



Webinar #2 Summary:

The Impact of Covid-19 on Dispute Board Operations *Emerging best practices and challenges in transitioning from in-person to virtual DB procedures*

From DRBF's members-only webinar 1 June 2020

Panelists: Graham Easton, Andy Griffiths, Toshihiko Omoto, Elizabeth Tippin, Leo Grutters. Moderated by Ann Russo, DRBF Executive Director

In polling the participants attending this webinar, we found 25% had participated in an online DB meeting and/or a DB hearing as of the end of May 2020.

Question: How did the Parties initially reacted to the shutdown of in-person meetings? Were they supportive of continuing Dispute Board operations virtually?

Elizabeth: In California where I am, we did not have a choice to meet in-person due to shutdowns related to Covid-19. Parties were supportive of continuing the DB process and, because of the value of seeing someone, they were supportive of using the virtual platforms. Disaster preparedness plans they had did not include preparations for something like Covid-19. My personal experience just before the shutdown involved face-to-face arbitrations in February, where one person who was sick. That was uncomfortable for me, so I immediately signed up to be a host on the Zoom.com platform and trained on it using a small practice group. By the beginning of March, I was comfortable enough to host a Zoom DB meeting and a virtual site visit using video and Google maps. It was terrific. Since that time, everyone has been onboard to use various formats, including Microsoft Teams and WebEx. Further, Parties have also become willing to host virtual meetings. I hope the 75% of people in this webinar who have not held a virtual DB meeting will find they are easy to use, given practice.

Graham: Down under (Australia), shifting from in-person to online was almost like business as usual. There was no resistance or difficulty, because most owners and contractors were doing this as part of normal business anyway. I have not yet hosted a meeting as a DB member or chair. My experience has been that the owner or contractor has hosted the meeting, which presents some issues. It means the chair of the DB loses control to some extent, because they don't have control of the platform. We have learned that the DB chair should set some ground rules for how the meeting will proceed; that we need a more detailed agenda than used in in-person meetings; and to have a "test" meeting to make sure everyone knows how to use the platform. I'm not a great fan of virtual meetings, because I'm not as comfortable with the technology. I will be very happy when we can return to in-person meetings.

How do other DB members respond to virtual meetings?

Leo: When we were initially confronted with news that in-person meetings would not be possible, DB members first thought we could wait for a couple of weeks for the lockdowns to end. But in time, we realized we could not stop progress on the DB and had to face the need for virtual meetings. Many DB members were unfamiliar with the

platforms. Unfortunately, in R2 counties, there is no one platform that will work everywhere. We work using every single platform and learn how to use them all. Meetings I've been in are getting better and better.

Toshihiko: I am currently chairing two DBs. For one, we had already met three times for site visits, and people knew each other very well. One Party on this project requested a formal DB opinion be issued using a virtual platform, and the process was well received. At a second virtual meeting, we gave our opinion. For the second DB, we had not yet had a site visit. Before starting DB operations on that, Covid-19 meant we had no progress for several months. However, members have agreed to hold the first virtual meeting in the coming weeks.

Question: For routine board meetings, how did you organize your first virtual meeting. What platforms did you use? How did you organize pre-meeting documentation?

Andy: As Graham mentioned, the meeting needs to be more structured. For a site visit, you need more photographs, video and any drone footage to be provided before the meeting and organized in a way so the DB can understand where they were taken and why. During the meeting, Parties should explain where on site the photos were taken and why they were taken. Both parties should be part of the process of what to present to the DB, so the DB gets a balanced picture. We need high quality videos, not those taken while driving, and without voice commentary. Drones are good if you have an experienced person taking it. These files are very large and so should be loaded onto a large file transfer site (like Dropbox) before the meeting and not sent via email. For all these reasons, virtual site visits are more challenging compared to being there in person, walking around the site to see what's important.

Graham: There is absolutely no doubt that presentations like video and photos do need to be provided well in advance of the DB meeting, and this takes time. Also, we've found it important to ask the parties to provide a brief joint summary in advance of the board meeting. During the actual meeting, it's also helpful to have two screens: one to see the Parties and one to view the documents. It's difficult during remote meetings to feel like you're highly involved in the meeting, and people sometimes lose their attention.

Question: Aside from the virtual platform, how does the structure of a virtual hearing differ from a routine meeting?

Toshihiko: One arbitration I was involved before any lockdowns or stay-at-home orders, I was the sole arbitrator. I proposed to have the hearing online to reduce costs related to my travel. All Parties agreed. It was very effective. In another hearing scheduled for next week, I am preparing notes in advance about what I want to clarify, so the parties will have the time to prepare a reply. With this information and a clear agenda, I expect it to be effective.

