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

DRBF Forum

Volume 21 Issue 1 February 2017

An Argument for Contract Admissibility

By Dick Fullerton

Note from the editor: *In Vol. 20 Issue 2 of the Forum, Kurt Dettman wrote an opinion article about whether the DRBF should reconsider its recommended best practice on the issue of admissibility. The DRBF received several letters advocating that the DRBF maintain its recommendation that Dispute Board recommendations and decisions be admissible in any further proceedings. This article and the following letter by Bill Baker are responses based on experiences in the U.S.*

CHALLENGE

A DRB recommendation results from a comprehensive inquiry by experts into the details of a construction dispute, and parties are free to use the recommendation as the basis for a negotiated settlement. If unsuccessful, most can expect that the recommendation will be admitted as evidence in subsequent legal proceedings. The admissibility of a recommendation is supported by a provision in many standard DRB contracts. Most state DOTs include such language, and the practice is encouraged by the DRB Foundation (DRBF) and by the majority of industry professionals. But the question is nonetheless debated, with supporters welcoming the enduring influence of a recommendation and detractors questioning the effect on the legal process. Admissibility is a critical component for participants and DRB members, industry professionals and attorneys alike, so it is important to recognize the inherent benefits and obligations.

HISTORY

In 2013, Kurt Dettman and I served on a Colorado Department of Transportation (CDOT) board in eastern Colorado. During rides to the project, we talked about admissibility. He was opposed to the practice at the time, which I found concerning because I held it to be a cornerstone of DRB success and acceptance.

(continued on page 12)

President's Page

Dick Appuhn
President
DRBF Executive Board of Directors

Dear Members, Supporters and Friends of the DRBF,

This is the first message for the 2017 Forum issues. The Foundation has significant plans for this year that should be of interest to everyone.

The 17th Annual International Conference is scheduled to be held in Madrid between 24 and 26 May at the Westin Palace Hotel. The conference theme is "Grab the Bull by the Horns: How to Face, Avoid, and Resolve Project Disputes Early" and the organizers have arranged for an auspicious line up of speakers. The event will not only feature the normal introductory and advanced workshops but it will introduce for the first time a session dealing with dispute resolution under Public Private Partnership (PPP) agreements. The PPP workshop will be led by DRBF experienced practitioners with backgrounds in dispute board applications and PPP projects. I am confident that this conference will be well worth attending and I look forward to meeting all of you there.

The 21st Annual Meeting will be held in Chicago for the first time, between 14 and 16 September at the Westin River North. The conference theme is in development with a committee of experienced DRBF members and event organizers. Mark your calendar now and plan to join us in September.

In addition to the annual meetings and conferences there is a full programme of training and outreach events scheduled for this year. Members are encouraged to participate in these activities and those of you wishing to do so should contact Ann McGough at amcgough@drb.org or through the Foundation's website (www.drb.org). Look for events in Trindad & Tobago, California, Chile, Washington, Nevada, Mexico City, and Vancouver to name a few; with more in the early stages of development.

The DRBF administrative team has been working actively to improve communications for all members. You will have had the chance to renew your membership using our new online processing system. Early indications are that the system is easy to use. It also gives us the opportunity to share with you the various committees in each region if you are interested in getting more involved in DRBF activities. This is one of the best ways to maximize your membership in the Foundation.

I look forward to active participation by the entire membership to further individual goals as well as those of the Foundation.

Warmest regards,

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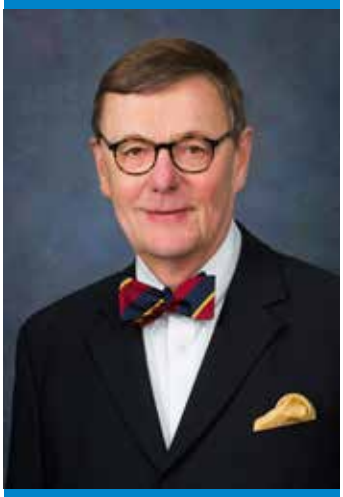
The Forum is published quarterly by the Dispute Resolution Board Foundation (DRBF). Any opinions expressed are those of the authors and do not necessarily represent the opinions of the DRBF.

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.

A conversation with... Bob Smith

Note: *Thank you for the opportunity to share some of my thoughts on the DB process. Before we get started, in answering your questions I will use the abbreviation "DB" in referring to both DRBs and DABs, the term "Owner" which is typically used in North America, and for purposes of our discussion is equivalent to the term "Employer" used in other parts of the world and the word "Determination" for a DB Recommendation or Decision. Next, my answers will not be based on facts or circumstances associated with any DB on which I am currently serving. Finally, the views I express here are not necessarily those of my employer or the DRBF.*



Robert (Bob) Smith
Co-Founder, DRBF
Recipient of the Al Mathews Award for Dispute Board Excellence (2002)

Q You are one of the co-founders of the DRBF. How did the organization come about?

A It is fair to say that the concept of an organization for sharing of ideas and dedicated to "spreading the word" about DBs evolved over perhaps 10 years. In the early to middle 1980s, the construction industry in North America was struggling to find a better way to deal with ever larger construction disputes which were often resolved only after expenditure of enormous sums for litigation or arbitration. There was also a heightened awareness of the benefits of appropriate risk allocation in the same timeframe. The next phase came about as interest groups within professional and technical organizations began to coalesce and cooperate in preparing guidance publications on contracting practices. Parallel to the DRBF movement, other alternatives to litigation (which came to be known as "ADR" for "Alternative Dispute Resolution") such as step negotiations, mini-trials and mediation evolved and were being applied and evaluated. An ad hoc group of individuals aligned with ASCE's Underground Technology Research Council led by Pete Douglass took some of the first steps in publishing commentaries and specimen contract clauses for DBs, geotechnical baseline reports, and escrow bid documents. Eventually, members of the ad hoc group decided to prepare a manuscript for what would become a hard cover book, the *Construction Dispute Review Board Manual*, to be published and marketed by McGraw-Hill. The next step was the decision to use the book royalties (modest as they turned out to be) for seed money for a professional organization. The group began preparing bylaws, statements of purpose and organizational objectives and the like. I was the incorporator and applied for and obtained a non-profit corporation designation (and tax-exempt status) from the U.S. taxing authorities. A structure was developed, officers and board members were named, and the Dispute Resolution Board Foundation was established. Great thanks go to more people than can be possibly be acknowledged for their various significant efforts in supporting this nascent movement. Many of these individuals or their employers became Charter Members, providing additional seed money.

The organization struggled a bit in its formative years. My recollection is that the first annual meeting attracted about 30 individuals. Not too many years after that, the financial success of an annual conference in Europe looked tenuous and the conference occurred as planned only because a DRBF member fronted the expenses.

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

A In the early 1980s, I became active

with the American Society of Civil Engineers and other organizations seeking to promote the principles and practical application of better contractual risk allocation. I met Joe Sperry when we served on an arbitration panel hearing a dispute on a wastewater project in Michigan and learned that we shared an interest in better contracting practices. We later worked together on a contractual and construction risk assessment for a large metropolitan authority. This led to my involvement in the UTRC group headed by Pete Douglass (discussed above). My nomination and appointment as Chair of a DRB on a tunnel project in the state of Texas followed in 1986.

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

A It is hard to limit the answer to just one situation. The short answer is I have served on DBs where the owner was difficult, or another DB Member was difficult, or the contractor was difficult. The typical "difficult DB Member" situations have included the obvious bias of one member of the DB and an unwillingness of a member to contribute to the preparation of a determination. A difficult owner may be one unfamiliar with the DB process and therefore apprehensive or one who does not trust the system, process, or DB members. Such lack of "buy-in" by a party is problematic. Fortunately, many of these concerns can be dealt with over time, partly through the DB familiarizing the owner with the process and partly by the DB's conduct and showing of neutrality and integrity, which creates trust.

Q Should the DRBF recommend maximum and minimum age limits for DB members?

A Absolutely not. In my opinion, the age of a Board member candidate has little to do with their competence. As the founders' generation is "graying" the DRBF leadership has recognized the need to expand the pool of qualified DB members. I think most experienced practitioners would agree there are many competent project managers and project engineers that have extensive experience in various technical disciplines and are qualified. Unfortunately, there are impediments to DB appointments for such capable people in their 30s and 40s. First, their job responsibilities may be such that it could be difficult for them to find the time to serve as a DB Member and second, they may be in an employment situation laden with potential conflicts of interest.

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

A This question cannot simply be answered with a specific number because few DBs are created equal. While travel distance and time can generally be forecast quite accurately, the biggest variable in a DB Member's workload is the number of disputes to be heard and decided by the DB and this obviously can't be forecast in advance. My own experience has been that serving on eight domestic DBs (or four domestic and two overseas DBs) at the same time was sometimes close to a full-time job. It becomes a real challenge to hold hearings and prepare decisions when more than one DB requires attention at the same time. I have heard of some individuals that serve on over 20 active DBs at one time. Frankly, while I have never taken on so many simultaneous appointments, I don't understand how this can be done and how the DB can properly serve the parties.

