originator.

The topics included in my report were as follows:

1. Audit Organization
2. The project
3. List of documents provided to the auditor before the audit
4. Questions from the auditor(s) to the parties
5. Site visit
6. Conclusion

The purpose of the audit report is to highlight the objective and global appreciation of events previously defined and proposals of improvement for the project.

It is recommendable to present the conclusions to the originator before submission of the report.

It may happen that the originator may not feel comfortable with the report and his content. Usually, the most discussable points are the non-conformities. The report could be revised unless otherwise agreed.

Action plan

The action plan is an important milestone of the audit. This is where the auditor will define the steps/tasks that must be performed for the benefit of the project. It is the view of the author that an audit without a clear action plan is totally pointless.

A basic and pragmatic action plan has four major elements as follows:

1. Events/questions
2. Is it a conformity? Is it a non-conformity?
3. What has to be done and by whom? Action date

Obviously, the auditor should provide clear and robust explanation in order to help the parties to correct their ‘’non-conformity’’ if any.

Benefits in dispute avoidance

It is my view that constructive audits can

be performed by an auditor, the Engineer or the Dispute Adjudication Board (DA)/ Dispute Avoidance and Adjudication Board (DAAB). There is nothing wrong with performing audits on site unless otherwise agreed by the parties. This will help the party or parties to treat their non-conformity, which could lead to potential claims and disputes at later stage.

It is obvious that it is important that the parties (contractor and employer) have aligned objectives and are committed to avoid disputes and minimize wasting their efforts. A common framework for each project plan may be developed early in order to define the orientations and start to establish a positive relationship between the parties.

The new FIDIC 2017 edition suite of contracts includes a prevention Sub-Clause (21.3). But nowadays, most of the time, the right attitude before in front of problems is generally missing. The key of the collaborative approach for dispute resolution is within the sentence "if the parties so agree". Dispute avoidance is better than dispute resolution for both parties. Prevention is an attitude that the parties should have from the early beginning of the project.

As a matter of fact, the Engineer is often missing a good understanding of contractual issues in order to deal with a construction project commercial issue. With proper training, and follow up training, the Engineer's representative could deal with project contractual issues and dispute prevention.

In the real world, Dispute Adjudication Boards (DAB) are not systematically appointed by the parties and may have totally failed having dispute avoidance experience.

Auditor(s) appointed by one or both parties should not substitute the Engineer or the DAB/DAAB. However, an auditor can contribute with an action plan, raising potential claims and give solutions to avoid them.

Conclusion

First, it is important that international funding institutuions (IFI) increase audits during the tender stage, construction stage and finalization of the project. Experts appointed by the IFIs should open folders, drawings, reports, documents, etc. in order to have a clear picture of the project. Ceremonial meetings with ministers and VIPs visiting completed works have reduced benefits.

Constructive audits performed by one independent auditor can be useful in helping the parties to make decisions with the help of an action plan.

It is my view that the Engineer or the DAB / DAAB could take initiative to perform audits whenever it is necessary unless otherwise agreed.

The new 2017 edition suite of FIDIC contracts includes great improvements compared with the 1999 edition. However, regarding the Sub-Clause 4.1.9, it is worth while to note that the employer or the Engineer has not the obligations to perform audits of their management system. This could have consequences and interesting discussions on site.

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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:

Dispute Boards - Pertinent Aspects of Operation: Part 1: DB Decisions
Author: Anton van Langelaar,
Published in: Civil Engineering November 2017

Dispute Boards - the New FIDIC Section Edition 2017 DB Provisions

DRBF Paris 2018 Summary
Author: Rob Horne

The Use of Dispute Boards on Major Infrastructure Projects
Author: Peter H.J. Chapman

Papers and Presenatations from DRBF conference in Tokyo

Do you have an article or presentation to submit the DRBF Library?
Email us at home@drb.org.

