



Forum

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FEBRUARY 2004

More Power for Uganda

Owen Falls Extension Hydroelectric Project

By Robert W. McLean

Uganda's economic development was held back in the 1990's by a lack of electrical energy. Rotating blackouts were normal throughout the country causing temporary shutdowns of manufacturing facilities.

Uganda, located on the equator with a population of 25 million and an area of 241,000 square kilometres, is slightly smaller than the state of Oregon. In the mid-1990's the Uganda Electricity Board (UEB) began construction of the Owen Falls Extension Hydroelectric Project to provide an additional 200-MW of generating capacity for the country.

The contractor for the completion of the civil works mobilized his equipment and staff to the site in late 1997. At the same time *El Niño* caused very heavy rainfall for several weeks throughout East Africa. Bridges, highways and railways were washed out between Mombassa Port, Kenya and Uganda. Claims for delayed shipment of construction equipment and materials resulted in disputes that were referred to the Dispute Review Board (DRB). The following gives an overview of the project and describe some of the disputes that occurred during the construction work.

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Claims for delayed shipment of construction equipment and materials resulted in disputes that were referred to the Dispute Review Board.



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President's Page

I am writing this letter on the first day of 2004 so first may I wish each and every member of the DRBF, wherever you are in the world, a very happy, prosperous and healthy New Year.

At the start of each year it is usual to look ahead to anticipate what the following 12 months has in store. For the DRBF, 2004 needs to be a year both of consolidation and development. As the organisation foremost in the world in the promotion of DRBs, we need to ensure that our message to industry is consistent and widely publicized. In 2003 we made a good start in producing literature that explains the concept of dispute resolution boards and their effectiveness in avoiding and resolving disputes. We must not lose this impetus and must continue to develop a complete suite of documents that will encourage utilization of DRBs as well as assist those using the concept to do so wisely and effectively. In particular the power of the internet must be used by the DRBF to good purpose so that www.drb.org becomes the source of all information that any board member or end-user would need to know. The development of our web site, the re-writing of the DRB Manual and the continuation of the development of a DRBF portfolio of documents are all matters that need to be addressed with great vigour during the forthcoming year.

As you will have read in the last *Forum* a number of new committees have been established by the DRBF. Elsewhere in this edition you will find reports from these committees that set out the aims and objectives and what is currently the 'work-in-hand' of each committee. DRBF members are invited to contact committee chairs if they consider the ambit of any particular committee should be expanded or if a member has something he or she wishes to communicate to the committee for consideration. We need to know YOUR views before we can formulate strategies and goals for the future of OUR Foundation.

Since the last *Forum* (and before this edition drops through your letterbox) I have or will have represented the DRBF on several occasions. In early December in London I spoke and answered questions on dispute boards at a major FIDIC seminar. A few days later, in India, I spoke to a group on how best to use dispute boards in domestic and international contracts – during which it became clear to me that India would be extremely keen to participate in the distance-learning initiative currently under discussion between the DRBF and the World Bank. In mid-December in Frankfurt, Germany I spoke informally to bankers who fund large infrastructure projects about the benefits of dispute boards. In mid-January in Dublin, Ireland a workshop/assessment that centres on dispute boards will be held at which I and several other members of the DRBF Board of Directors will be speaking. At the end of January I will speak at a seminar in London concerning the ICC's dispute board initiative. Plans are afoot for a visit to Beijing in the spring to cement the DRBF's relationship with the Chinese dispute resolution organisation, CIETAC.

The start of any new year is, by necessity, the end of an old year and I would like to thank several people without whose assistance and ability over the last year (or more) the DRBF would not be where it is today. Almost all members of the DRBF will have had contact with Steve Fox. Steve, in his quiet, unassuming but efficient way, is the link between members and the Board of Directors. He may think at times that his work goes

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The *Forum* welcomes articles on all aspects of Dispute Resolution Boards, and members are encouraged to submit articles or topics to the DRBF, attn: Editor.

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Best Practices

The Best Practices Guidelines Committee (BPGC) has just recently received its charge and is in the process of formation. Initially the committee will comprise six people contributing domestic, international and legal perspectives drawn from membership on dispute review boards (DRBs) on many projects. In addition to the chairman, members include Gordon Jaynes, John Nichols and Gwyn Owen. Two other members have not yet confirmed. The selection of a vice-chair has been deferred until the board has been in operation, and it can be determined if additional members are needed to bring more DRB experience and diversity to the board.

The mission of BPGC is to produce a concise and meaningful Best Practices Guidelines (BPG) for DRBs in two parts, a statement and a rationale or commentary. There will not be a direct incorporation of the Code of Ethics or DRB Manual in BPG but they will form the foundation of BPG. The goal will be to respond to the consensus of the DRBF Washington conference that the document presented there was overly long and contained too much minutia. BPG will address major issues. The first document produced will be generic and applicable to DRB practices worldwide.

The goal of BPGC is to produce a first draft of BPG for DRBF Board of Directors (BOD) review and commentary by the BOD between June and October 2004. Incorporation of comments and production of a second draft could follow in sixty days. The second draft should be published in a subsequent issue of the *Forum* which will invite comments from the general membership within sixty days of its publication. The final document should be ready for publication and promotion thirty days thereafter or between Nov. 2004 and March 2005. Thus the minimum goal for the current DRBF year is to produce a first draft of BPG.

Harold McKittrick

Bylaw Revisions

The Bylaw Revision Committee is seeking suggestions from the membership on proposed revisions to the bylaws. Send your input to me at sguy489@aol.com or call me at 703-966-7597.

Sam Guy

DRB Manual

The steering committee met in late October and in November and established the outline and plans for publication. These have been reviewed and approved by the committee, including Al Mathews. The primary objective of the revision is to promote worldwide use of the DRB process. The other notable objectives are to allow for frequent updates with latest best practice, and to encourage maximum participation of DRBF members.

The Manual will be in 3-ring binder size, with the text in pdf. format for downloading from the Internet. It will have four sections: Concept – an introduction and general description, Guide for Owners and Contractors, Guide for DRB Members, and International Modifications.