Q What practices have you seen that could, in your opinion, be improved?

A frequent concern is the failure to

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properly integrate the DB specifications or requirements with the prior steps in the contract's dispute resolution process. This often creates gaps and overlaps which may lead to disputes over the DB's jurisdiction. It should be absolutely clear to all parties when an issue is "ripe" for referral to the DB. The DB process should be hand-in-glove with the prior steps. Another common practice of concern is the timeline for completing the steps prior to a referral to the DB. For example, the Conditions of Contract may state that when an issue cannot be resolved at the field level, it must be escalated to the next level in each party's organization within 10 days and the people at that level must make a decision within 10 days, and so on. While these short periods are theoretically desirable, in many instances they are not realistic or practical and as a result the parties may ignore them altogether, and months may pass before the next step in the resolution process is reached.

Q **What is your opinion of jurisdictional limitations on a DB, for example, limiting the Board's jurisdiction to only underground construction issues or limiting it to claims only above or only below a certain specified value?**

A I have always found limitations on subject matter jurisdiction problematic because they have the potential to create jurisdictional disputes that have to be resolved before a dispute can be addressed on the merits.

Jurisdictional limits based on the sum in dispute are also problematic as the claimant may "game the system" to obtain a forum it deems most desirable. For example, assume that the contract provides that all claims with a demand of less than $500,000 will be handled by a DB and claims of $500,000 or more will be subject to arbitration. Then, say a claimant demanding $900,000 wants to have the DB consider the dispute -- it may divide its claim into two claims of $450,000 each. On the other hand, a claimant with a $400,000 claim seeking to have it arbitrated could apply disputed mark-up percentages to increase the claim sum to $525,000.

Q **As a former Professor of Civil Engineering, do you have any opinions to share with respect to training of DB members?**

A Indeed, I do. My observation is that the level and added value of training may vary a good deal from one training entity to another. In my view, those entities should periodically re-evaluate the substance and methods of their training programs. Such an evaluation should answer the following questions:

1. Is the subject matter current and tailored to the needs of the trainees?
2. Does each training course and lesson within that training course have specific objectives?
3. Is there a way to determine if the objectives have been achieved?
4. Are there specified learning outcomes, e.g., the trainee should "be familiar with the symptoms of a dysfunctional DB", or "be able to prepare a flow chart of a contracts dispute resolution process", or "understand the valid grounds for granting a request for a clarification"?
5. Are the training sessions regularly observed and audited by an oversight committee?
6. Do the courses provide meaningful opportunities for participant interaction?
7. Is the time well-utilized? Training courses often devote a significant amount of time to discussion of the merits of a hypothetical con-

struction dispute. In my view, this is not a good use of the time available. DB Member selection criteria almost universally require that the DB Members have experience in the principal technical disciplines in the contract and further require that the DB Members have experience in contract interpretation, i.e., applying the contract to the facts and making a decision. In my opinion, training organizations should assume competence in technical subject matter and interpretation of contract documents and focus on the dispute resolution process. This can be done by positing hypotheticals founded on procedural and process issues that may come up in the course of a meeting or hearing, e.g., how should the DB proceed when the parties refuse to prepare a joint stipulation of facts? Or, how should the DB handle a situation when new evidence is first presented at the hearing? Or, if the DB is tasked with preparing Operating Procedures, how should it address procedures already set out in the contract documents—incorporate them in full or simply provide cross-references. The list could go, but I could see an entire day devoted to an interactive workshop on "what to do when". If the process is not handled well, the contracting parties may very well lose confidence in the abilities of the DB Members and they may never get to the point of resolving a dispute.

Q Have you ever observed barriers to the acceptance of a DB determination by one or both parties?

A Yes, and I believe there are several potential explanations for this, most of which can be dealt with proactively. First, if a party perceives the DB's determination to be guided by the DB's perception of fairness and equity rather than the terms of the contract it could be justifiably reluctant to accept the determination. This is very preventable. Most DB agreements mandate that the determination be based on the terms of the contract and therefore the DB is contractually obligated to do just that. While the DB should ensure fairness in the process, it should not consider fairness in the result. A DB does not have authority to ignore the contract. Another barrier to acceptance of the determination is that the disappointed party may consider the DB's analysis of the merits or quantum or both, and rationale, to be insufficient. Most DB Specifications or Three-Party Agreements require the DB determination to be reasoned. In my view, it is important that the DB members take the time to summarize each party's rationale so that the parties know the DB understood it, and then express their own rationale, which may be in line with one of the parties' position. Sometimes it may appear that DB took a results-oriented approach by first deciding what they considered to be the proper result and then developing a narrative to support it. Finally, though I have no experiential or empirical evidence to support it, I believe that a dissenting opinion may sometimes be a factor in a party's unwillingness to accept a DB determination. That is, the disappointed part sees a ray of hope based on the dissenting opinion. This is not to say I am against dissenting opinions, but I do believe they should be clear and specific with respect to the elements of the DB determination with which the dissenter disagrees and the basis for the disagreement.

Q What has given you the greatest satisfaction from serving on DBs?

A From a process perspective, it is very satisfying when at the conclusion of a project or at the last DB meeting the

CONTINUED

Mechanical Contractors Association of Westem Washington
Meyer Construction Consulting, Inc.
Mole Constructors, Inc.
Nadel Associates
Stephen J. Navin
John W. Nichols, P.E.
Parsons Brinckerhoff
Quade & Douglas, Inc.
Pease & Sons
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James L. Wilton
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parties both state that the availability of the DB encouraged them to work out their differences between themselves. Statements such as "Our goal was to resolve our issues without using the DB in its dispute resolution mode" and "the Board helped us do that by having frank discussions at the periodic meetings and encouraging us to avoid accumulation of unresolved issues and reminding us that we were in the best position to resolve our issues." A stalwart of DB practice and a role model for many of us often tells parties at an impasse that it is time for them "to put on their big boy pants."

The experience of serving on DBs with many outstanding professionals was also very satisfying. I learned a great deal from them and many of them have become good friends. I have also had an opportunity to continue and update my engineering education by learning about materials, means and methods and technology which did not exist when I received my degree.

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

A In a number of instances the DB got the sense that communications between the parties were strained or deteriorating. I think everyone will agree that open and frequent communication between the parties is a key element in avoiding disputes. In some of those situations the DB invited the principals of the parties to meet privately with the Board to offer them an opportunity to critique the Board's performance and effectiveness, make suggestions for improvements or even "vent" if they wished. This often helped to "clear the air" and sometimes encouraged more positive procedures at the field level. I regret that this practice was not used more often. These meetings also afforded the Board the opportunity to share the DB's observations. Sometimes we learned that the owner's team members were not familiar with the DB process and therefore apprehensive. This told the DB that we should have done a better job of explaining the process at the kick-off DB meeting and further should have asked the parties if they had any questions or concerns about the process as subsequent meetings and site visits.

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

A Contracts sometimes task the DB to prepare and distribute meeting minutes. I may be stepping on some toes (certainly not for the first time), but I think the time invested in preparing and distributing DB meeting minutes yields little, if any, benefit and should be reserved for instances where there is a clear and compelling need. It is fine to prepare and distribute a document that states the time and place of the meeting, attendees, the meeting agenda, action items, the date(s) of the next meeting(s). In some instances, review of meeting minutes has consumed an hour or more of time at the next DB meeting. Also, knowing that minutes are going to be kept could have an adverse effect on the parties' candor with the DB. Problems may arise when substantive matters are discussed in the minutes. A party may disagree with a statement in the minutes and request a correction or modification. This can sometimes lead to a skirmish with the other party, who thinks the DB correctly captured the discussion just right.

Q What is your preferred relaxation away from DBs?

A My wife and I enjoy both local and international travel. Local means cruising the lakes surrounding Madison, Wisconsin in our boat, often with family or

friends, and spending time at our cabin on a small lake in northern Wisconsin. In fact, I've spent many hours – indeed days – at the cabin drafting DB determinations. The tranquility of the woods punctuated by the calls of the loons (and lack of internet service) facilitate contemplation and clear thinking. I also enjoy spending time with my seven grandchildren ranging in age from 3 to 15.

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

A My wife and I have had the opportunity to visit many countries around the world (some with much better winter weather than Wisconsin!). We have met wonderful and friendly people, learned about and experienced many cultures, and experienced breath-taking views. On the other hand, having been born, raised and educated in Wisconsin and having established and maintained a global presence from Wisconsin, there is no other place I would rather live. My wife and I have many friends of long-standing and enjoy living in a "college town." Madison is the home of the University of Wisconsin where we began our respective careers. Five of my seven grandchildren are within an hour's drive and Madison is a 40-minute flight from three major airline hubs through which we can visit the world.