Forum Newsletter Editorial Deadline

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

Deadline for the next issue:

15 September 2018

Climb to the Top! 18th Annual International Conference & Workshops in Tokyo, Japan

By Toshihiko Omoto, Conference Chair

The 18th Annual DRBF International Conference & Workshops was held 23 to 25 May, 2018 in Tokyo at the Park Hyatt Hotel. A total of 135 delegates gathered from 30 countries and regions. The event started with full-day workshops in two courses followed by one and a half days' conference under a theme, "Climb to the Top! How Dispute Boards Can Elevate Projects Across the Globe". Tokyo Conference Chair, Dr. Toshihiko Omoto, and his team endeavored to successfully carry out the event, but the major reason for the success was the great contribution of everyone involved.

Toshihiko Omoto opens the conference.

We express our great gratitude for the following sponsors who financially supported the event.

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Two Workshops

Two full-day workshops were held on 23 May. One introductory workshop was titled "Dispute Board Administration & Practice Workshop" and the other advanced workshop "Experienced Employer and Practitioner Workshop". All seats of both workshops were sold out. We appreciate those tutors who contributed to preparing texts and providing fine lectures. Tutors of the introductory course were Toshihiko Omoto, Gordon Jaynes, Geoffrey Smith and Fernando Marcondes while the advanced course was led by Murray Armes, Andy Griffiths, Kurt Dettman, Alan McLennan and Paul Taggart. A Welcome Cocktail Reception sponsored by Sense Studio followed the workshops.

Conference

The conference was held on 24 & 25 May and commenced with an opening address by Toshihiko Omoto, the Conference Chair, followed by keynote speaker Kiyoshi Kobayashi, Professor of Kyoto University and President-Elect of the Japan Society of Civil Engineers. The keynote was a highly philosophical and rhetorical one titled "The Incompleteness

of Incomplete Contracts". Practical approaches for dispute resolution including early contractors' involvement was covered citing theories of Nobel prize winners. Five sessions and one special speech followed the keynote.

Session 1, Prepare to Reach New Heights: Introduction to Dispute Boards and Dispute Avoidance, was moderated by Toshihiko Omoto, Adjunct Professor at Kyoto University. Speakers were Gilberto José Vaz, Leader of Gilberto José Vaz Advogados, Christophe von Krause, Partner, White & Case and Gordon L. Jaynes, Lawyer in private practice. Fundamentals of DBs were talked by the moderator and speakers. Topics included DB vs. Arbitration, prevention of formal disputes, note and concerns in handling new versions of FIDIC, etc.

Session 2, Elevating DBs in Asia: Legislative and Funding Agency Developments, was moderated by Nicholas Brown, Partner, Pinsent Masons. Speakers were Sarwono Hardjomuljadi, Special Advisor, Ministry of Public Works and Housing (Indonesia), Tomohide Ichiguchi, Director, Loan Procurement Policy and Supervision, Japan International Cooperation Agency, Malith Mendis, Chairman, Mendis Cobain Consultants and Hazel Tang, Centre Director, Singapore International Mediation Centre. Current situations of DBs in Asian countries were talked by the moderator and speakers. Topics included historic background of dispute resolution and introduction of a new law in Indonesia, analysis of DB usage of JICA's projects in Asia, current situations of DBs in Sri Lanka, India, Nepal, incorporating mediation into the DB process, etc.

Special speech, A view from Mt. Fuji: Japanese Construction Industry and Overseas Activities, was presented by Yoshihiro Yamaguchi, Chief Executive Director, Overseas Construction Association of Japan (OCAJI). He talked on OCAJI's history and activities, current situation and trends of Japanese construction industries based on statistic data.

Session 3, Explore One of Your Climbing Tools: New FIDIC Contracts, was moderated by James Perry, Partner, PS Consulting. Speakers were Aisha Nadar, Member, Executive Committee, FIDIC, Takashi Ogura, Counsellor, Taisei Corporation and Mathias Fabich, Head of Unit, Contract Management, Porr Bau Gmbh. Moderator and speakers talked on FIDIC and new FIDIC Conditions of Contracts published in 2017. Topics included comments on new versions of FIDIC, clauses 8, 13, 20 and 21, changed /unchanged rules, DAB vs. DAAB, etc.

