



Webinar 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: Andy Griffiths, Elizabeth Tippin, Hal McKittrick, Leo Grutters

Moderated by Ann Russo, DRBF Executive Director

In polling the 100 participants attending this webinar, we found 64% had participated in an online DB meeting as of the end of May 2020. Only 25% had participated in a DB hearing. Most, about 80%, characterized the online DB experience as "excellent" or "good."

Feedback from attendees about the webinar was overwhelmingly positive, with all rating it "excellent" or "good." Attendee comments included: "The practical experience [panelists] shared made this webinar particularly interesting. Hope there will be more." "Very worthwhile discussion." "Excellent presentation." "Thank you for organizing this very useful presentation."

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

Elizabeth: I found that DB members took more coaxing than the Parties did. 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 was sick. That was uncomfortable for me, so I immediately signed up to be a host on the Zoom.com platform. By the beginning of March, the entire state of California had stay-at-home orders. DB Parties then jumped at the opportunity to use Zoom, and I trained other DB members. Since that time, everyone has been onboard to use various formats.

Andy: In southern and eastern Africa when the outbreak started and international travel stopped, Parties initially thought: let's postpone for a month or two, so can have in-person onsite meetings. As they became comfortable with Zoom in other parts of their business, they became more willing to use it for the DB. But in one remote location, we had to be quite patient due to connection problems. But it's been a huge benefit, especially for remote places. It allows us to avoid one- or two-day travel times to get to the site. This medium is here to stay.

Hal: In the US, reception to virtual meetings has been very positive. The DRBF has been encouraging members to keep the DB process going, and I've found that the membership has been supportive and enthusiastic. However, sometimes the Parties are not as positive.

Leo: I've found reception varies, depending where you go. I work across international borders. On one project, fellow DB board members were not initially keen on using

virtual platforms, I presume because no one knew where this was going. Some DB members were inhibited by the tools. But when it became clear that Covid wasn't going away, they embraced it. I'm all for it, and I've found other DB members are converted too. Online meetings are here to stay, so we all have to get used to it.

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?

Tippin: I hosted my first virtual DB meetings thru Zoom in early March. Beforehand, I trained the other DB members, so they would be comfortable with the platform and features like the whiteboard, share screen and breakout rooms. For the other Parties, we did no training. But during the first few minutes of the meeting, we went over these topics. Site contractors lead a site visit using share screen, showing google maps and still images. It helped with this project that the Parties already had an established relationship. On another project, one Party hosted the meeting using WebEx. This was a new project, so we organized a kick-off meeting and other virtual meetings to develop an agenda. In another project, construction was suspended, so the Parties decided not to move forward with a DB meeting. They have deferred further meetings until the project is back on track.

In all cases, we discussed the option to record the meetings and decided that it would not be appropriate. We also discussed rates. DB members offered a reduced daily rate; otherwise, the hourly fee was billed at normal rates. It's also important to consider who is going to host each meeting, because depending on the virtual platform, that person might have access to more features. If you are actually having a hearing, it makes sense for the chair to be the host, because that person can control breakout rooms for discussion.

Leo: For me, deciding on platforms and logistics was trial and error at the beginning. For the first meeting, I approached Parties to ask how they felt about having a virtual meeting. They said they were fine with it and tasked the DB members to work out rules, guides and details. We had little guidance. In this case, Zoom backfired because it was going to through bad press due to security. One contractor would not agree to participate until we used GoToMeeting. Also, we didn't know until the meeting that we had internet connections that weren't too stable. Once we reached about 20 people in video room, everything crashed. Switching off cameras posed a problem, because we wanted to read body language. We also looked at logistics related to document sharing. We started out by giving everyone share screen options, but that soon it became ineffective and unworkable. In the afternoon, to resolve this, we gave one specific person the task of calling up each document up from a shared server. That server was already in place, which was a benefit. That method worked, and the person acted as a secretary. We also figured out quickly that, unlike face-to-face meetings that can last all day, people became tired after hours of being in a virtual meeting. We found that four hours a day is the limit.