Q Do you have any closing thoughts or comments?

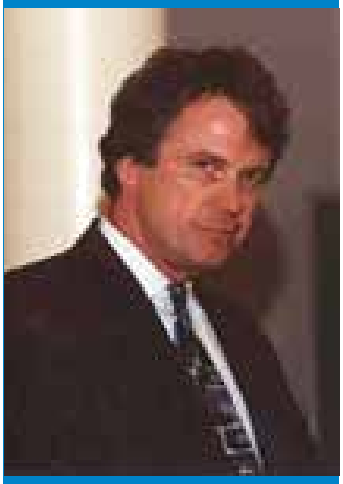
A When the co-founders of the DRBF took the legal steps to create it, they each had some vision of where it might go, but I don't know that any of us expected that on the 20th Anniversary of its founding, the DRBF would have over 1,000 members in 70 countries. Nor did they envision that the DRBF would organize two annual conferences, one in North America and another elsewhere in the world. These conferences have proven to be very popular and a wonderful opportunity to learn about recent developments and best practices and exchange ideas with colleagues from around the world. Obviously this could not have happened without the support and efforts of a host of individuals and organizations. Nor did any of us envision that the DRBF would publish a professionally produced glossy paper colored quarterly 32-page newsletter (the "Forum").

I am very grateful for having had the opportunity to help "plant the seed" and see it grow into a strong tree. This would not have happened without the dedication and leadership of so many of our members from Europe, Africa, Asia, Oceana and the Americas and I am even more grateful to all who have willingly given their time, talent and support. Well done!

Bob Smith *can be reached at robert.smith@akerman.com.*

Ethics in Today's World of DRBs

Contractor's Vice President approaches a Board member during a break in a DB formal hearing and offers to sponsor a DBRF event at her offices.



Jim Phillips Ph.D.
Chair
DRBF Ethics Committee

The issue raised at the conclusion of my last column in the *Forum* asks the question: Assume you are DRB Board member sitting in a formal hearing listening to presentations concerning a dispute between the parties. During a break in the proceedings, the contractor's Vice President approaches you about wanting to sponsor a DRBF event at its offices. This question has come up in a number of contexts and a number of times over the past few years. I also have received telephone calls about it whenever a Foundation member has a conversation with a member of industry who wants to host a Foundation event at their office.

Preliminarily, an offer to a sitting Board member for a benefit to the DRBF may seem to be a remote benefit to the Board, especially if none of the Board members are Foundation members. However, depending on the whether the Vice President knows the Board's membership status, the offer itself may appear to be an effort to influence the outcome of the hearing in favor of the contractor. Also, how would the owner react if he/she heard that this offer is being extended?

In the question for our discussion, the fact that it arises during a formal hearing creates, in my view, a unique circumstance, because the inference is that the offer is being made to perhaps curry favor with the Board regarding the disputes that are being heard. It is one thing to make such an offer outside the context of a hearing, perhaps at an annual meeting and conference when topics such as training program locations are being discussed, or venues for other Foundation or industry meetings. It is another to make the offer in the middle of a formal hearing because it may be viewed, as previously indicated, as promoting bias toward the contactor in the hearing.

Another potential ethical issue that comes up around this question is the one of value, or quid pro quo. The contractor that offers to host a DRBF meeting may be viewed as expecting favors from the Foundation itself, or its members. If XYZ corporation hosts an all-day event, the question becomes: what is the value of that benefit, or perhaps, what would the DRBF have to pay for that space in the market, or what amount could the corporation receive if it were to rent it out to another party? Whatever that value is; it is either a lost amount/profit to the contractor, and/or a gained value to the Foundation.

One thing is clear to me about this issue: it is absolutely not the time to have this conversation. Initially, I believe the Board member should either ask the Vice President to repeat the offer in front of the owner, or shut it down quickly, change the subject, or excuse themselves to return to the hearing. If there is an innocent reason for the offer, no doubt it will come back up at a more appropriate time and place. Contacting the DRBF staff and reporting the offer may be appropriate after the hearing. If the DRBF wishes to pursue it, it may do so, but not in the context of a formal hearing.

The question of the value of the offer of a contractor, or an owner for that matter, to host a meeting requires further discussion. If the DRBF wishes to accept such an offer, the Foundation leadership may wish to discuss whether to offer to pay fair market value for the office space so as to completely avoid the appearance of impropriety. I believe this might be one way for the Foundation to avoid the appearance of favortism toward one particular contractor.

However, the DRBF Procedures Manual's Section on Sponsorship Protocols discusses the issue of sponsorship. It provides for several methods for avoiding an appearance of favoritism for a sponsor. The Manual provides that any fees collected from a company should be used by the Foundation to help offset the costs of the event in order to keep registration fees low. It also provides that the Foundation "may not favor one sponsor over another," and if possible each event should have multiple sponsors. It also provides that certain levels of sponsorship may be offered free membership in the DRBF, and be recognized for their sponsorship in the *Forum,* and at the event. Also, because public agencies are precluded by law or policy from sponsoring DRBF events, the DRBF should provide these agencies opportunities to opportunities to be recognized as valuable users of the DRB process that provides similar exposure and recognition as private companies.

Related to this issue is the question of industry sponsorship of the Foundation's activities, in particular, the annual conferences. This topic has also been discussed by the membership from time to time. If a contractor or owner wishes to sponsor a dinner, seminar or any other activity, the suggestions in the DRBF's Policy & Administrative Procedures Handbook noted above should be looked to for guidance.

ETHICS: FOR NEXT TIME

Assume you are a Board member on a DRB and are hearing presentations regarding several disputes brought to a formal hearing by the contractor. After most of the contractor's case has been presented, the representative for the contractor asks the Board for a recess. The recess is granted. The representative then comes up to the 3 Board members who are standing together and whispers that he now knows that a part of the material just presented is false and contrived.

What should the Dispute Board do?

Ethics Commentary or Question?

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(continued from page 1)

Kurt mentioned in subsequent conversations that he was "coming around" to admissibility, so I was disappointed to read his recent *Forum* article, "To Admit or Not To Admit, Revisited," where he proposes that the DRBF revise best practices to discourage admissibility, largely for legal reasons.

After a career in commercial construction, I began to offer mediation, arbitration and later DRB services for construction cases. Working and teaching in alternative dispute resolution (ADR) has allowed me an understanding of various dispute methods. Mediation, one of the more popular, offers parties the opportunity to negotiate disagreements with the help of a mediator. It legitimately claims 80-85% effectiveness in resolving disputes but is nevertheless criticized by some for not always "closing the deal," relying exclusively on party interaction and persuasion to achieve settlement. Perhaps because mediators have little authority, some parties come to the table with an adversarial mindset and reject conciliatory perspectives. The lack of "teeth" causes some to consider mediation ineffective, and they occasionally label it "worthless" before escalating their dispute to arbitration or litigation.

CDOT implemented their DRB program in 2008, after encountering an insurmountable backlog of legal claims, and the agency has not had any claims decided by arbitration or litigation since. The DRBF promotes the fact that Dispute Boards prevent as many as 98% of cases from being decided by arbitration or litigation. DRBs begin with practices similar to mediation, encouraging a collaborative exchange for parties to work through issues. But they go further, offering an advisory opinion or a formal hearing that results in a non-binding recommendation. Parties are free to reject the recommendation with the caveat that should they carry their case forward, the arbitrator or judge may consider it in making a binding award or ruling. A member of the original CDOT task force recalls that admissibility was intentionally included so that recommendations could be addressed in subsequent proceedings.

ARGUMENT

Kurt argues that the power of a DRB comes from the guidance boards offer parties to negotiate their own solution, that the recommendation is intended primarily as a persuasive mechanism toward acceptance. I am not familiar with the early development of DRBs or whether admissibility was included from the beginning, but it seems to be purposefully incorporated into current practice so that the work of boards during a project, and particularly their thorough evaluation of disputes, may allow the recommendation to live beyond the hearing.

Admissibility does indeed reshape how parties present their dispute in a hearing and how they advance the issue to a legal proceeding. Instead of disregarding a recommendation, parties must deal with it in settlement negotiations or face it again in a subsequent proceeding. To block the recommendation from consideration might limit a DRB to outcomes similar to mediation and similar claims of inadequacy. The difference in effectiveness between mediation and DRBs demonstrates that current provisions allow Dispute Boards greater acceptance than a purely persuasive model; admissibility appears to provide the "teeth" that has led to this acceptance.

It can be argued that DRB recommendations are occasionally flawed, that a

Board may make errors in deliberation or judgment and should be subject to legal review. Indeed, such is the nature of any human practice, and parties are free to advance their dispute to have it reevaluated from a legal perspective. But the recommendation of the DRB deserves to be reconsidered on its merit rather than disregarded in favor of a purely legal process by neutrals with different perspectives and quite different expertise.