Session 4, Scale New Peaks: Expanding

the Use of DBs for PPP Projects, was moderated by Lindy Patterson, QC, 39 Essex Chambers. Speakers were Hop Dang, Partner, Allens Pte Ltd, Hanoi Branch and Zhiyong Li, Deputy General Manager of Legal Department, PowerChina International. Moderator and speakers talked on general schemes of PPP and related issues. Topics included risks in PPPs, DB in PPP, case studies in Asian PPP projects, etc.

Session 5, Assemble the Right Team of Contractors and Employers: How to Manage DBs for the Best Results, was moderated by Frank Leech, Tendering Team Manager, Taisei Corporation. Speakers were Simon Longley, Partner, HKA Global, William P. Sabandar, President Director, PT MRT Jakarta, Weddy Bernadi Sudirman, General Manager, Construction of Power Plants, PT PLN and Satoru Tsutae, Executive Director, Taisei Corporation. Moderator and speakers talked on practical usage of DBs and their experiences of DBs used in their projects. Topics included principles needed for successful DB procedure, experiences of DBs in Asian projects, Indonesian power plant projects and Jakarta MRT projects.

After the conference, over 100 delegates and guests joined the Gala Dinner Cruise on the Tokyo Bay and enjoyed a fine dinner and nice night views from the "Symphony Moderne" yacht. Intimate and earnest conversations were recognized here and there.

The conference resumed the following day with announcements from Ann Russo, Executive Director, DRBF and Sebastian Hök, DRBF Representative for Germany. It was declared that the 19th Annual DRBF International Conference and Workshops would be held in Berlin, Germany in 2019. An introductory video of Berlin City was aired. Three sessions followed the announcement.

Session 6, Lessons Learned from other Climbing Adventures: An update on the DRBF survey on the use of DBs, plus an Italian project case study, was moderated by Romano Allione, Consultant, Adjudicator. Speakers were Roberto Panetta, Adjunct Professor, Bocconi University, Geoffrey Smith, Partner, PS Consulting and Leo Grutters, Arbitrator/Adjudicator, C25 Global Gmbh. Moderator and speakers talked on the philosophical background of DBs, current situations surrounding DBs in Italy and detailed analysis of DB surveys carried out by DRBF. Topics included Italian experiences, predominant and reluctant areas where DBs were used, Standing vs. Ad-Hoc, dispute avoidance and party satisfaction, the future of DBs, comments from Contractors, Employers and DB members, etc.

Session 7, Refocus on the Goal: The Role of Lawyers and Non-Lawyers on the DBs, was moderated by Elizabeth A. Tippin, Principal, Elizabeth A Tippin Dispute Resolution Services. Speakers were Murry Armes, Director, Sense Studio, Giovanni Di Folco, Senior Partner & President, Techno Engineering & Associates, Ferdi Fourie, Owner, 4ie Claims Resolution Services and Sebastian Hök, Lawyer, Kanzlei Hök, Stieglmeier & Kollegen. Moderator and speakers talked on goals of the DB process and historic role of attorneys and non-attorneys. Topics included ADR continuum in cost vs. controllability from DB to jury trial, and the necessity of continuous learning of engineering skills for lawyers and legal concepts and theories for engineers; it does not matter whether you are a lawyer or engineer, but be professional, meet the required experience for DB members, etc.

Session 8, Explore Other Mountaintops: Expanding the Use of DBs in Non-Construction Industries, was moderated by Gerlando Butera, Partner, Addleshaw Goddard. Speakers were Rene Mueller, Senior Contract Manager, Shingo Ohno, Managing Consultant, Systech International and Ron Finlay, Chief Executive, Finlay Consulting. Moderator and speakers talked on usage of DBs in other than construction industries. Topics included cases in the power industry, insurance industry and various DBs applications in Australia.

The Conference Chair, Toshihiko Omoto, expressed the summary of the event and appreciated all tutors, moderators, speakers, delegates, DRBF Secretariats, Sponsors and Supporters, expecting to see everyone again in Berlin next year. DRBF Executive Board of Directors Meeting was held after lunch. This is the end of all events.