Section 1 has been redrafted and rewritten and four sets of preliminary review comments have been received and input – it has gone out to reviewers in January and hopefully will be on the Internet in March. Section 2 has been redrafted, and is being rewritten. Section 3 will be redrafted in late January and Section 4 is being rewritten in January. The binders will be mailed out before Section 1 is complete. All sections of the revision should be on the Internet before July.

Each chapter of the revision will be a stand-alone document to facilitate subsequent updates. The plan is to eventually have a DRBF member responsible for each chapter, coordinated by an editor for each section, in turn coordinated by the committee chairman. This rewrite and the subsequent updates are big writing efforts; the help of

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accomplished writers, with extensive experience with the DRB process, is solicited.

Joe Sperry

Education

Although 2003 ended with the first DRB workshops done outside the U.S. in Amman, Jordan, the past year was a slow one for Foundation education efforts.

The Jordan workshops, done for twenty-eight participants on December 17 and 18, have received excellent reviews and additional workshops in the Middle East are being planned.

2004 is looking to be better. Workshops are being planned in Dallas for the last week of February with a special workshop for DART and an Administration and Practice workshop also scheduled. Caltrans will once again be hosting a series of workshops in San Diego and Sacramento in March and an Administration and Practice workshop and an Advanced Chairing workshop are scheduled in conjunction with the AUA conference in Atlanta in April.

There are also discussions of workshops in Australia in August along with the usual workshops planned in conjunction with the Foundation Annual Meeting in San Francisco in October. Workshops are also being planned for Florida in the Fall.

If you know of any organization or agency that might be interested in workshops, please contact Steve at the DRBF office or Larry Rogers. If you know of anyone who might be interested in attending a workshop, have them contact Steve.

Larry Rogers

Information Technology

The recently formed IT committee is planning further developments to the DRBF Web site to increase its usefulness to members. Comments and suggestions in this regard are welcomed.

John Bradshaw

World Bank Liaison

This is a new Committee, formed to work with the Bank in the promulgation of successful use of Dispute Board provisions in the Bank's Standard Bidding Documents, especially "Procurement of Works." The committee co-chairmen are Armando Araujo, who heads the Bank's Procurement Policy unit, and Gordon Jaynes. With much help from committee member John Bradshaw, the committee is investigating collaboration with the Bank to develop "e-learning" modules regarding Dispute Boards. The aim is to create material which will be used by Bank staff to increase their understanding of Dispute Boards and successful use of Dispute Boards by Bank borrowers. It is hoped that the modules eventually will be made available by the Bank to its borrowers, for training of borrowers' staffs. The committee hopes that, longer range, the DRBF participates in some distance learning programs of training on Dispute Boards, particularly for borrowers, using the Bank's facilities for "real time" interactive video links to Bank offices in developing countries.

Gordon Jaynes □

WANTED: DRB INFO FOR TABULATION

The DRB Manual is in the process of being rewritten and will be accessible to all members through the website, www.drb.org. Section 1 will go on-line in March, and it will include the summary sheet of the Foundation's tabulation of DRBs. This promotes the use of DRBs and it should be as complete as possible. It is likely that many DRBs are not currently accounted for. (To see what is included, contact Steve Fox for a copy of the latest tabulation.)

Please get information on as many DRBs as possible to Steve Fox by March 1. If you don't have the forms, call, fax or e-mail Steve at the DRBF office.

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The World Bank's Policy and Practice with Respect to DRBs

The following is an excerpt from the keynote address given by Armando Araujo at the DRBF Annual Meeting on October 18, 2003.

Up to this point, the World Bank's policy has been to "recommend" DRBs on all projects. The organization is about to make it mandatory for all projects over \$50 million. The World Bank is currently financing \$25 billion worth of projects each year, and they have leverage with the borrower.

Our main objective as a development entity is not to loan money, but to see a project implemented. Therefore, it is critical that the borrower and contractor work well together to resolve disputes.

The World Bank has been working hard to harmonize their contracts with those of other multilateral financing agencies. The Bank standard contract is based on the conditions of the FIDIC contract (red book) with several modifications. FIDIC has recently updated its contract (new red book) including the majority of the Bank's modifications, however, several differences continue to exist, particularly with regard to DRBs: FIDIC expects the engineer to resolve some disputes, and they use different language.

From the World Bank's perspective, DRBs promote speedy resolutions, reduce risk and contract price, and in some countries may reduce the risk of corruption during contract execution.

Furthermore, DRBs reduce the number of issues that go to arbitration (which costs time and money), and they encourage the contractor to keep working while

issues are resolved. All of these support the World Bank's goal of getting the project implemented.

The rules for DRBs procedures are included in World Bank contracts. There have been some problems along the way. For example, a board member may not have been knowledgeable or had a conflict of interest, or some parties may have had trouble accepting authority to appoint the DRB members when there is a difference of opinion.

The challenges ahead include:

- New performance based contracts are expected to bring new kinds of disputes.
- How to handle new long term contracts (like in concessions for 20 years).
- Auditing for quality assurance – this can be tough to accept if you don't believe the process is fair.

To review all of the World Bank's DRB documents, visit www.worldbank.org and look under "procurement."

Note: Armando Araujo is director of the Procurement Policy and Services Group for the World Bank and is a director of the DRBF. He can be reached at aaaraujo@worldbank.org. □

Jordan Hosts First DRB Training Outside the U.S.

By Larry Rogers

Amman, the capital of Jordan, is a bustling city of three million people. Jordan, with a population of six million, is a small country, strategically located at the crossroads between Israel and Palestine to the west, Egypt to the south, Syria to the north, Iraq to the northeast and Saudi Arabia to the southeast. Aqaba, a port at the southernmost end of Jordan, with access to the Red Sea and the Suez Canal via the Gulf of Aqaba, was declared a development zone by the Jordanian Government in 2003. The tax-free status of the principality should encourage inward investment into the region, turning it into the commercial center of Jordan. In excess of \$10 billion US will be invested in the region over the next ten years as the commercial port facilities, including phosphate loading terminals, is transferred 17 miles down the coast away from the city center, which will in turn be redeveloped as a holiday resort. A new international airport is also being commissioned for the principality. There are major plans for a canal to link the Gulf of Aqaba to the Dead Sea to replenish the dwindling waters of this ancient resource, which have been depleted by commercial extraction and the continuing effects of 17 thousand years of evaporation.