LEGAL CONCERNS

Though most DRB members are non-attorneys, everyone involved should be aware of the potential impact that admissibility could have on legal proceedings. Black's Law Dictionary defines admissible evidence as

"Evidence that is relevant and is of such a character (e.g., not unfairly prejudicial or based on hearsay) that the court should receive it."

The qualifications in parentheses may point to the legal concerns for admissibility, which could be challenged on the basis that testimony was not taken under oath, was not subject to cross-examination, or was based on inadmissible hearsay. Additionally, DRBs do not offer parties the right of discovery. Such legal considerations, absent a contractual admissibility provision, could be used to keep a recommendation from further consideration. But DRB recommendations state these very limitations (at least on CDOT projects), so arbitrators and judges are aware and free to give the recommendation the weight they feel it deserves. In fact, there is nothing in the contractual provision that would prevent a party from addressing to the arbitrator or judge reasons that a DRB recommendation should not be given full consideration.

Should the admissibility provision be eliminated, parties could be in position to avoid a DRB recommendation altogether simply by rejecting it. Regardless of problems during construction, and without a recommendation carrying weight greater than persuasion, parties might circumvent the intent of admissibility in favor of a strictly legal outcome.

CONCLUSION

The purpose of admissibility is not to limit access or restrict the legal process, but it is important, based on a deliberate and thorough review by construction professionals, that recommendations be allowed into subsequent tribunals. To hold in favor of the small number of parties who reject a recommendation and proceed to arbitration or litigation could jeopardize the effectiveness of a DRB for the overwhelming majority who reach agreement using the process. Discouraging admissibility could encourage parties to reject a recommendation with the hope of a different outcome through legal means.

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Amissibility: A Contrary View

By William B. Baker P.E.

In the November 2016 issue of the *Forum*, Kurt Dettman opines "DRB best practices should discourage admissibility (of DRB reports in evidence) in later proceedings."

I strongly disagree.

My opinion is based on my experience as an arbitrator/mediator in the construction industry for more than 40 years, service on nearly 200 Dispute Resolution Boards, and extensive service as a trainer in arbitration, mediation, and Dispute Board procedures. I also served for two years on the DRBF's committee to rewrite the DRBF's *Practices and Procedures Manual,* a committee of DRB practitioners with extraordinary experience. The committee engaged in an extensive peer review process in which the issue of admissibility was thoroughly vetted with few expressions opposing the admissibility of DRB reports.

The current DRBF *Practice and Procedures Manual* in Section 2.8.3. states:
"On rare occasions, the parties have failed to reach agreement despite the good efforts of the DRB. In such cases, depending upon the specific contract language, one of the parties may initiate arbitration or litigation proceedings.

Contract specification language typically permits the DRB's report to be admitted as evidence in these subsequent proceedings. Experience has shown that this practice has been a major factor in the effectiveness of DRBs since it allows the litigation forum access to a reasoned written report prepared by knowledgeable industry experts who have witnessed, first hand, the construction of the project." (emphasis added)

There is a very good reason for this provision in the Manual. Experience really has shown that this practice has been a major factor in the effectiveness of DRBs.

While evidence is anecdotal, from my own experience and that of dozens of colleagues, thousands of claims were resolved through the DRB process, saving millions of dollars were arbitration or litigation involved. The parties frequently indicated that they took the DRB report seriously because DRB members were experienced construction experts and they knew the report and recommendation were admissible.

Dettman states:

> "First, the purpose of the DRB process is to resolve disputes between the parties, negotiating at the project level. For that reason, the DRB process is meant to be relatively informal; does not follow rules of evidence; encourages candor and open discussion on contested points; and is intended to be a basis for the parties to resolve issues for themselves, without recourse to legal proceedings."

Well stated. That's exactly why the DRB process is so successful.

> "Second, the purpose of the DRB report is intended to provide guidance to the parties on the relative merits of their arguments; an analysis of the dispute as presented to the DRB; is not based on an evidentiary record; and is intended to be persuasive to the parties to accept the DRB recommendation, or at least use it as basis for negotiations to resolve the dispute. Stated an-

other way, the report is not written for the purpose of being used in later legal proceedings, nor should it be."

The DRB report is written for the express purpose of resolving disputes. Admissibility lends to the report's seriousness and gives it strength.

"Third, if the DRB report can be used in later legal proceedings, then the parties must at least think about how to present the dispute so that they preserve their positions in those proceedings, if they do not accept the DRB report or negotiate a resolution. This factor also could have the unintended consequence of encouraging more legal and claims consultant involvement in the DRB process because of the need to shape the DRB process and submissions to protect legal interests later. Obviously this goes against other DRB best practices that discourages lawyer, and to some claims consultant, involvement in the DRB hearing process."

I do not disagree. But it is to be guarded against by contract specifications and in any event worth the risk.

"Fourth, from a purely legal perspective, making the report admissible in evidence means that everything in the report 'goes in,' regardless of arbitration or court rules that might otherwise prevent it from being used or at least require some sort of foundation for its use. This means that the parties are, in essence, waiving evidentiary protections that they might otherwise have in later legal proceedings. That is not the intent of the DRB process, but that could be the result if admissibility in evidence is permitted."

Mr. Dettman's comments are based on his own admission: that they are "from a purely legal perspective."

As most long-time DRBF members will remember, the DRBF and the DRB process were founded in large part to "get the lawyers out of the construction dispute resolution business."

I rest my case.

I urge our DRBF colleagues to weigh in on this issue, and I urge the DRBF to continue to promote admissibility of DRB reports.

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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 new information about Dispute Boards, DRBF members, or an article to share, please let us know! Contact Forum Editor Ann McGough at amcgough@drb.org

Deadline for the next issue: **March 15, 2016**

Adventures in Dispute Board Member Selection: A Look at Recommended Best Practice and Variations that Arise in Eastern Europe

By Romano Allione and Florin Niculescu

One famous (or infamous) case of utilizing member selection is critical for the proper and effective operation of a Dispute Board to achieve the goals of dispute avoidance and dispute resolution. Basic qualifications for a DB member may be summarized as: integrity, impartiality & neutrality, experience in the project works, and availability. The members must have and maintain the trust and confidence of the parties, (which of course also includes the capacity to stand firm despite the eventual various types of pressures a DB member may be exposed to).

In case of a three-member Dispute Board, the parties will generally select one member each to be agreed by the other party, and the two accepted members would than propose a Chair for acceptance by the parties. In addition to the standard qualifications for members, the Chair should have experiences and qualities to supplement the other two members and also have the capability to take a leading role.

In particular, the Chair needs to possess the skills to weld a team instantly, as in many cases the three members are meeting for the first time when appointed, or worse, they only get in contact for the first time when travelling to meeting the parties. Communication and command skills, patience to accommodate everyone's ego, leader appearance in front of the parties and of the two other members, are just a few of needed features.

In the case of a single-member DB, the choice is even more critical; the sole member shall have the qualifications required of the members as well as the leadership required from the Chair. Both parties have to agree on the choice, and feel confident in the Board member's impartiality.

Traditional Methods of Member Selection

There are a number of tried and true methods for DB member selection, which include:

- Knowledge (direct or indirect): any party would like to propose for appointment a well-known individual. This of course would be positive and acceptable provided the independence, neutrality and lack of conflict of interest are guaranteed and said knowledge is clearly disclosed. Participation at seminars (and specifically those of the DRBF) will allow meeting a number of prospective members and for users to exchange views and assess candidates.
- Recommendation by trusted persons: this is also a typical scenario, of course to be supplemented by direct contact.
- List of approved Adjudicators: currently, the only published list of approved adjudicators is the FIDIC President's List. This is a good reference as the individuals have been assessed by the FIDIC APA panel, but a proper screening is still required to consider specific experience in the project works and to

check the lack of conflict of interest and availability. Again, direct contact is required. National lists by national associations affiliated to FIDIC are also an option, especially in the cases of contracts in the national language, providing a trustworthy selection process has been undertaken.

- Membership to specialized associations such as the DRBF: being associated with the DRBF and other serious organisations is considered a positive, but does not give any certainty on full compliance with the requirements. Compliance is to be checked by CV review and direct contact with the candidate.

Eastern Europe: Some Direct Experiences

Among experienced practitioners, the recommended form of Dispute Board for the most effective result is the standing, three-person DB. In reality, some places such as Eastern Europe proceed with a sole-member Dispute Adjudication Board (DAB) on a regular basis, generally cited as being chosen in the spirit of saving money (although one can question if it is a real savings).

In most of the cases, projects in Eastern Europe with DABs are mainly related to roads/motorways, sewage/water supply, and waste water treatment plants. These types of projects have a rather straightforward technical pattern, hence the degree of technical complexity is not as difficult and an experienced DAB member is expected to be able to manage it successfully.

An exception may be in the case of railways projects, where several disciplines are met, in the case of a single Works Contract which includes track, signalling, electrification, etc. In current practice, Employers apparently seem to prefer to award separate Works Contracts for each discipline, hence, the number of DAB members may not be a significant issue.