Memories, Reflection and Gratitude of the Event

Workshops, Conference and Welcome Reception were held at the host hotel, Park Hyatt Tokyo. The modern hotel provided nice views to everyone as venues were located at the 39th floor. Someone might have remembered an old movie, "Lost in Translation" which was filmed in this hotel.

From almost a decade ago, many Japanese members have been asked by other non-Japanese members, "Have a DRBF conference in Japan!" We believe that we could have finally answered these requests.

Three daytime tours were planned for guests of the delegates. None of them was implemented due to insufficient number of participants. We regretted so much that we could not have offered more attractive tour that many people would be interested in. We apologize to those who planned to join the tour for our mismanagement.

The "Whova" mobile application was used again for this event, and worked well to make everything smooth and provide presentation data immediately after the conference. This is especially beneficial for those non-native English speakers.

Two days before the Gala Dinner, it was anticipated that we would have a rainy night on the cruise, as the weather forecast indicated the possibility of rainy weather was 70 %. An executive director of DRBF flatly stated, "Don't worry! I ordered good weather". Her statement came true and we could enjoy a fine evening. We were really surprised with her magic. We believe this incident bodes a bright future for DRBF and its members.

Thank you again for all delegates, guests and other persons who participated in this excellent event.

Toshihiko Omoto can be reached at toshihiko@omoto4adr.com

DRBF CONTRIBUTORS

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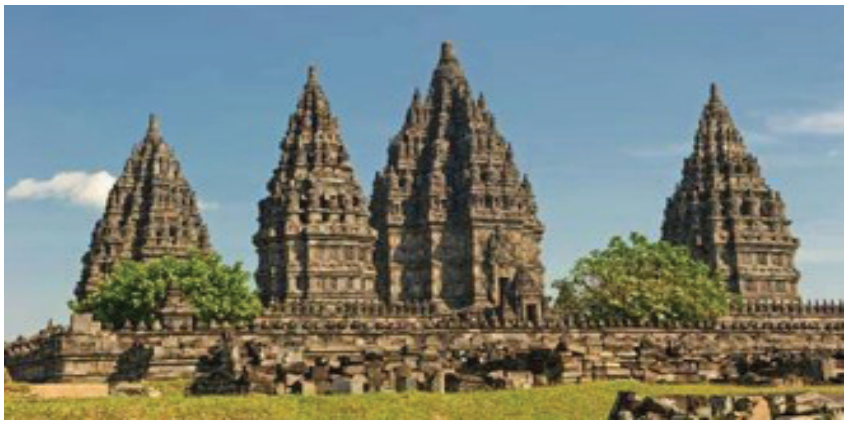
Join Us!