Question: What is your experience with having a virtual site visit in conjunction with a virtual meeting?

Hal: During a virtual meeting for one project, the Parties provided 700 photos, broken into categories, in order to show progress. Another project had its first DRB meeting and consisted of three different contracts and two contractors. We set this meeting up as a general overview covering key elements of all the projects. The owner enhanced this by preparing detailed illustrations of key features of the entire project.

Andy: Nothing can replace first-hand knowledge gained by walking around the site. In person, you as an individual can look at what you want to look at, and from the vantage point you want. If using photos, they need to be properly compiled into categories, as Hal explained, and distributed beforehand. During the meeting, the Parties need to explain why they took each photo and what it's showing. Also, Parties should agree what photos to show and not to show. With cell phones, videos are easy. But they need to be good quality: taken while the person is standing still, not while driving, for example. Also, limit commentary on video, because everything recorded will be shared with everyone. We also need a good number of videos. In one dam project, we were quite familiar with the site, and the drone was excellent in showing the dam as well as upstream and downstream. We could stop the footage and zoom in closer, look at it in detail and at our own leisure. So if you have a drone enthusiast onsite, great. On the other hand, amateur footage will give amateur pictures that could be useless.

Also, with video footage, the file sizes are enormous and can be difficult to share on a platform like Zoom or WebEx. So look at big file transfer systems like Drop Box.

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

Hal: As Andy said about site visits, there is no substitute for a live, in-person hearing. But virtual hearings can come pretty close. One I was in lasted eight hours, with four presenters for each party and up to 24 people were involved. The DB asked for position papers two weeks ahead, rebuttals one week ahead, and witness information two days before. We had an agreement not to record it. During the meeting, the Parties in rebuttal asked to present certain documents. If this had been an in-person hearing, the board would have received these documents when they presented them. But during the virtual hearing, we had to wait a day or two to get rebuttal documents.

Some things are different with virtual hearings and meetings. There is no ability to scan the room, look at people to see how they are reacting. You also miss the chance to slide a piece of paper to a fellow board member or have a conference at lunchtime. So virtual meetings are not as spontaneous. Also, during rebuttal, each Party had control of the

screen during their presentation. This made rebuttal a little fuzzy, but it's important that the Parties have that control.

Overall, I think you can achieve solid results in a virtual hearing. Before my first one, I was one of the biggest doubters. Now I support it, even though I far prefer onsite.

Follow up question: What might you do differently at a future hearing?

Tippin: To address some of the issues Hal mentioned, it's nice to have the option to cut off the meeting at lunch time and resume after lunch.

Hal: Next time, I would caucus with board members during a break, even though we did have a post-hearing meeting.

General comments from the panelists:

Andy: Virtual meetings were thrust upon us suddenly, but they're now here to stay. They can help cut down expenses, especially in travel, but we need to develop more guidelines. 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. They keep the communication going, which is the most vital aspect of DBs.

Hal: These are very useful tools. But in some situations, the Parties do not communicate in the absence of the DB. So for certain projects, I would not use it at all.

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. I'm all for it.

Elizabeth: There's nothing that beats in-person meetings and site visits. But I'm all for getting back to going to the project and meeting the people when it's safe. But virtual meetings have been very helpful to keep trust going between Parties and DB members. The DB chair and members should continue to innovate, being flexible, nimble.

Audience Question and Answer

Audience Question: Besides limiting virtual meetings to four hours at a time, what techniques and technology platforms can be used for virtually training large groups?

Leo: For training, especially over a number of days, you need a virtual platform designed to allow students to come together between sessions. Some make it very easy to help students communicate with each other and with the instructor over video, chat and email. During live sessions: we answer questions online that we can easily answer. If they're more complex questions or more specific to one student, I ask the student to submit it in writing. Trainers then come together to answer it.

Elizabeth: To prepare for a meeting or training, get a small group together to learn the platform, meet regularly, share being the host and practice using the features.

Another participant offered: Microsoft Teams for Education may be a good option. Many schools and universities in the USA are using it.

Question: What are considerations about whether hearings are recorded or minuted?