Besides the usual ad-hoc DAB(again, in anticipation of saving money) or the permanent (standing) DAB, recentlya "hybrid" type of appointment has been introduced, a sort of "permanent ad-hoc" meaning an ad-hoc DAB is appointed (sole member, of course), but for resolving all disputes arising out of a certain Works Contract. This provides an advantage for the parties,who do not need to undergo a DAB appointment process every time they have a dispute to resolve. However, parties also do not reap the most important benefit of the standing Board, **that of dispute avoidance.**

Moreover the DAB sole member has no indication of when his/her services may be required, which can result ina period of no income for the DAB member or periods with a huge workload. This can be difficult to manage from a scheduling perspective.

To date, in most cases, the Employer and Contractor are proposing possible DB members that are subsequently discussed until one of them is approved.In most of the cases, it appears that the Employer's proposal prevails; there are cases where the Employer refused to accept the Contractor's proposal, simply because of "loosing face".

Alternatively, in some cases, the Employer draws a list of potential DAB members out of which a selection will be made, or simply makes a selection, even prior tendering of works, and the Contractor has nothing to say; such a case was encountered under a World Bank-financed project, though such practice may seem somewhat odd from both the perspective of public procurement and impartiality.

Moreover, in that case, the Employer requested an offer from the selected DAB member for a single Works Contract, but then included him in all Works Contracts they tendered out and concluded – much of the surprise of the DB Member himself!

When making above mentioned proposals, the parties are choosing in general either a person they worked with before, or someone who was recommended to them from a trusted source (recommendation through "word of mouth").

The above mentioned lists by National As-

sociations of Consulting Engineers are also occasionally consulted, but apparently, parties still prefer someone that has been recommended to them, probably in consideration of the limited pool of professional deemed to be independent. Generally, personal knowledge of a potential DAB member gives a higher degree of confidence.

Methods for Improving Selection Procedures

An improvement in the DB member(s) selection process is the use of personal interviews.

As prospective DB members, the authors have been invited to such interviews and the method worked nicely. A face-to-face interview enables the parties to actually "feel" the candidates, beyond a well written CV or a good recommendation and actually allows the parties to understand the degree of knowledge of the candidate, the way of thinking, his way of conducting the DB process and in general, ensure they feel "comfortable" with one candidate or another. It is also the first step in building rapport, essential for an effective Dispute Board.

Moreover, interviews give the parties a chance to improve the selection process based on such elements and not only based on CV and/or fee considerations. There are known cases where a candidate with a higher fee was selected, simply because they were more convincing in the interview than the other candidates.The parties want the best candidate for the project, which is assessed through interaction rather than just documentation.

Obviously, if the prospective DB member resides far from the project location or the parties office headquarters, it may be an inconvenience or even unrealistic for that DB member to travel at his own expense for a meeting with the parties. This could even deter some good potential candidates to apply for the job in the first place. A viable option however, is to conduct interviews via Skype or other similar IT applications, largely available nowadays. These programs offer video conferencing so that the parties can have a naturally flowing dialog. Questions and answers flow in both directions and parties are in the position to ask and receive answers in real time to all the questions they have in mind, including expertise, impartiality (once even related to one of the author's nationality), manner of conducting the process, etc.

Likewise, the DB member has the opportunity to learn more about the project, the parties, and the potential for disputes, so one can make a decision if the position is indeed desirable and a good fit for their particular skills and expertise.

Suggested Possible Improvements

In recent years, it appears that Dispute Boards have become more and more popular, but somehow veering away from the recommended best practices for the best results. To avoid this, several ideas might be applied:

- Establishment of National Lists, based on clear selection and evaluation criteria, avoiding personal preferences and connections, and preferably with independent assessors, either already members of the National List and/or FIDIC President's List, or independent assessors from abroad. Such National Lists should be revised periodically based on DB members' activity, ongoing training, and reputation, penalising any slippage in their conduct.
- Usage of interviews with both Employer and Contractor, giving Contractors a fair chance to have a say and get involved in the DB member(s) selection.
- Ex-post evaluation of DB members by the parties, including manner of conducting the DB process, understanding and consideration of arguments provided by the parties, explanation of rationale leading to the decision, impartiality and fairness, timesheeting, etc.
- Employers and Contractors in the relevant countries to provide feedback to the National Association of Consulting Engineers on their lists.
- In general, in each country, there are a few major Employers and Contractors

with whom National Association of Consulting Engineers should establish a communication for learning from them about the quality of performance of the DB members. Using the suggested exit evaluations, these Employers and Contractors may provide highly valuable input. Obviously, such input should be in no way affected by the decision outcome, i.e. praises or critics should not be determined by the simple fact that a party lost or won and the relevant association should screen such feedback accordingly. As long as it is feasible from a confidentiality point of view, a National Association of Consulting Engineers may consider creating a database of issued decisions (eventually anonymised) for others to learn from and for adjudication outcomes to capitalise in a "jurisprudence" like manner. The matter under decision by the Dispute Board may be of a high interest for the whole national market.

- Usage of Standing DBs – as shown above, the merit of this tool, if properly used, is widely recognised and most likely would lead to avoiding many disputes, delays and costs. At the same time, in a very open manner, it would create a steady level of business for adjudicators in a certain market (especially as many contracts are using the national language only). That would allow on one hand the DB members to keep themselves available to intervene at a short notice, and on the other hand, to the parties to benefit, the full potential of the DB member's preventive skills and services.

Adjustment of DAB related Conditions of Contract and Procedural Rules following the model of the Golden Book, which emphasises the preventive role of the DAB (and provides for a standing one) and allows for DAB decisions revision, either at the Parties request, either at the DAB Member(s) choice. Recent trends in that respect in the Golden Book did not go unnoticed and the following new provisions are highlighted in particular:

- emphasis on DAB's dispute prevention role
- standard choice of standing DABs, are highly appreciated
- power given to the DAB to decide if the 28 days deadline can be overruled or not
- possibility of DAB to revise a decision, or of Parties to request that, under certain circumstances. Such provisions appear to prevail, the trend is confirmed in the draft Yellow Book presented at the International FIDIC Users Conference in 2016, which brings a considerable set of changes, among others, obligation for the Employer to observe too, the 28 days deadline for notifying their claims.

Conclusion

When properly implemented, the Dispute Board has a major positive influence on project success. The personality and skills of the members is paramount, hence the member selection process is most important.

The prospective members' requirements (particularly experience in the type of work, independence and lack of conflict of interest) have to be complied with; in addition to such verification a face-to-face interview (possibly joint by the parties) would be very useful if not essential; if a face-to-face interview is not possible an IT call (Skype or equivalent) would certainly be very helpful. The interview process can help the parties understand the candidate's experience and perspective, and build confidence and rapport which are the first step in a successful Dispute Board experience.

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Abnormally Low Tender and Construction Disputes

Note from the author: *The purpose of this article is to open one insight on abnormally low tenders and their dramatic consequences for the parties. From my experience, tenders which have low financial proposal comparing with Employer's cost estimate and others competitors are increasing in Eastern Europe (Albania, Serbia, Romania, Ukraine…..) and in other part of the world. Construction companies from Portugal, Spain, Italy and others who are facing problems in their own countries need to work abroad. Consequently, they do not fear to submit low offers even if they cannot fully justify their financial proposal. The "low tenders" approach means that they will probably have their money in one or another way just doing "paperwork" during the course of the project.*

In order to explain my point of view, I use the example of a large scale project in Ukraine that is to be built under the FIDIC Design Build Form of Contract 1999 (Yellow Book). Due to confidentially, it is impossible to disclose names of the companies and relevant information of this project.

Abnormally Low Tender

The project is located in the eastern part of Ukraine in one of the most important industrial and cultural centres, with a population over one million inhabitants. It has high concentration of heavy industries – steel, chemical and machine-building. The project aims to complete the 4 km extension for existing metro within five years. The construction started in 1981 and was phased for two sections:

Section 1 (7.82 km with 6 stations) was put into operation in 1995. It also included electrical depot and metro engineering facilities.

Section 2 (4 km with 3 stations) is an extension of the existing line. The construction of Section 2 has started in 1996 but has never been finished, only 11% of works have been completed to date (vertical shafts and tunnel sections, drill and blast method).

The project is financed by two major banks which are the European Bank for Reconstruction and Development (EBRD) and the European Investment Bank (EIB). The loan agreement with the EBRD was signed on July 27, 2012, and the finance contract with EIB was signed on October 25, 2013.