It is timely therefore that Mr. Hussam Tafish takes up his post as the Jordanian country representative of the DRBF on the 1st January 2004.

In July 2003 the Nationwide Academy of Dispute Resolution Middle East Ltd, (NADR) under the direction of Mr Tafish, established a Dispute Resolution Center in the Royal Jordanian City Terminal Building. The NADR center offers a modest sized arbitration suite, training, conferencing and mediation facilities.

NADR is an international dispute resolution service provider with longstanding offices in Dallas, Texas, USA; London and Pontypridd, UK; Kuala Lumpur, Malaysia; and Athens, Greece. The Jordanian office of NADR was established in 2001. NADR is a staunch supporter of the DRBF, sending three delegates to the DRBF International Conference in Paris in September 2003. The Nationwide Mediation Academy (NMA) is the ADR practitioner training section of NADR.

The NMA teamed up with Larry Rogers and the DRBF to provide six days of construction dispute resolution training at the Meridian Hotel, Amman in December 2003. The course opened with four days of adjudication training under the guidance of Corbett Haselgrove-Spurin and Nick Turner, from the 13th – 16th December followed by two days of DRB training (The DRB Administration and Practice Workshop and The DRB Chairing Workshop) conducted by Larry Rogers with the assistance of Corbett Haselgrove-Spurin on the 17th and 18th December. Both programs were supported by text and workshop materials which, supplemented by the DRB *Manual*, will provide many hours of reading and research for delegates over the coming months.

Larry Rogers is of course well known to everyone at the DRBF, both as the key DRBF trainer along with Jim Donaldson since 1996 and as the founding editor of the *Forum*. Corbett Haselgrove-Spurin, head of construction law and dispute resolution at the University of Glamorgan in the UK and company secretary of NADR UK Ltd joined the DRBF in 2002, attending the Orlando training course and conference and the Paris International Conference in 2003. He has actively promoted the DRBF in the UK, presenting papers on the DRB process to the Society

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of Expert Witnesses in London in October 2002 and at the University of Glamorgan / Chartered Institute of Arbitrators Forum in Wales in April 2003. The University of Glamorgan will run the DRBF training program, led as ever by Larry Rogers, in Wales in 2004 followed up by a concerted effort to encourage the Welsh Assembly to make DRBs an integral part of government procurement in the region in future.

The program, opened by engineer Aktham K. Malkawi, biddings director of the Government Tenders Directorate, was attended by 28 delegates, with representatives from government departments and contractors. Most of the delegates were practicing civil engineers but two construction lawyers and an architect also attended. One delegate came from the UK and another from Palestine, but the majority was Jordanian. It was a grueling six days for the delegates, commencing at 9:00 am each day. Remarkably, whilst the proceedings officially ended at 6:00, many delegates remained in the function room discussing the day's proceedings and asking the trainers for clarification of various issues till well past 7:00 each day.

The significance of the introduction of DRBs to Jordan cannot be over-emphasized. In the past dispute resolution in the industry had, in the event that negotiation failed to resolve issues, been the sole preserve of the courts and arbitrators, frequently drawn from overseas panels. Practitioners in the industry clearly recognize the shift to a more cooperative approach to dispute resolution. Delegates universally welcomed the DRB concept of early identification of problems and informal resolution, reducing the scope for conflict and protracted formal hearings. Not unsurprisingly, the lawyers were, as ever, the target of much gentle ribbing by construction practitioners who had in the past been caught up in the litigation process. Some things never change!

It is too soon to predict how well the DRB concept will be received by the industry in Jordan. However, the warm welcome and hospitality offered to the trainers, and the opportunity to glimpse a completely new

culture has been both rewarding and exhilarating. If the enthusiasm for the DRB concept shown by the delegates is anything to go by, the concept will make a major contribution to dispute settlement in the construction industry in the Middle East in the future.

Feedback from the seminar has been overwhelming and due to demand from the industry a second course will take place in Jordan in March 2004. It is hoped that as a result of this series of training programs the DRBF will recruit many more new members from across the whole of the Middle East.

Training Director Larry Rogers can be reached at RgrsADR@cs.com.



Larry Rogers (right) presents training certificates to Jordan Country Representative Hussam Tafish.

If you've got news about members, DRBs or other things of interest to our members, we'd like to hear it.



Deadline for the next issue is April 1, 2004 (no foolin'!)

Promoting DRBs in Canada

Country Rep: Robert W. McLean



Government agencies and private corporations in Canada are concerned about the high cost of settling construction disputes by litigation and are endeavouring to develop and

implement alternative methods of dispute resolution.

In Canada the two most frequently used forms of contract are the:

- Canadian Construction Documents Committee form (CCDC), and the
- Federal Government form

Some of the provinces adopt the Federal Government form. Each of these contract forms provides a specific dispute resolution procedure. Since they are the predominant contract forms and they do not promote the Dispute Resolution Board (DRB) process DRBs are seldom used in Canadian construction contracts.

The Ministry of Transportation in the Province of Ontario includes a specific in-house dispute resolution procedure in construction contracts. Currently a three level dispute resolution mechanism is specified. If this process is unsuccessful the dispute can still be dealt with through third party advisors, referees, binding arbitration, or litigation.

B. C. Hydro specifies a modified DRB procedure for construction contracts.

The Toronto Transit Commission in Ontario has used partnering and DRBs on contracts dealing with the Can \$935 million Sheppard Subway Project. Six major

construction contracts on this project ranging from Can \$35 million to Can \$120 million included partnering and DRBs. DRBs were not mandatory. Each of the parties to a contract submitted the name of one member and these two appointees then selected a chair. The DRBs that were appointed did not entirely eliminate the potential use of arbitration/litigation for the resolution of some issues.