Yogyakarta, Indonesia

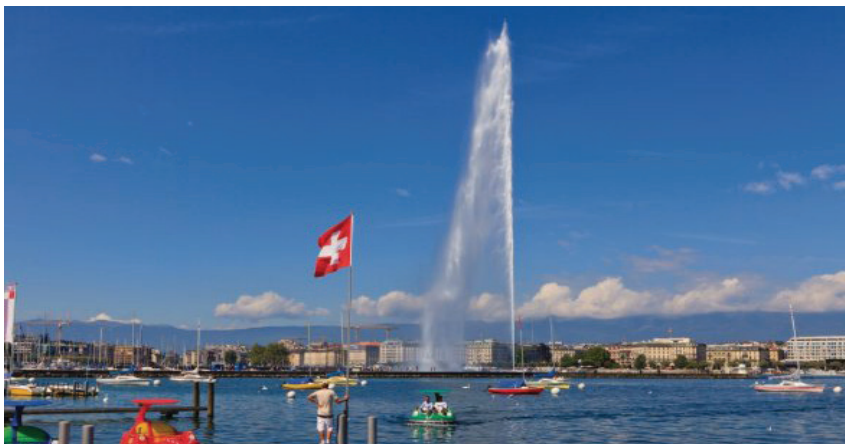
Dispute Board Conference & Workshop

Sheraton Mustika Yogyakarta

20 - 21 August 2018

Click to Register

Conference Chair:
Sarwono Hardjomuljadi



Geneva, Switzerland

DRBF Regional Conference & Workshop

Hotel President Wilson

14-16 November 2018

Registration Opening Soon

Conference Chair:
Michel Nardin

Charlotte, NC USA

DRBF 22nd Annual Conference & Workshops

Embassy Suites by Hilton Uptown

17-19 October 2018

Click to Register

Wednesday, 17 October (optional events):
Introductory **Seminar**, **DRB Training Workshops** for DRB practitioners and users (owners and contractors), and **Welcome Reception**

Thursday and Friday, 18-19 October:

DRBF Conference
Presentations, panel discussions and peer roundtable on the latest developments in DRB use and best practice.
Al Mathews Awards Dinner

Move your project across the finish line!
Dispute Review Boards: Effective, Efficient, and Timely Dispute Avoidance and Resolution

Don't miss 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**

DRBF CONTRIBUTORS

Sustaining

Romano Allione

Altana

Dick Appuhn

JayDee Contractors

Jim Donaldson

Driver Trett

Graham Easton

Ronald Finlay

Watt Tieder Hoffar & Fitzgerald

Volker Jurowich

Frank McDonough

Harold McKittrick

Probyn Miers

Navigant

Gwyn Owen

Tom Peterson

Pinsent Masons

Robert Smith

Paul Taggart

Barry Tozer

Hatch Mott MacDonald

Stacy and Witbeck

Welcome to New DRBF Members

Nabil Al Tawil
Dubai, UAE

Alexander Aquino Gonzales
Lima, Peru

Paolo Balegno
Karuma, Uganda

Charles Blamire-Brown
London, UK

Francesco Buonanno
Rome, Italy

Thomas Carey
Co. Wicklow, Ireland

Illeperumage Chandrasiri
Piliyandala, Sri Lanka

Graeme Christie
Auckland, New Zealand

William Corn
Murrieta, CA USA

Andrea Dalceggio
Panama

Juan Jose Davidovich
Ciurdad de Mexico, Mexico

Atilla Dikbas
Istanbul, Turkey

Micael Eidlin
Port Ludlow, WA USA

Srinivas Ethiraj
Chennai, India

Kimberly Farley
Kent, WA USA

Gaelle Fihol
Paris, France

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Seattle, WA USA

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Jakarta Barat, Indonesia

Gregory Hill
Redmond, WA USA

Luis Infante
Miguel Hidalgo, Mexico

Clyde Joseph
Auburn, WA USA

Kevin Lai
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Vincent LeFeuvre
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Christopher Loeffler
USA

Alfredo Machuca
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Zulfikar Manggau
Balikpapan, Indonesia