The Employer adopted the following two stages tender for this large scale project:

(a) the First Stage tender consisted of a technical proposal only, without any reference to prices, and a list of any deviations to the technical and commercial conditions set forth in the tender documents or any alternative technical solutions a tenderer wishes to offer, and a justification therefore, provided always that such deviations or alternative solutions do not change the basic objectives of the project. Following evaluation of the First Stage tenders, the Employer invited each tenderer who meets the qualification criteria and who has submitted a technically responsive tender to a clarification meeting. Only qualified tenderers submitting a technically responsive and acceptable First Stage tender have been invited to submit a Second Stage tender. The first stage of the tender was launched in beginning of 2013 and eight proposals of tenderers were submitted to the Employer on July 2013.

(b) the Second Stage tender consisted of an updated technical tender incorporating all changes required by the Employer as recorded in the Memorandum to the clarification meeting or as necessary to reflect any amendments to the tender documents issued subsequent to submission of the First Stage tender; and the commercial tender. The sec-

ond stage of the tender was launched end 2014.

Due to financial, economic, social difficulties and war in Eastern part of Ukraine just four tenderers from Italy, China, Turkey and Ukraine submitted their offers in October 2015.

The following prices were submitted for the second stage tendering evaluation :
Tenderer A: EUR 323.865.682 inclusive VAT / EUR 269.888.068,00 exclusive VAT
Tenderer B: EUR 297.319.328 inclusive VAT / EUR 247.766.106,86 exclusive VAT
Tenderer C: EUR 338.602.876 inclusive VAT / EUR 282.169.063,10 exclusive VAT
Tenderer D: EUR 224.000.000 inclusive VAT / EUR 186.666.666,67 inclusive VAT

The first Employer's cost estimate established during the feasibility studies was EUR 301 million exclusive VAT in 2011.

Due to the fact that the current project cost estimates were prepared in the Ukrainian national currency, Hryvnia, as for prices at the end of year 2014, the Employer updated their cost estimates up to EUR 291,80 million inclusive VAT taking into account the following data: changes in the cost of construction works; the cost of industrial products; the cost of building materials, products and structures; the cost of mechanical engineering products as of 01.10.2015 published on the website of the Ministry of Regional Development, Construction, Housing and Communal Services of Ukraine.

In the construction industry a significant number of similar cases impacted successful implementation of the projects in the past, and frequently resulted in:

- A significant number of variations and contractor disputes
- The increase of prices and significant extension of time
- Suspension of contracts or reduction of progress of works
- Termination of contracts resolved in national or international arbitration

Having examined the tender proposal from Tenderer D and having analyzed all the potential risks, the author considered the tender to be "abnormally low" taking into account the following three aspects:

- Comparison with the Employer's cost estimate
- Comparison with the others tenders received
- Comparison with regional, national and international market price

It is worth to note that the lowest evaluated Tenderer D was fulfilling all selection criteria and it was not robust and/or valid grounds to reject them.

In the beginning of 2016 the contract was awarded to the Tenderer D and in the mid July 2016 it was signed between two parties. The contract aimed to complete Section 2 under the FIDIC Design Build Form of Contract 1999 (Yellow book) including construction of tunnels and stations. This form of contract is currently in use on two other Ukrainian major projects, the Beskyd tunnel and the Chernobyl new safe confinement.

Employer's Position

First, the Employer was deeply surprised with the Tenderer D's offer to carry out the design and works of their metro. Worries arose after a deep comparison of Employer costs estimates and the other competitors was done and they found themselves in front of a strange animal called an ''abnormity low tender''.

What to do?

Pursuant to the bank's template Instructions to Tenderers (ITT) Paragraph 37.4 of the tender documents the Employer, when in doubt concerning the appropriateness of the successful tenderer's price, may require the successful tender to increase the amount of the Performance Security to a level sufficient to protect the Employer against financial losses in the event of default of the tenderer under the contract.

The true measure of an abnormally low tender is the risk to the Employer that the tenderer will not be able to perform the con-

tract entirely and properly. Therefore, the main reason for the performance security is to cover the costs of the Employer in case of early termination of the contract and enable him to overcome difficulties that have been caused by non-performance of the contractor, such as, for example, finding a new contractor to complete the works.

First, the amount of EUR 43.8 million inclusive VAT was recommended by the consultant as an increased amount of the Performance Security in order for them to be protected from any Contractor's default such insolvency for example.

The proposed increase of the Performance Security from EUR 22,40 million, which is 10% of the contract price inclusive VAT, as it is stated in the Tyender documents, to the amount of EUR 43.8 million, was foreseen solely for the purpose of reducing the risk of the Employer in the event of contract termination caused by the contractor's fault in the early stages of contract implementation.

In the Employer's opinion, it was rational and fair towards the contractor to reduce the amount of Performance Security from EUR 43.8 million to the standard level of 10% foreseen by the tender documentation, after the contractor performs 50% of the works under the contract. Achieving of the stated level of performance was to be displayed in the respective certificates (IPC) and confirmed by the Engineer.

Tenderer's Position

The Tenderer D did not accept and flatly refused to provide a Performance Security of EUR 43.80 million. The Tenderer D quoted that the total price of their tender (EUR 224 million including VAT) was sufficient for implementing the contract with due regard to all Employer's requirements. Based on their wide experience, they declared to be ready to design, execute and complete the works when due by not causing any harm or damages to the Employer.

ln their opinion, the Employer's cost estimates based on the first stage of the design developed by the designer could not be considered on equal merit with the "market prices", as it is based on the designers' assumptions and their reactive empirical knowledge of the "market prices", which is usually based on an averaged statistical data, published rates and indexes, covering large regions and broad spectrum of works.

The Tenderer D comment that these publically available data often may be influenced by a highly inflated prices for works obtained outside of an appropriate tender. Therefore, the Tenderer D argued that their price takes into account the local material-equipment, labour and other costs. Furthermore, according to their experience and estimates, they estimated that the prices of the other tenderers are highly overestimated as the extreme profit was included in them.

The Tenderer proposed to increase the performance security up to EUR 29 million justified by two methods:

- 10 % of the Employer's costs estimate
- Methodology proposed by the Tenderer taking into different factors based on foreseen work performance

After long and intensive discussions, it was agreed by the Tenderer and the Employer to increase the performance security up to EUR 29 million.

Bank's Position

According to EU directive an Employer must not under any circumstances exclude an abnormally low tender "automatically" without first asking for an explanation of the tender and allowing for a verification procedure.

Unfortunately, EBRD, EU, EIB and others financial institutions, have not a standard generally accepted procedure for determining the required amount of the increase of the Performance Security in case of the underestimation/unbalance of the tender price of a successful tenderer.

First the banks find the amount of EUR 43.8 million as an increased amount of the performance security to be abusive and unreasonable. After long discussions, banks finally

did not object the amount of EUR 29 million.

Potential Disputes

At the present time, the contract between the parties (the Tenderer D and the Employer) is signed and no disputes have been yet declared by any parties. However, in such large scale contract of tunneling activities, the author expected that claims and disputes related with extra time and/or extra money will have to be resolved by the DAB or alternatively by amicable settlement or arbitration as per Clause 20 of the contract of the FIDIC Design Build Form of Contract 1999 (Yellow book).

Potential claims and disputes for this project will find probably their origin in:

- Errors, default and others defects in employer's requirement (Sub - Clause 1.9)
- Rights of assess to the site (Sub - Clause 2.1)
- Extension of time for completion (Sub - Clause 8.4) except ''exceptionally adverse climatic conditions''
- Delays from authorities (Sub - Clause 8.5)
- Delays in payments (Sub - Clause 14.8)
- Employer's risks (Sub - Clause 17.3)
- Use or occupation by the Employer (Sub - Clause 17.3 f)

Moreover, it is expected that during construction works the following Employer events or share event will probably disrupt or delay the tunneling works.

- Incompatibility of the works already performed under previous contract with the contractor's design works
- Inaccuracy of geological investigation data
- Changes to existing hydrogeological regime
- Unexpected occurrence of flooding
- Subcontractor's underperformance and eventual re-work
- Occurrence of large-size rock fall
- Occurrence of unexpected explosion
- Unexpected cracking of station falls
- Presence of excessive radiation underground
- Presence of contaminated soils
- Deformation of buildings along the alignment

Conclusion

The contract between the two parties (the Employer and the contractor) recently was signed and the "show'' must go on…..

Having analyzed successful Tenderer D's offer and the potential disputes, it appears that the eventual contract termination by the Employer is essentially a very serious matter and will lead to logical problems such as the appointment of the new contractor, the corresponding delays and the increase of the project price. Moreover, the termination of such a large scale contract could lead to very difficult issues that will have to be addressed by the Employer.

In case of non-performance from the contractor, the amount of EUR 29 million corresponding to the agreed performance security will most likely cover the potential expenses for legal services, the loss of economic benefits, retendering, interest payments for credit funds, consultant's and Engineer's services ...).

It is my opinion that it is urgent for banks to develop a clear and robust procedure and mechanism which may result in rejection of an abnormally low tender under defined circumstances. If the above is unacceptable, the banks could develop an appropriate procedure to address the abnormally low tender through the tender evaluation process.