Mandatory mediation is required in some provinces prior to taking a dispute to the courts. In such situations the DRB process cannot be applied. The mediation approach is generally believed to be less expensive than using a DRB.

The Alternative Dispute Resolution Institute (ADRI) of Canada with affiliates in each province promotes the use of mediation and arbitration as alternatives to litigation. Mandatory mediation is required in several regions of Ontario. Members of the ADRI of Ontario can apply to be listed on provincial mandatory mediation rosters from which mediators are selected.

There is a general perception in Canada that the DRB process is too expensive for small to medium sized projects. Unfortunately there are not many large construction projects in the country that can justify the use of DRBs.

Further, it appears that some Canadian clients with large high capital cost projects may have a concern about compromising their legal position on potential claims if DRBs are used. The current trend for large projects in the energy sector to use procurement methods such as Design/Build (DB) and Design/Build/Operate/Transfer (DBOT) alters the risk allocation between parties and therefore affects the role of a DRB.

The federal and provincial governments are responsible for initiating and developing

many of the large construction projects in the country. To develop growth in the use of DRBs it will be necessary to demonstrate to these government ministries that DRBs provide an economically viable alternative to litigation. If government ministries are successful in applying the DRB process private corporations may be influenced to consider the DRB approach.

Note: Robert W. (Bob) McLean, P. Eng. has over 42 years engineering and management experience, and has been involved in all aspects of conceptual design, detailed design, preparation of contract documents, evaluation of contractor's bids, award of contracts and management of engineering, construction, supervision and financial aspects on several hydroelectric projects in North America, Africa and India. His project management experience involves extensive negotiations with international construction contractors and equipment manufacturers to resolve claims and contractual disputes. He has had formal training in the area of dispute resolution and mediation, and now focuses on providing dispute resolution and mediation services for engineering and construction disputes. □

Would You Like to Be a Country Representative to the DRBF?

Help give the DRBF a voice in your country by becoming a Country Representative. You may be called upon to act as a spokesperson, and should be interested in raising the profile of DRBs and increasing membership. You may also be asked to help organize DRBF events within the country you represent.

To qualify, you must be a member of the DRBF and live in the country you represent (you need not be a national). Terms are for a three year renewable period.

If interested, contact the DRBF office today: Phone 206-248-6156, Fax 206-248-6453, or e-mail home@drb.

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unnoticed by the busy members and directors of the Foundation but in that he is wrong. His stalwart efforts and unremitting energy have been major factors in the DRBF's progress to date and we are extremely grateful to him for his work during the last year and before.

Although with the DRBF for only a little over a year, Ann McGough, the editor of the *Forum*, has certainly made her mark. Who can refuse Ann anything when she asks so nicely and produces such a polished and professional journal for us. Thank you Ann for your excellent efforts during the last year – long may they continue.

Those of you who have attended workshops or the annual conference will almost certainly know Larry Rogers. Larry has been involved with the DRBF for as long as I can recall. He was the first editor of the *Forum*, he organised and presented the training workshops (with Jim Donaldson) and over the last couple of years was actively involved in the DRBF membership drive. During 2004 Larry has decided that he will concentrate his efforts principally on developing workshops in the US. Thank you Larry for all you have done for the DRBF in recent years. We wish you well.

Talking of workshops, the Directors of the DRBF wish to encourage more members to become workshop trainers (both in the US and worldwide) and to that end we are issuing a call for 'expressions of interest.' Training is not easy but if you think you have what it takes, let us know.

Don't forget the dates of the DRBF International Meeting in Stuttgart (18/19th June 2004) and, of course the DRBF Annual Meeting in San Francisco (23/24th October 2004).

Yours sincerely,



DRBF Board Meeting

Summary Minutes

By Peter M. Douglass
Secretary/Treasurer

DECEMBER 12, 2003 MEETING

A DRBF board of directors meeting was held by conference call on December 12, 2003 with 17 directors and officers participating. The following is a brief summary of the discussions and actions taken at the meeting.

Treasurer's Report:

Based on projections through 12/31/03, the DRBF will need to dip into their reserves for about \$13,500 in 2003. This is largely the result of fewer and less well attended DRBF workshops than anticipated and is believed to be the result of the economy, particularly the reduced budgets of state highway departments that commonly hold DRBF workshops annually. The board suggested that the budget projections for workshops be broken down further in the future.

The draft 2004 budget was reviewed with significant changes from the 2003 budget including the addition of corporate grants amounting to \$10,000 on the revenue side and the first raise for workshop trainers since their inception on the expense side. The draft budget bottom line for 2004 is a break even year.

Board comments regarding the draft 2004 budget are summarized as follows:

- Steve Fox explained that the general practice has been to drop a scheduled workshop if there are not at least 10 people registered at 30 days out;
- The demand for workshops has generally been about 3 to 4 per year plus the "captive" workshops supported by FDOT and Caltrans;

It was noted that we need additional trainers both in North America and Internationally;

- A motion was passed to increase the trainer's fees by \$250 for each actual workshop;
- A motion was also passed to increase the workshop registration fees by \$100 to \$445 for DRBF members and \$495 for non-members;
- It was suggested that we consider e-mailing the Annual Directory in an effort to reduce the distribution costs but the general feeling was a preference to retain the hard copy.
- It was also suggested that we consider bulk mailing to foreign countries but Steve Fox noted that there tend to only be a few members per country. It was suggested that we look into bulk mailing all copies to the country representative for cheaper in country distribution to the members.

2004 Annual Meeting:

Bill Baker reported on three options for the meeting location in San Francisco:

- The Airport Hyatt Regency @ \$105 per night
- The Airport Sheraton @ \$89 per night, and
- The Sir Francis Drake (downtown SF) @ \$159 per night

Bill noted that a cab ride from the airport to downtown was about \$40 to \$50, but there is also a BART connection between the airport and downtown.