Ana Yuni
Kota Tangerang, Indonesia

Ian Massey
Durban, South Africa

Scott McNay
Broomfield, CO USA

Stefan Müller
Centurion, South Africa

Gerry Nel
Sandton, South Africa

Junko Ogushi
Tokyo, Japan

Joao Paulo Pessoa
Sao Paolo, Brazil

Paul-Alain Pichereau
London, UK

Irina Pongracz
Paris, France

Raden Cahyo Prabowo
Jakarta Barat, Indonesia

Dodik Priyanto
Jakarta Selatan, Indonesia

Hamansyah Purba
Jakarta, Indonesia

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Pasco, WA USA

Kevin Rozendaal
Federal Way, WA USA

Paul Samuels
Johannesburg, South Africa

Michelle Santiago Fernandes
Sao Paulo, Brazil

Alfons Schulze-Hagen
Mannheim, Germany

Ayse Selcen Can
Istanbul, Turkey

Viacheslav Shandryk
Odessa, Ukraine

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Bali, Indonesia

David Warner
Seattle, WA USA

Xavier Zeno
Montigny-le-Bretonneux, France

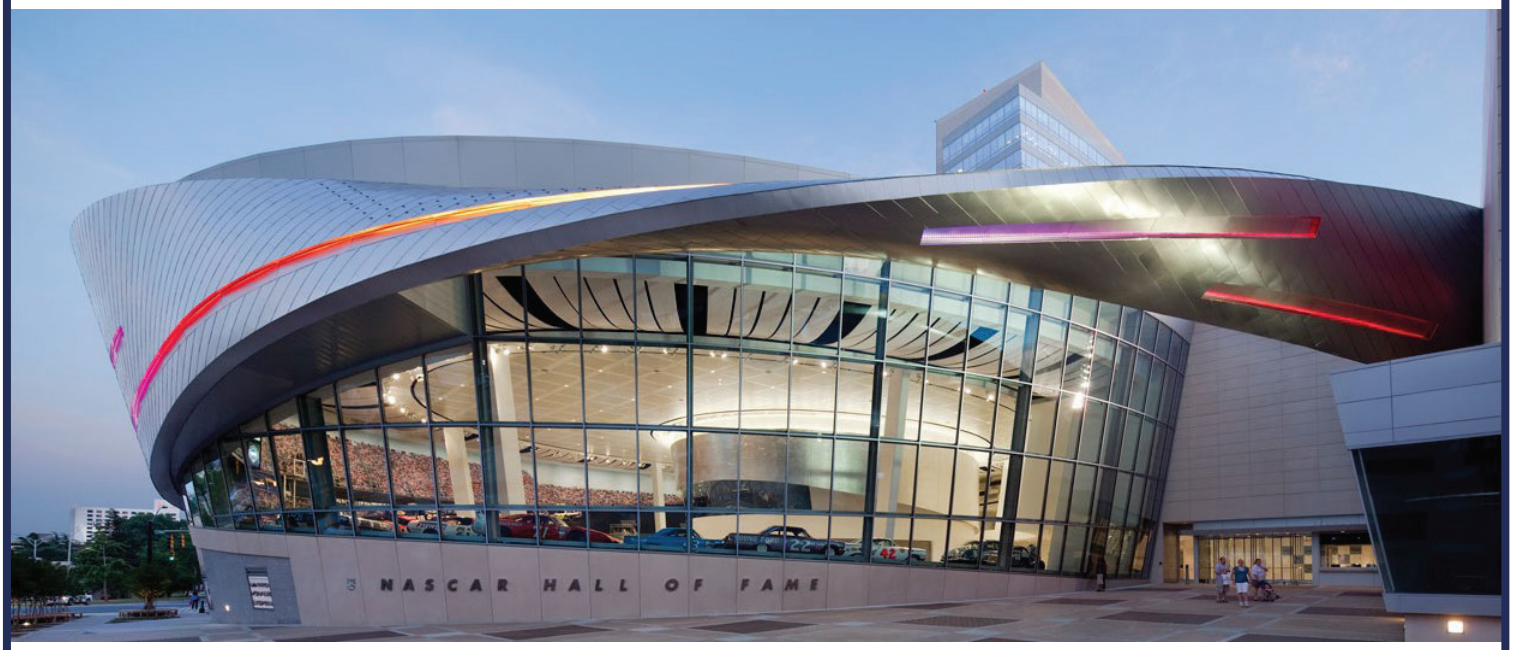
Do you know someone who would like to join the DRBF?

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.

DRBF *Forum*
Dispute Resolution Board Foundation
3440 Toringdon Way, Suite 205
Charlotte, NC 28277 USA

DRBF Awards Dinner: Al Mathews Award and Excellence in Dispute Avoidance & Resolution Award

18 October 2018 NASCAR Hall of Fame



A highlight of the **DRBF 22nd Annual Conference,** the Awards dinner will honor this year's recipient of the Al Mathews Award for Dispute Board Excellence and recognize the Excellence in Dispute Avoidance and Resolution award for an exceptional project team. Afterward, enjoy cocktails and buffet-style dinner while enjoying the sights and exhibits at the one of a kind venue, the NASCAR Hall of Fame. Sponsored by Lane Construction Company.

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

More details about the 22nd Annual DRBF Conference at www.drb.org