Roger Ribeiro *is an Engineer and Head of Procurement and Contracts for egis international; this article is his opinion and do not represent the view of egis international. He can be reached by email at roger.ribeiro@egis.fr or amiable.compositeur@gmail.com.*

Sofia DRBF Conference November 2016: Dispute Boards as Lifeboats to the Project Ship

Adriana Spassova
DRBF Representative for Bulgaria

"I appreciated very much the strong cooperation between the DRBF committee and the FIDIC organization, that will give excellent results. The opening presentation by Enrico Vink and Giorgiana Tecuci highlighted the commitment of FIDIC and DRBF members for the continuous improvement of their activity and raised the optimism for a better world!"

- Alfonso Pelosi

My dream has come true: in November 2016 we had the first DRBF Conference in Sofia! We had more than 100 participants from 18 countries, including 20 from Bulgaria. Among the Bulgarians were employers' representatives from the Ministry of Regional Development and Public Works, National Railway Infrastructure Company and Ministry of Environment and Water.

I have summarized here highlights of the events, and have included a brief summary of the Bulgarian legal system and use of DBs. I hope you find it informative.

In rooms located above the ancient Romanera centre of Sofia, we focused on the preventive role of the Dispute Boards, which have a lot of potential as an instrument for project management. Our guru Gordon Jaynes inspired us for the main topic, with the analogy between shipboard lifeboats and DBs for large or complex projects:

Have you ever encountered doubt about the wisdom of having lifeboats aboard ships, especially passenger ships? No, because the reasons for their presence outweigh the possible cost savings of not having them. Also, on a long voyage, there is no way to be certain that other emergency services will be available in time to meet the need.

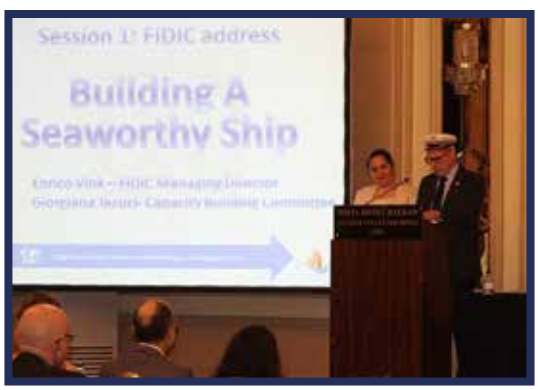
Dispute Boards involve maintenance costs, and demand management time of the team from other project participants. However, the costs and time are more than compensated to the contract Parties if the Dispute Board is established before the project "goes to sea." Further if the project Parties collaborate with the Board so that it can work proactively, formal Referrals to the Board may never be needed. The, the project "ship" may dock at its destination without formal disputes.

Keynote: Our adventure began with the Keynote Address by Ms. Ekaterina Zaharieva, of the Bulgarian Minister of Justice, a lawyer, and former Minister of Regional Development and Public Works, President's Chief of Cabinet, Chair and legal advisor to the Ministry of Environment and Water. After the event, Minister Zaharieva sent a special letter to Region 2 President Levent Irmak, sharing her pleasure to be part of the DRBF Sofia Conference.

News from the Bulgarian Arbitration Court: Alexander Katzarski, Deputy Chairman of the Arbitration Court at the Bulgarian Chamber of Commerce and Industry, welcomed the participants. This is the most important Arbitration Court in Bulgaria, with more than 100 years' experience, including FIDIC cases with DAB decisions, used as evidence.

FIDIC Clause 21 and new initiatives: The FIDIC Managing Director Enrico Vink opened Session 1 with a captain's hat, giving us insight into the 2017 editions of the FIDIC books. A new Clause 21 is introduced in the 2017 editions, separating the disputes from the Contactor's and Employer's claims, which are in Clause 20. The good news is that the Dispute Adjudication Board in the new editions is already named Dispute Avoidance/Adjudication Board and a separate Sub-Clause treats the avoidance of disputes. Also, at last the mistake with the ad-hoc DAB in the Yellow Book is corrected and a standing Board shall be the default procedure.

Giorgiana Tecuci, Vice-president of ARIC, informed us about many new initiatives of the FIDIC Capacity Building Committee.



DAB in Recent ICC Cases: In "Notes from Recent Journeys," David Brown gave interesting information from his special research on DAB in recent ICC cases. He summarised the main issues related to DAB, upgrading our knowledge, based mainly on the ICC Dispute Resolution Bulletin from 2015.

Making the most of DABs: In "Avoiding Rough Seas," Nicholas Gould shared how to make the most of DAB, and how the DAB can make the most of its dispute avoidance function.

Challenges with DABs: "When Your Crew Comes from Many Places," speaker Lindy Patterson, who is the first female accredited as adjudicator in the FIDIC President's List, shared the challenges that a DAB may encounter in a multicultural environment.

Mock Hearing: The entertaining mock FIDIC DAB Hearing, "Take Your Place in the Lifeboat," was delivered by an experienced team: Simon Delves, Mark Entwistle, Simon Fegen, Alina Oprea, John Papworth, Yasemin Cetinel and Paul Taggart. It was highly appreciated by everyone.

DABs in Other Countries: I moderated the session "Our Sailing Adventures," with well-known experts who focused their comments on the DAB experience in many countries: Richard Kerry (Bulgaria); Yasemin Cetinel (Turkey); Robert Werth (Germany); Florin Niculescu (Romania); Krzysztof Woznicki (Poland); Lukas Klee (Czech Republic); and Michel Nardin (Switzerland).

Special thanks: We greatly appreciate the support of our conference sponsors:

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We also thank cooperating organizations who helped us promote the event. Thanks to the DRBF Executive Director Ann McGough

and to the other members of the Organising Committee Levent Irmak, Peter Sansom and Yasemin Cetinel, and Amy Avery from DRBF for the beautiful logo, website and continuous support! Lastly, thanks to the DRBF Board for the opportunity and to all the participants making my dream come true.

About Sofia, the host city: During the conference, we enjoyed two interesting days in Bulgaria's capital and largest city, Sofia. Inhabited for many millennia, there is hardly another city in all of Europe that has so many noteworthy Christian, Islamic and Jewish monuments so close together.

For example, situated in the yard of the conference venue, Sofia Hotel Balkan, is the Saint George Rotunda. Built in the 6th century, it is the oldest Orthodox church in all of Eastern Europe. We had our Welcome Reception in the National Archaeological Museum, which has in its collection valuable treasures discovered in Bulgaria. After the conference, we spent an evening together with a folklore programme and traditional Bulgarian food and wine. The wine tasting was one of my tasks for the event preparation, and Bulgaria boasts many famous wineries. I selected four wines with specific national characteristics, and was very proud that the French experts appreciated my preferred red wine.

Some of the participants joined the conference tours to see the Rila Monastery and Plovdiv, the second largest city, named the 2019 European Capital of Culture. I hope that newcomers discovered the beauty and history of Bulgaria. I am happy that we had great time together, and I am looking forward to seeing old friends and meeting new DB fans at the DRBF Conference in Madrid this May!

The Legal System in Bulgaria and Its Italian Connections

The keynote to the DRBF Conference in Sofia mentioned the legal system in Bulgaria. For those who would like to learn more, this brief summary may be of interest.

The Bulgarian state was founded in 681, and became an EU member in 2007. The process of forming the contemporary legal system of Bulgaria starts with the liberation of the country from Ottoman political domination in 1878. It is marked by the adoption of the first Bulgarian constitution in 1879, a founding document upholding the most progressive and democratic principles dominating Europe in the nineteenth century.

The modern Bulgarian legal system is influenced by two very important factors: the democratization and liberalization of the country's economy, which started on the one hand after the fall of the Communist regime in 1989. On the other hand is the integration of Bulgaria into the EU. The Bulgarian legal system evolved through a profound and strictly monitored alteration in order to achieve coherence with the acquis communautaire, or European Union laws.

A typical representative of the Romano-Germanic legal family, the Bulgarian legal system recognizes the Acts of Parliament as a main source of law. The Bulgarian jurisprudence does not regard the judicial precedent as a source of law. Nevertheless, the legal doctrine sometimes refers to the so-called direct sources (Acts of Parliament and subordinate rules) and indirect sources (or "subsidiary" sources) of law such as: case law (the practice of the courts); the legal doctrine; the legal customs, moral rules, and equity ("justice"). In addition, two types of decisions of the Constitutional Court are clearly a source of law (but they cannot be regarded as case law). In terms of direct sources, the Bulgarian legal system is based on a strictly defined hierarchy of the sources of law. The Constitution is the supreme act and other acts may not contradict it.

Bulgarian contract law is governed mainly by the Contracts and Obligations Act of 1950 as amended and the Commerce Act of 1991, as amended. Bulgaria's previous Contracts and Obligations Act was drafted in 1892, based on the Italian Codice civile of 1865, which implemented the Code Napoleon.