Elizabeth: I have experience where there is a signed agreement in the Zoom format that no one will record. I recommend reinforcing and enforcing that no one will record the virtual meeting.

Question: Do you think that remote meetings will cause a reduction in the number of disputes avoided?

Leo: Time will tell if virtual meetings will work, given the drawback that they do not allow the DB members to easily see and anticipate issues they could see in person.

Andy: The DB board will be in the best position to know if or when it's time for an in-person meeting. I'd be reluctant to have too much time between in-person meetings, because we need to pick up on body language so we can address issues as soon as possible.

Hal: A big part of the role of a DB involves the relationships we're developing. We're evaluating Parties, and they're evaluating us. And that best happens in person. Will dispute avoidance effectiveness be reduced if using only virtual meetings? My answer is yes.

Question: How can caucuses be handled in virtual hearings?

Hal: Features of different virtual platforms can help. In some, you can restrict comments to specific Parties. Prolonged breaks can give time for a caucus. If the platform you're using doesn't allow you to chat with someone privately, use a different platform for the caucus (email, phone, Skype, Facetime).

Elizabeth: You can also set up another meeting. I've used breakout rooms in Zoom effectively, to have a private caucus with three DB members only.

Question: Are there challenges with having virtual meetings in bigger countries which have recently emerging DB traditions and experience.

Andy: Where Parties are not familiar with the process, I would approach with trepidation having the very first DB meeting be a virtual one. But today given Covid-19, we don't have that option. We wouldn't want to delay the first site visit by six months, for example. But I would prefer when possible to have the first meeting in person.

Hal: I had one meeting that involved both inexperienced DRB members and inexperienced Parties. But there was an urgency to have this first meeting. For both Parties, this was the first time using a DB, so I made this first meeting informational and instructional, and avoided discussing specific issues. We excluded contractors from addressing their issues at that meeting, and set up a face-to-face meeting for them later.

Question: Do you expect virtual hearings to take more or less time for those involved to resolve disputes, compared to conventional procedures?

Elizabeth: When thinking about hearing disputes using virtual platforms, I have to think it will take a little more time. For one, preparing for virtual meeting takes time, to look at documents, review briefs, learn what Parties are saying.

Andy: Virtual hearings will take more time logistically. We have to be careful to make sure everyone has the right document before we proceed, for example. It could also take more time if English is not the first language of the participants or if the internet is patchy. We need to be doubly careful to afford the time to fully understand what's being said.

Hal: In my experience, the time required for the virtual hearing I was part of was not a great deal more than I normally experienced.

Question: Do you expect various institutions to publish recommended practices/rules for virtual meetings?

Leo: Yes, because we can't afford to delay meetings for 6 months. The DRBF is working on some of these things. We are the leading organization in DBs, and people are looking to us for these guidelines. Also, organizations like FIDIC, ICC and others have started the process, everyone has recognized the need.

Question: How can site tours be affected by lack of in-person visits?

Hal: As we've said, there is no substitute for an in-person site visit. In my experience, issues arise during site tours between Parties. If you're not there, you miss it. If a virtual meeting is totally structured or rehearsed, you might also not get that important body language feedback.

Elizabeth: On the other hand, when on a site visit, a conversation sometimes starts with a DB member, such as, "This was what I was talking about." We want everyone involved in all discussions and so we don't want that type of interaction. But in virtual meetings, there are no side conversations. Everyone hears everything at the same time and can respond.

Question: How do you see us moving forward with face-to-face and virtual meetings?

Andy: I definitely see virtual meetings being used in the future, especially when trips have long travel times. We could have a combination of both types, having infill meetings virtually. However, spacing in-person meetings too far apart in order to save money defeats the other real savings of avoiding disputes in ways in-person meetings can.

Question: Some contracts include an obligation to visit the site. How can this be addressed now and in the future?

Leo: This is relevant especially for FIDIC, which requires the DB to meet with the Parties in certain intervals. If virtual meetings are to be a reality, the DB and Parties need to agree upfront, getting approval right from the start to have certain virtual meetings.