Leo: One hearing I was involved in had been planned for the end of February. It was delayed for two months, and then we convened with a telephone conference in mid-

March because the Parties were not prepared to delay the hearing any longer. Parties agreed to a virtual hearing. All parties were English speaking, so translation was not an issue. To make sure the virtual meeting would go smoothly, we assessed the technology available to all the participants. We also used what I call a tribunal secretary for sharing documents: Instead of everyone trying to share documents on-screen, this person referred to exhibit numbers and managed document sharing for everyone. Initially, we also had some trouble controlling who would speak and how long. So this tribunal secretary kept a check on the amount of time each party spent commenting. The meeting was scheduled for eight hours, but we all agreed after four hours to break until the next day. We all found it is tiring to sit in front of a computer screen for too long. Everyone was satisfied with the results and felt they had a proper chance to state their cases and defend themselves.

General comments from the panelists:

Elizabeth: We have found that there is much that can be accomplished in virtual meetings. I believe they will be useful also after the Covid-19 crisis. However, there's nothing that beats in-person meetings and site visits. DB chairs who are flexible and nimble can use virtual meetings to maintain progress. For one virtual DB meeting recently, no one knew anyone, but we were able to establish openness and trust, and focus on dispute avoidance.

Toshihiko: In Japan, many businesses have carried out what we call 'telework' from home. We found it works very well, and some companies have found they do not need huge offices and will keep this style of working. So, some virtual meetings can help save money.

Andy: Virtual meetings were thrust upon us suddenly, but they're now here to stay. They are another tool in the toolbox, to ensure that DB process are being followed and that communication takes place regularly, which is the most vital aspect of DBs. I also agree that they can't replace in-person meetings, but we can look at ways to have both in-person and online visits.

Graham: I agree they are another tool, especially for procedural conferences and addressing particular issues. But for routine DB meetings, virtual meetings are grossly inferior. They are not as effective in allowing us to get a feel for what's going on at sites, and they make it less effective for us to ask the difficult questions that Parties don't want to answer.

Leo: Site meetings are much easier for the DB to deal with in a virtual manner. Hearings, though, are a bit more difficult. We are finding ways to deal with the challenges. Virtual meetings make DB members more accessible to the board. In countries with less experience with the DB process, they seem to go back to normal behavior (not communicating with each other, for example) when the board is not on-site. Virtual meetings allow for quicker access to the board and to the Parties, to discuss issues at earlier stages if the parties desire. The board can also provide informal opinions more

quickly and easier using virtual meetings. For contentious issues, in-person meetings are preferable.

Audience Question and Answer

Audience Question: What is your experience downloading and accessing large files, like video and photos, for DB meetings?

Andy: Whatever the DB sees, each party should also see. Parties use different mechanisms, like Dropbox (which has size limits) and other file sharing systems. You just have to agree on a common platform and ensure that each party has access to it. That can be a challenge if the file sharing system is proprietary.

Elizabeth: Develop a protocol for how those documents are accessed. For example, if they want an advisory opinion, will files be in a separate file or accessed in another way? It does work very effectively to have one central storage.

Graham: Most major construction projects have a file sharing platform, and DB members are normally given access to it or to a special location within the system.

Audience Question: Virtual meetings sometimes create problems with time zones, internet connections, and language barriers. How do you handle these issues?

Leo: It's important that all Parties have the opportunity to participate at a reasonable local time. That can be difficult when there is a 12 hour time zone spread. A "reasonable hour" is open to interpretation, so open, frank discussions about meeting time with all the parties is the way forward.

Related to translation or language issues: in physical meetings, it's easier to understand each other when you're looking at each other in person. It is a lot more difficult in a virtual meeting. The solution is patience. Ask people to repeat themselves, and to speak slowly and clearly.

Andy: I agree that patience is important. We need to be patient in having people repeat things two or even three times in order to overcome communications issues. Problems can occur for many reasons: a bad internet connection or an accent that is difficult to understand.

Elizabeth: In arbitrations with interpreters, you have to consider the need for the meeting to last two to three times longer. And everyone needs more breaks, as well.

How are DB fees affected by this move to virtual?

Elizabeth: DB fees can be daily or hourly, depending on the project. Most contracts I work on are on an hourly fee.

Toshihiko: For a site visit, we are usually claiming a daily fee that is based on travel time. In one situation, the DB agreement included only a daily and retainer fee, with no mention of hourly rate. The Parties agreed to pay the daily rate based on the number of hours I worked.

Audience question: How can DB members support each other and the Parties?

Graham: It's important for board members to communicate regularly outside formal DB meetings, maybe on a weekly or bi-weekly basis. Also, the chair needs to have regular liaison with the Parties and to pass down that information to the other DB members. That creates a circle of communication that is more frequent and intense than it would be in normal circumstances.

Audience question: Do you agree that some DB meetings (vs. hearings) can be done virtually after the current crisis is over?

Andy: The familiarity we're all gaining with the online platforms shows what can be achieved. But you still cannot replace the value of an in-person meeting. After this crisis is over, I would be reluctant to have too much time between in-person meetings. I would also plan to have in-person meetings early on, to establish the relationships and the process. Perhaps you can have a virtual one to two hour meeting every second month, to make sure Party communication is going on. Virtual meetings can keep the momentum going after an in-person board meeting.