The board concurred with Bill Baker's recommendation of the Airport Hyatt Regency and directed that he and Steve Fox proceed with finalizing arrangements

Board of Directors Meeting Schedule

The board has scheduled meetings for the following dates:

Feb. 13, 2004
 April 16, 2004
 June 11, 2004

If you have something you would like the board to discuss or consider, notify Peter Chapman or one of the directors.

for the October 23 & 24, 2004 Annual Meeting.

Committee Reports:

It was suggested that in the future the committee reports be e-mailed to the board members prior to the meeting in an effort to reduce the length of the conference calls.

International: Gordon Jaynes and Peter Chapman reported:

- A training seminar is scheduled next week in Jordan. Larry Rogers will be one trainer at no cost to the DRBF with another trainer from the UK;
- Chapman and Jaynes are both going to Beijing for the signing of the Memorandum of Cooperation with CIETAC;
- Chapman gave a presentation in India;
- FIDIC conference was held in London;
- A 4-day workshop will be held in Dublin, Ireland next month with Chapman, Jaynes and Leto presenting; and
- An International conference will be held in Stuttgart, Germany with Country Representative Helmut Koentges attending for the DRBF.

Strategic Plan: Dan Meyer reported:

- Need to re-look at the 2 yr and 5 yr plans.

Fund Raising and Corporate Patronage:

Dan Meyer reported:

- Need some professional assistance this first year in order not to screw up our current good image. The board gave Dan the go ahead to pursue this assistance and report back to the board at the next meeting.
- Need a spot survey of user expectations including the amount of the contribution and what the grantor's can expect for their contribution.
- Dan envisions a permanent fund raising committee of eight, with four of these from the DRBF and four from ultimate users.
- Need to prepare a mailing package with background information and testimonials.

Web site and Advertising: John Bradshaw reported:

- Ann McGough will be helping John on this committee work and will start at the beginning of the new year;
- Several members have been contacted to participate on the committee;
- A document has been drafted and will be floated around to the board members for comments;
- There are a number of activities to report on, with a lot of overlap between committees that needs coordination;
- John would like to change the front page of the Web site and needs some marketing input.

DRB Best Practices: Hal McKittrick reported:

- He feels that six people are needed to serve on this committee including representatives from domestic, international and legal perspectives;
- Hal has invited some people to participate;
- A lot of what he envisions is based on feedback on the draft Best Practices presented at the Annual Meeting, including:
 - The draft was too long;
 - The draft contained too much detail;
 - We are looking for a statement of best practices with some discussion;
 - There is considerable overlap with the DRB Manual revisions.
- Timing:
 - First draft out between June and October of 2004 for board review;
 - 2nd draft following the first draft by about 60 days;
 - Final document out in first quarter of 2005.
- Joe Sperry noted that this committee's efforts need to be integrated with the Manual Revisions committee and Hal and Joe will talk.

ByLaw Revisions: Sammie Guy reported:

- Gerry Carty, Hugh Cronin and Pete Douglass have agreed to serve on the committee;
- Sammie will also try to get Bob Smith on the committee or at least ensure we get his feedback;

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- Sammie ask the board members to identify any previously suggested and new bylaw revisions that are needed;
- Any revisions will need to go to the general membership in October for approval.

World Bank Liaison: Gordon Jaynes reported:

- five or six training packages need to be developed for web based communications (this being preferred to CDs for updating reasons);
- John Bradshaw will try to get examples of past training packages with Armando's help;
- Video conferencing on a global scale will require a fair bit of funding;
- Armando indicated that FIDIC is likely to put out another updated version.

Education and Training:

- Peter Chapman indicated that Larry Rogers wants to step down as chair of this committee and limit his activities to workshops;

DRBF Revised Manual: Joe Sperry reported:

- Schedule:
 - Part I - finish in March
 - Part II – finish in April
 - Part III – finish in mid-year
 - Part IV – International chapter with no current schedule
- Text to be distributed as PDF files;
- Budget needed for:
 - Ann McGough for editing;
 - Notebooks including cover & spine inserts and divider tabs - say initially 700;
 - Webmaster budget;
 - Other items so that Steve doesn't get stuck with a lot of extra work.
- Case history input – Looking for 12 new case histories for inclusion in the revised manual - needs to be complete by the end of January and Joe suggests about a half page each (at 8.5"x11"). Need permission of both the owner and contractor to include the project in the revised DRB Manual and the job needs to be completed. Also looking for references, preferably testimonials. John Bradshaw agreed to head up a group to pull this information together and Bob Rubin agreed to help.

Workshop Trainers:

It was noted that we need trainers with DRB experience and that some are located on the East Coast. We also need to hook John Nichols, North American Regional Chapter Coordinator, into this effort.

Face to Face Board Meeting in the Spring:

Peter Chapman suggested that we have a face to face BOD meeting in the spring. It was agreed that each board member would pay their own expenses.

New York City was suggested and Bob Rubin offered to host the meeting. He also said that he would look into accommodations for the board members near his offices.

Peter Chapman agreed to send e-mails to the board members regarding the date.

Regional Chapters:

It was agreed that we need to set standards for chapters and that bylaws need to be written.

Dan Meyer noted that the chapters need to be joined at the hip or they will cannibalize the national organization.

Joe Sperry noted that this may need to be addressed in the revised DRB Manual. Bob Rubin, Jimmy Lairscey and Jack Woolf will get together to discuss this situation and will keep Sammie Guy (ByLaws committee chair) involved and aware of any developments.

Other:

Jack Woolf suggested that a committee be appointed to search for an executive director for the Foundation.

Peter Chapman ask that Brison Shipley act as chair of that committee and suggested that he, Bob Rubin and Jack Woolf also serve on the committee.

The next BOD conference call is set for Friday, February 13, 2004 at 9 am PST. □

Breakout Session: Conducting the Hearing

Led by Joe Sperry and Pete Douglass

The “Conducting the Hearing” session during the Annual Meeting attempted to reach some consensus on topics related to the conduct of a DRB hearing. Following are some of the main conclusions/consensus that came out of the three sessions that were held on this topic.

