



Forum

VOLUME 12, ISSUE 1

FEBRUARY 2008

Educational Forum Spreads Dispute Board Message to the Philippines

By Salvador P. Castro, Jr.

True to its commitment to create awareness and to actively promote the use of Dispute Review Board, Dispute Board/ Dispute Adjudication Board (DRB/DB/ DAB), DRBF-Philippines, successfully launched the use of DRB/DAB/DB through a Forum held on 24 October 2007 at the Linden Suites, Ortigas Center, Pasig City, Philippines.

The Forum was attended by 86 participants comprising members of the DRBF-Philippines and key representatives from the various stakeholders of the Philippine industry sectors, such as Owners/ Employers, Design Consultants, Quantity Surveyors, Project Managers, Construction Industry Organizations, Representatives from the Government, International and Local Funding Institutions, and the Judiciary.

(continued on page 18)

The Forum meeting was followed by a two day International Contracts Training Course



The Forum organizers and speakers: *(sitting, L to R)* Amb. Sedrey A. Ordonez, PDRCI Chairman, Robert A. Cochrane, Melanie Meilhac, Eduardo R. Ceniza, PDRCI President, Salvador P. Castro, Jr., DRBF Country Representative, Michael Roberto P. Reyes, CECOPHIL President; and *(standing L to R)* members of PDRCI Board of Trustees and CECOPHIL Board of Directors: Gregorio Navarro, Victorino Orocio, Custodio O. Parlade, Bienvenido Magnaye, Mario E. Valderrama, Thelma C. Mauricio, Estelita Y. Gutierrez, Ricardo P. Ongkiko, Roberto N. Dio, Claro V. Parlade, Daisy P. Arce.

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President's Page

Well it's 2008 already and here is the second edition of my "President's Page" summary... where did the last 3 months go?? Although I might be a bit late by now, Happy New Year to you all!!

Since my last review the DRBF's committees have been very busy. Kerry Lawrence, together with input from many sources from not only the US but also the international guys including John Madden and Dick Appuhn have been developing their standard training materials. These will complement the already approved standard DRBF training modules which are now in use. Kerry and his committee has also developed the "Train the Trainers" course and is now working on such new courses as "Introduction to DRBs" and a 3 to 5 hour "Presenting to a DRB" program aimed at owner and contractor reps. Both the Florida and Australian chapters have also developed their own materials which will shortly be available electronically for use subject to an agreement with both the chapters and the DRBF's head office. I am also pleased to announce that one or two commercial course providers have also developed their own course materials based on the DRBF's training modules and these have already been in use in Southeast Asia, Europe and the Middle East.

Providing training programmes for major DB users has also taken a leap forward at this time with more training being offered to Caltrans and other DOT users in the US and to groups in Eastern Europe, Abu Dhabi, the Philippines and with the support of Dick Appuhn's committee, to the African Development Bank in its head office in Tunis. Congratulations to all for their efforts. We are also underway with negotiations with engineering firm Hatch Mott MacDonald to provide in house training to them over various regions in the US, for which we thank the support of their senior management.

Other positive developments have come about also with the creation of the President's Provisional DB Member List. I wish to thank all those of you who have applied to go on to the list showing a deep rooted commitment of rank and file DRBF members to be of service to the users of the system. The committee considering the applications is hard at work and the first list should be available around late February. Employers and in some cases contractors are already showing signs of interest in the list and the DRBF is already known to be the "default nominator" within standard forms of contracts for DB positions in a number of regions throughout the world.

During the next three months I will be launching the DRBF's first mentoring scheme which will hopefully provide a breakthrough in the chicken and egg theory for those who wish to participate as DB members on contracts – look out for some news shortly on the DRBF web site and in the next edition of the Forum.

Have you all booked your tickets to go to Cape Town in South Africa for the May International Conference? The details are on the web site and the organisers need you to pass the word around to all of your contacts to give them the details. The format of the conference this year is slightly different to the routine conference and the linked training packages are very exciting. Why not include it with a holiday in sunny Africa?

John Madden is hard at work on the international side and he has come up with an excellent initiative for all Country Representatives this year – get one more person to join the DRBF. I think we should all take his lead and each of us should try to get one person we know to join up this year! Give it some thought, it can't be that hard.

As I close out this letter I wish to invite you all to take a look at our web site. Our hard working Administration Manager Steve Fox and Editor and Webmaster Ann McGough have put in a lot of work on the site and we all need to spread the word – why not make it a link on your own web sites and certainly pass the details on to your friends and colleagues. Also take a look at our Australian Chapter's web site www.drba.com.au if you need to know what goes on "down under."