Dispute resolution in Bulgaria

The Bulgarian legal system is divided into first instance courts, second instance courts and the last instance court. There are no specialised construction courts. The Arbitration Court settles civil disputes and disputes over filling gaps in contracts or adapting contracts to new circumstances, regardless of whether one or both parties have their registered office or domicile in the Republic of Bulgaria.

The slow and ineffective justice is a problem for the state, especially for investment projects. The alternative dispute resolution is of great importance to reduce the burden of the court system. Though the adjudication is not integrated in our legislation, we appreciate the preventive role of the Dispute Boards, which reduce the court burden and lead to better project management and successful implementation of the investment projects.

FIDIC rainbow has been used in Bulgaria since 1995, presently for only 1% of contracts. Bulgaria harmonised its public procurement legislation with the new European Directives in April 2016. The use of well-known balanced standard forms is an effective instrument in public procurement, guaranteeing certainty and transparency, thus restricting corruption. The Bulgarian Society of Construction Law (member of the European Society of Construction Law) drafted sample Particular Conditions for the FIDIC Red and Yellow Books, harmonised with Bul-

DRBF Representative for Brazil: Fernando Marcondes

Fernando Marcondes is one of the DRBF's newest County Representatives, appointed for Brazil last summer. Fernando is among the most respected construction lawyers in Brazil, acting exclusively in this sector as a lawyer and arbitrator. He is a partner of L.O. Baptista Lawyers, one of the most recognized law firms in Brazil. He is responsible for the Construction & Infrastructure Department.

Fernando began work as a court clerk in 1980. After graduating in 1987, he started his career as a lawyer in 1988. Construction entered in his professional life in 1991, "to stay forever," he says.

As the founder and president of the Brazilian Institute of Construction Law (IBDiC), he is personally dedicated to broadcasting the benefits of Dispute Boards (DBs). He has been working on including DBs in public construction contracts and having them provided by law. He is a frequent speaker on the topic in Brazil and Latin America, and has been published in what has become a national reference book, *Civil Law and Construction* (2011). This work is also referenced in a recent publication, *Dispute Boards, A Way To Prevent Controversies* by Karin Hlavnicka Skitnevsky (October 2016), for which he served as reviewer and was invited to write the preface. In addition, he coordinated four books dedicated to construction law and contributed as co-author to several other books about construction and alternative dispute resolution, as well as many papers published in specialized magazines and journals.

Fernando was engaged by DRBF in 2015 to be part of the team that trained over 50 engineers and lawyers to act as Dispute Board members for the Rio de Janeiro Olympic Games contracts. After being nominated as a DB member in several contracts, he was recently chosen to take part of a new DB installed for the next construction phase of the Sao Paulo Metro, which should be the most relevant Brazilian DB for the next years.

Fernando lives in Sao Paulo with his wife, Camelia. They have five adult and independent "kids" and a granddaughter who lives in Spain. They enjoy going to their country house almost every weekend with their dog, Miguel, to "get a break from Sao Paulo's insanity," Fernando says. They also travel abroad every year, mainly to Spain, France and Australia. Fernando also intends to do the famous "Camino de Santiago" trail in Spain by bike, which is his preferred sport.

Fernando Marcondes *invites you to help promote Dispute Boards and DRBF activities in Brazil: fm@lobsvmfa.com.br, +55 11 3147 0868.*

Fernando Marcondes DRBF Representative for Brazil

garian legislation. A standing DAB is proposed to be used for both contracts, strengthening its role, using the Gold Book Clause 20.1.

The preventive role of the Dispute Boards has several important aspects:

- Independent experienced professionals appointed by the contract parties may give opinions and decisions, when requested by the parties
- The disputes may be discussed by the parties in front of the dispute board before their escalation
- If a standing dispute board is appointed by both parties in the beginning, the contemporary records shall be kept in order and the issues leading to compensation shall be followed and agreed
- When additional payment is due, the temporarily binding adjudicator's decision shall enable the contractor to be paid and continue the execution of the works.

DRBF Hosts Joint Seminar on Dispute Boards in Italy

On November 29, 2016, within the premises of the Ordine degli Ingegneri in Rome, a seminar was held on the "Collegio Consultivo Tecnico (CCT)", a procedure somehow similar to dispute boards that the new law (D.P.R. 50/2016) on public contracts has introduced in Italy with the aim of preventing and resolving disputes between public employers and contractors in large construction contracts, as an alternative to traditionally used procedures. The seminar was jointly organized by DRBF, AICE (the Italian Association of Cost Engineers) and the Ordine degli Ingegneri of Rome. Scope of the seminar was to inform technical public officers and engineering professionals about the international Dispute Board standards and discuss the legal and practical implications of CCTs with respect to the Italian jurisdiction.

More than 80 professionals and public officers attended the seminar. DRBF members Jacopo Monaci Naldini, Marco Padovan, Romano Allione and Dick Appuhn made presentations illustrating the origin and present developments of Dispute Boards, while other Italian legal experts introduced the concept of CCTs as defined by the new law and examined the major problems arising from the coexistence with other laws and regulations concerning public construction contracts. Rinaldo Sali, of the Chamber of Arbitration in Milan, has also illustrated the main concepts of the Dispute Board rules, prepared in cooperation with DRBF, that the Chamber has recently introduced.

The discussions performed during the seminar have outlined similarities and differences between CCTs and DBs and the perspectives of practical implementation of CCTs have been specifically addressed; however, many legal aspects have been recognized as still remaining open. The need of further discussions and especially of specific training for the future members of CCTs has also been put into evidence.

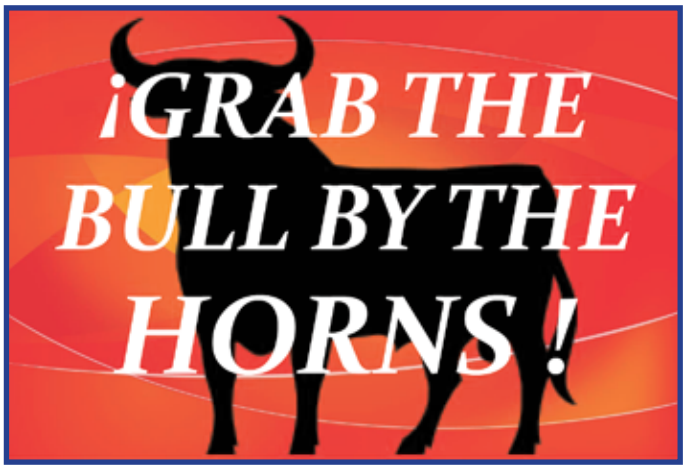
The interest raised in the audience was very satisfactory and the possibility of replicating the seminar in other cities in Italy is under consideration.

Andrea Del Grosso, *DRBF Representative for Italy, can be reached at delgrosso@dicat.unige.it.*

Upcoming DRBF Events

The DRBF has a number of upcoming events in 2017, including training workshops, regional conferences, and the popular annual conferences. Information can be found on the DRBF website: www.drb.org

DRBF 17th Annual International Conference



How To Face, Avoid And Solve Project Disputes Early

24-26 May 2017

The Palace Hotel • Madrid, Spain

Explore how Dispute Boards have become a best practice to avoid disputes and resolve them early--all to keep major projects on schedule and on budget. During the conference and workshops, we will focus on the application of Dispute Boards, as well as new developments shared by professionals from around the world. The conference will also cover the unique preventive role that Dispute Boards offer. Experienced practitioners will share their insight on best practices and lessons learned. Delegates will have ample time to share, learn and network. On day one, choose from one of three workshop options. The two-day conference features engaging presentations and lively panel discussions on the latest developments and issues facing the dispute resolution community worldwide.

- May 24 **Dispute Board Workshops** - Full-day Administration & Practice workshop and an advanced level workshop for experienced users and practioners, or the new half-day session on the use of DBs for PPP projects. Earn continuing education credits!
- May 24 **Welcome Reception** at Palacio de SANTOÑA
- May 25 & 26 **Annual Conference** - Presentations and panel discussions on the latest developments in Dispute Board application.
- May 25 **Gala Dinner** - Enjoy socializing with conference delegates, speakers and guests at the popular Gala Dinner at Casino de Madrid. Not to be missed!

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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.

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

DRBF Regional Conference & Workshop

June 2, 2017

Radisson Gateway Hotel SeaTac

Seattle, Washington

The DRBF's Northwest Regional Conference is an annual gathering of DRB users and practitioners in the Northwest Region who meet to discuss best practices, ethics, challenges and solutions. Registration begins at 7:30 am with continental breakfast served. The event starts at 8:00 am and lasts until 5:00 pm, with morning and afternoon breaks and catered lunch from 12:30 - 1:30 pm for all participants.This full-day workshop qualifies for Mandatory Continuing Legal Education (MCLE) credits from the Washington State Bar Association.

Register at www.drb.org