1. It was apparent that there are some significant differences between the perceptions and procedures of the international and North American communities on this topic. This may well be driven by the different contractual arrangements that are common in the two areas, with FIDIC contracts the norm on international projects and contract specifications drawn from the DRB Manual the norm in North America. It may also be related to a strikingly different perception of the legal community in the two areas.
2. Scope of the Dispute Hearing:
This issue was directed at identifying what most commonly results in an efficient and satisfactory DRB recommendation. Again there were decided differences between international and North American views.
 - a) International DABs (Dispute Adjudication Boards) are commonly asked to address the specific quantum (\$) dispute issue, along with the issue of entitlement, as part of the dispute question before the board. It was pointed out that there is considerably less communication between the parties on international projects and this may well explain the greater reliance of the parties on the board to address quantum issues.
 - b) In North America the board recommendations more commonly address disputes over entitlement, with or without general guidelines for determining quantum. North American DRBs generally discourage (or are discouraged by the parties) addressing specific quantum (\$) believing that once the entitlement issue is resolved, the two parties can most efficiently resolve the specific quantum.
3. Restrictions on matters over which the board has jurisdiction:
This issue stems from some recent contracts limiting the jurisdiction of the Dispute Resolution Board to technical matters only, excluding the board from addressing disputes over other contractual issues. The consensus from the session participants was to encourage contract language that imposes no restrictions on the board’s jurisdiction and, if restrictions are deemed necessary, to be very specific in delineating in the contract exactly what those restrictions are.
4. Attorney participation in the DRB hearing:
This topic focused on whether lawyers should be allowed to make presentations at the DRB hearing, other than addressing specific legal issues. Again there was a decidedly different viewpoint between international and North American participants at the session.
 - a) International DABs tend more toward lawyers participating in the hearing, in part because there seems to be a greater respect for lawyers and a greater belief in their integrity. In addition, FIDIC contracts make the recommendations of the board binding on the parties, subject to limited opportunities to appeal to subsequent proceedings.
 - b) North American participants at the session were predominantly in favor of discouraging attorney participation in the DRB hearing, although there was no real

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objection to attorneys attending the hearing.

5. How proactive should the board be at the hearing?;
This issue revolves around whether the board should probe the parties during the hearing in an effort to uncover the “truth,” or whether the board should rule on the information as presented by the parties in order to just “settle the dispute.” The overwhelming majority believed that the board needs to be as proactive as necessary to find the “truth” on which to base their recommendations. It was pointed out that in a judicial hearing, one judges on what is presented, but DRBs hearings are not judicial hearings.

6. Should new information be allowed at the hearing?;
The issue here is whether the parties should be limited to presenting only information that was presented in their position papers, and possibly written rebuttals provided to the board and the other party prior to the hearing. The consensus was that the board should discourage “zingers” from being introduced at the hearing but allow new pertinent information to be introduced with the proviso that the other party be given adequate time to evaluate and rebut the new information. This will most likely delay the proceedings and may cause the hearing to be reconvened at a later date resulting in added costs as well.

7. One party “no shows”:
When one party refuses to show up or participate in a DRB hearing the board is generally left in a very awkward position. According to the Three-Party Agreement the board is generally required to conduct a hearing when requested by either party. It is unlikely, however, that the board can obtain the unbiased truth on which to base their recommendation if only one party attends the hearing. Nevertheless, there was a strong consensus that the hearing should be conducted, even with only

one party attending. More importantly, it was felt that there should be language in the contract that specifically empowers the board to conduct the hearing in the event that one party refuses to participate. □

2004 WORKSHOP CALENDAR

February 26 Dallas, Texas
Administration and Practice Workshop

March 15 San Diego, California
CalTrans Administration and
Practice Workshop

March 16 San Diego, California
CalTrans Chairing Workshop

March 18 Sacramento, California
CalTrans Administration and
Practice Workshop

March 19 Sacramento, California
CalTrans Chairing Workshop

April 17 Atlanta, Georgia
Administration and Practice Workshop

April 18 Atlanta, Georgia
Chairing Workshop
*(April workshops are part of the A.U.A.
NAT 2004 Convention)*

October 25 San Francisco, California
Administration and Practice Workshop

October 26 San Francisco, California
Chairing Workshop

Attendees should take the Administration and Practice workshop prior to the Chairing workshop. Registration fee includes lunch and materials. Each participant will receive a DRBF Certificate of Completion. The cost is \$395 for non-DRBF attendees and \$345 for DRBF members. To register for a workshop, contact the Dispute Resolution Board Foundation. For the latest additions to the training schedule, visit www.drb.org.

Breakout Session:

Drafting the Recommendation

Submitted by Kathleen Harmon

The purpose of the recommendations is to sell the parties home office and counsel of the wisdom of its proposed suggestions for resolving of the dispute. It should be a stand alone document and have several sub-parts.

The Introduction should include the following information:

1. List the attendees
2. List issues
3. Describe the positions paraphrasing the parties positions as well as selected quotes and also include oral testimony
4. Statement of the work

The Findings section's purpose is to answer questions, therefore it sets the stage for recommendations. It should:

1. Answer the "why" of recommendation
2. Quote contract language and detail out why or why not that section of the contract is appropriate or inappropriate regarding the dispute at hand

3. It should have detailed reasoning behind the findings
4. It should track the story of the dispute in clear and simple language

The Recommendation section should be succinct and describe the suggested solution to the dispute which may or may not include a detail of the damages to be paid, depending upon the parties presentations and whether or not both liability and quantum issues are brought before the panel.

Dissents - Should not be signed and can either be a separate section or blended into the main documents in the Findings section.

The format should be

- Summary Recommendation
- Introduction
- Findings
- Recommendation details□



Are you on-line and plugged in?

The DRBF will be increasingly relying on e-mail to distribute information in a timely and cost efficient manner. In order to receive the latest news and information, you need to be certain that the Foundation has your current e-mail address.

If you've never provided your address, or you've changed your address recently, please send it to the Foundation. It only takes a second to e-mail home@drb.org, and simply put "Add my e-mail to the database" in the subject line. Rest assured your address will only be used by the Foundation for official business, and never sold or distributed to a third party. And, if you find you are getting too much e-mail, you can always opt out of the distribution at any time. Do it today!

DRBF Survey Results – Part 2

By William Edgerton

In the last issue of the *Forum*, we presented some of the results from the survey of DRBF members that was conducted in August and September of 2003, and which were summarized at the Annual Meeting. We covered initial questions related to projects which are appropriate for the use of DRB's, and the formation of the DRB. This issue continues the reporting of survey results, focusing on the series of questions concerning selection of DRB members, DRB member qualifications and experience, and regular operation of the board.

The 1996 Construction Dispute Review Board Manual recommends that members of the DRB be selected in the following manner: owner and contractor each nominate one member and approve (or reject) the other's nominee. Those members nominate a chairman for approval by both parties. When asked "What is the best method for selection of DRB members?", 56% of the survey respondents said that this was the best method.

However, in the past eight years since the publication of the Manual, some owners and contractors have experimented with other methods for member selection, in an attempt to ensure impartiality of the board, and to avoid the perception that DRB members "represent" the party that nominated them. The most common "alternate method" (25% of the respondents) is for the owner and contractor to each provide a list of three to five nominees from which the other party selects one. Those members then nominate a chairman for approval by both parties. Another "alternate method" is for the owner and contractor to jointly select all three members and the selected members decide who will be chairman. 17% of the survey respondents believed this was the best method.

A series of questions were asked as to the qualifications and/or experience necessary for board members.

- It has been postulated that one of the most important qualifications is experience with the proposed construction method. Interestingly, over 30% of the owners said no such experience is necessary. This result could indicate that respondents see success of the process as depending upon other attributes of the DRB members.
- When asked whether DRB members should have design experience in the planned method of construction, 75% of the survey respondents said that it was not necessary. Presumably the other 25% have been involved (or could envision an involvement) in a dispute related to design issues.
- One issue has been whether attorneys should serve on DRBs. The survey respondents varied significantly in their response to this question. 38% of the contractors said that attorneys should never serve on boards, even if they are also a graduate engineer with hands-on construction experience, or as the 3rd selected member. 43% of the owners, on the other hand, said that there should be no restrictions whatsoever, and only 21% of the owner respondents would preclude attorneys from serving, even if they had other appropriate background.
- With respect to the importance of training in the DRB process, 54% of the survey respondents said that all DRB members should have received formal training prior to being appointed. In fact, over 65% of the owners, contractors, and construction managers believe that such training is essential. It is interesting to note that less than 40% of the DRB members themselves see such training as essential, leading to the conclusion that the users of the process and the practitioners do not necessarily agree on the importance of such training. 36% of all respondents think that there should be periodic training; i.e., once is not enough, and that one must stay current in DRB practices. Interestingly, 43% of the owner respondents want a national list of certified DRB candidates to be made available. Presumably, this would help to facilitate the selection process.
- One of the more contentious issues has been whether past employees of the contracting parties should be permitted to serve on the DRB. 32% of the survey respondents said that past employees should never be allowed to serve, but 56% said that service was permissible after a certain number of years have passed. The average number of years reported to be acceptable by these respondents was six. Only 10% of the survey respondents (29% of the owners and 3% of the contractors) said there should be no restriction on the use of past employees.

Several questions were asked concerning the regular operation of the board. With respect to the frequency of general meetings, 42% of the survey respondents said that regular meetings should be held every 3 months. 52% said that the frequency of meetings depends upon specific project circumstances, and that the frequency should be set

WELCOME TO NEW FOUNDATION MEMBERS

MEMBER ADDITIONS NOVEMBER THROUGH JANUARY 2004

Barclay Mowlem
David Charles Hudson
Pymble, NSW AUSTRALIA

George Bulloch, P.E.
Bulloch Management, Inc.
Seattle, WA USA

Bettina Carbajal
New York, NY USA

Department of Commerce
Ted (Edward) Smithies
Sydney, NSW AUSTRALIA

Anthony Francis
Fenwick Elliott
London, ENGLAND

Norbert Garcia
Traffic Engineering &
Construction Corp.
Miami Lakes, FL USA

Clive Weeks
GHD Pty Ltd
Melbourne, VIC AUSTRALIA

Geoffrey M. Gold
Centre for Regional Investment
& Development
Jakarta Seletan, INDONESIA

Nicholas Gould
Fenwick Elliott
London, ENGLAND

Michael Gunta
Addis Ababa, ETHIOPIA

Geoffrey Michael Beresford
Hartwell
London, UK

Yasuo Hikima
Hikima & Associates, Inc.
Kawagoe, Saitama, JAPAN

George W. Hodges
Big Canoe, GA USA

Christopher Hough
Fenwick Elliott
London, ENGLAND

Elaine R. Jordan
Sands Anderson Marks & Miller
Richmond, VA USA

Phillip Greenham
MinterEllison
Melbourne, VIC AUSTRALIA

Peter Vaughan Morris
Project Management Group LTD
Port of Spain, TRINIDAD

Denis O'Malley
Brown and Caldwell
Walnut Creek, CA USA

Alfonso Sanchez
Rockville, MD USA

Mina Raskin
Federal Bureau of Prisons
Washington, DC USA

George M. Ross
Morrison Ross LTD
Stirling, SCOTLAND

Richard Smellie
Fenwick Elliott
London, ENGLAND

David A. Smith
Smith Stillion, Inc.
Highlands, NJ USA

John A. Tackaberry QC
Arbitration Chambers
London, UK

Gary Lee
U.S. General Services Admin.
Washington, DC USA

James C. Whaley
Architecture & Engineering Div.
State of Montana
Helena, MT USA

Jawdat J. Yaghmour
Associated Consulting Engineers
Amman, JORDAN

David M. Young
Geelong, VIC AUSTRALIA □

by mutual agreement of the board and parties on a project-by-project basis. 16% of the respondents said that regular meetings should be discontinued after the dispute-prone elements of the job are complete.

Another key question related to how proactive the board should be at general meetings. 82% of contractors want to restrict DRB questioning at general meetings to those disputes that have been identified. Interestingly, over 70% of owners want the DRB to ask questions about potential disputes that have not been mentioned (or identified as such), in other words, to be pro-active. This outcome may result from the fact that many owners push for dispute resolution to limit outstanding issues; and, conversely, contractors want to ensure all facts have been identified before bringing a dispute to the board and are thus more likely to go slowly in advancing such disputes.

The next issue of the *Forum* will conclude the presentation of survey results, with discussion of questions related to hearings, recommendations, board termination, and other issues. □

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The new generating station is located downstream of Lake Victoria at the source of the Nile River which flows north for 5600 kilometres through Uganda, Sudan and Egypt to the Mediterranean. The Owen Falls Extension is about 800 metres downstream of the original Owen Falls Generating Station, which was built in the 1950's and currently has a capacity of 180-MW. By mid 2002 three of the five 40-MW units at the new plant were commissioned providing relief from the rotating blackouts. At the commissioning of the first generating unit President Museveni named the new plant the "Kiira Power Station," *Kiira* being the Lusoga word for Nile River.

The Owen Falls Extension utilizes a hydraulic head of 20.6 metres approximately three metres more than the head at the original Owen Falls station. The additional hydraulic head was obtained by constructing a 1.4 kilometre canal on the right bank of the Nile from just upstream of the original Owen Falls station extending downstream to the new Owen Falls Extension.

A spillway with three large hoist operated gates was constructed on the east side of the new powerhouse. This spillway provides the capability of passing a flood having a return period of 1:10,000 years.

The project structures retain Lake Victoria (69,000 square kilometres), which is almost as large as Lake Superior. Recognizing the importance of these structures the World Bank appointed a Panel of Experts from Canada and the USA to review the design characteristics of the structures to ensure that they were adequate both during and after construction. The panel met regularly throughout the engineering design and visited the site every six months during construction.

The contracts awarded for the civil works construction and for the manufacturing and installation of equipment were based on the International Federation of Consulting Engineers (FIDIC) standard contract documents. Bids were called on an international basis and contracts were awarded as follows:

- Initial Civil Works	SIETCO	China
- Completion of Civil Works	Impregilo/Salini Joint Venture	Italy
- Turbines & Governors	Kvaerner a.s.	Norway
- Generators & Exciters	ABB Generation AB	Sweden
- Gates, Hoists and Cranes	Tungabhadra Steel Products Limited	India
- Mechanical & Electrical	ABB Generation AB	Sweden
- Transmission Line & Switchyard	Pihl/KL contractors	Denmark
- Consulting Engineering	Acres International Limited	Canada

International funding was provided by the following agencies: The World Bank / IDA; African Development bank / Fund (ADB/F); Norwegian Agency for Development Cooperation (NORAD); Swedish Board for Investment and Technical Support (BITS) and Swedish International Development Agency (SIDA); Danish International Development Agency (DANIDA); Nordic Development Fund (NDF) / Norwegian Trade Council (NTC); Department for International Development (DFID); Canadian International Development Agency (CIDA); The Government of Swiss Confederation; and Uganda Electricity Board (UEB).

The Civil Works Contract included the power canal, highway bridge, powerhouse, spillway and tailrace channel. This contract was funded by the World Bank and required the appointment of a three member DRB to deal with disputes between the parties. The contractor and employer each nominated one member to the DRB and these two nominees appointed the third member as Chair. The DRB members came from England and Norway.

The DRB visited the site approximately three times per year throughout the duration of construction. The initial briefing visit was held shortly after the contractor had mobilized to the site. Throughout the construction period any claims, which were not resolved directly between the contractor and employer and became disputes, were referred to the DRB. The DRB scheduled hearings as necessary to receive the presentations of each party and the

engineer. On completion of each formal hearing the DRB issued a report including recommendations for resolving the disputes.

The very heavy rainfall in late 1997 resulted in claims for delayed delivery of construction equipment and materials because overland transport was disrupted and for an overall delay in the construction program. These claims became disputes that were presented at the first DRB hearing. The DRB recommended that the contractor was entitled to reimbursement of extra costs associated with the extensions of time that had been granted.

Other disputes referred to the DRB included:

- Increased cost of port duties and of sea, road and rail transport
- Measured quantities of rock stockpiles
- Increased cost of cement
- Late payment of advance payment
- Increased cost of concrete admixtures
- Rock stockpiles contaminated with clay
- Hardness of quarried rock
- Extra costs associated with highway bridge piers

The DRB recommendations for these disputes in some cases provided for cost entitlement and in others rejected the basis of the claim.

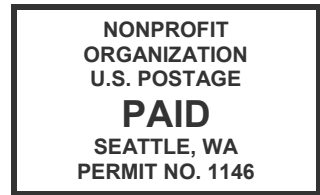
The most significant dispute was for costs associated with overall delay and disruption to the construction program based on a number of circumstances. This dispute included costs of under utilized heavy construction equipment, financial cost of delayed revenue and excise tax on fuel. The DRB recommendation provided guidelines for determining cost entitlements.

A total of nine DRB hearings were held to deal with 18 disputes. The regular visits of the DRB to the site ensured that the DRB members were aware of the overall progress of construction and of any particular circumstances that might cause construction delays or increased costs.

A few months after completion of the construction work the contractor and the employer reached agreement for the final contract payment without going to arbitration. □

Robert McLean is project manager for Acres International Limited. He can be reached at rmclean14@cogeco.ca





FOUNDATION FORUM

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FOUNDATION FORUM



Next step for International Conference: Stuttgart, Germany!



The DRBF will hold its 4th International Conference on Friday 18th and Saturday 19th June 2004 in Stuttgart, Germany.

This conference will discuss recent international experiences and developments in the area of dispute resolution, and particularly concentrate on possible application of the DRB concept in German speaking Europe as well as in Eastern European countries. Well reputed experts in this field are invited to lecture on these topics and to set the ground for interesting discussions. The conference is intended to be bi-lingual in English and German. A detailed program will be published in early 2004.

For further information, please contact Peter Chapman (+44-1372-843755) or Dr. H. Koentges (+49-201-8242589).