Gerry Owen



DRBF members Kerry Lawrence (l) and Bob Rubin (r) recently met with Colin Lawrence, Vice President and Deputy Tunnel Practice Leader with Hatch Mott MacDonald, to discuss DRBs.

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Board of Directors

Report of the Ten Year Plan Committee

A ballot to approve the Ten Year Plan was sent to the DRBF membership Dec. 17, 2007. Balloting will be closed after Jan. 15, 2008 and the results announced.

If the plan is approved, the president will appoint a nominating committee for the Executive Board and a “shadow committee” for the North American Board. A call for nominations to the Executive Board, the North American Board and Region 2 Board (Europe and the rest of the world) will go out to the DRBF membership shortly thereafter, all culminating in elections of July 1, 2008.

The shadow committees, the Ten Year Plan committee, the DRBF Executive Committee and Board of Directors will have to develop budgets and funding mechanisms for the regions and answer other important issues in the coming months if the Ten Year Plan is approved.

Board of Directors 2008 Meeting Schedule:

Executive Committee: February 15, March 14, and April 18, 2008 by conference call

Board of Directors: May 2, 2008 in Cape Town, South Africa

All DRBF members are encouraged to submit any comments or suggestions to Gwyn Owen, president of the Board of Directors.

DRBF Committees

Executive Committee of the B.O.D.
Gwyn Owen

Annual Meeting and Conference
Pete Douglass

AI Mathews Award
Gwyn Owen

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DRBF Bylaw Revision
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Education/Training - International
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Volker Jurowich

International and Membership
John Madden

Newsletter
Ann McGough

Nominations
Bob Rubin

Professional Conduct
Bob Rubin

**Implementation Oversight of the
10 Year Plan**
Harold V. McKittrick

Website
Ann McGough

World Bank Liaison
Gordon L. Jaynes

Finance and Administration Committee Report

By Jim Donaldson, Treasurer

As chairman of the DRBF's Finance and Administration Committee, I would like to take this opportunity to give members a brief report on the DRBF's financial condition and the administration policies status.

The DRBF had an audit performed for the calendar year 2006 which was a review of our financial position as well as our monetary procedures. Our accounting firm is Branch, Richards & Co., P.S., Certified Public Accountants. The report was completed in September of 2007 and has been forwarded to the Executive Committee and the Board of Directors.

After receiving the audit, Administrative Manager Steve Fox and I attended a meeting with the accountants to review their report and discuss any recommendations they had for improvements to our financial procedures. We will review their suggestions and present them to the Executive Committee and the

Board of Directors for their consideration.

The DRBF is in sound financial condition and we plan to build our reserves with our new membership categories and increased membership along with possible grants we are pursuing, and with the use of corporate sponsorships for our conferences and trainings.

We have also had a meeting with our insurance company, Marsh Consumer Seabury & Smith, Inc. This firm provides the Foundation with our liability coverages, and we met to review our current policies and to discuss addition updates that may be required or should be considered. We will also make recommendations to the Executive Committee and to the Board of Directors after our review.

With the DRBF moving forward with our 10 year master plan for the DRBF expansion, it is important to have a sound financial and administration position to build on. □

Forum Editor: Ann McGough

Editorial and subscription address:
Dispute Resolution Board Foundation,
19550 International Blvd. So., Suite 314,
Seattle, WA 98188
Phone: 206-878-3336
Fax: 206-878-3338
Toll free (US only)
888-523-5208
E-mail: home@drb.org
Web site: www.drb.org

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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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Dispute Resolution
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Save the Date!

**Dispute Resolution Board Foundation
12th Annual Meeting and Conference
October 4-5, 2008
Washington Marriott
Washington, DC**

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Membership Categories for 2008

The DRBF is committed to the promotion of the DRB process, and growing the membership base is an important component of that vision. By joining the DRBF, you become part of a movement to decrease the amount of litigated construction claims and network with others who are committed to expanding the use of DRBs globally. All members are urged to share the DRBF message and benefits of participation to industry colleagues who may be interested in joining.

DRBF membership includes:

- Networking opportunities
- Access to informational systems, including a hotline and historical data
- The *Forum*, a quarterly newsletter
- Access to the DRBF library
- Resume posting on the DRBF web site register of specialists
- Discounts on DRBF conferences and training workshops.

Last year, the DRBF Board of Directors decided to expand the categories of membership in the Foundation by adding Platinum, Gold and Silver levels. These categories are designed for members who are in a position to support the growth of the Foundation at a higher level than the standard member or sponsor level. The membership options are as follows:

Platinum \$5,000
Gold \$2,000
Silver \$1,000

In addition to the regular member benefits, these levels receive a separate listing in the DRBF Membership Directory and Forum newsletter.

Help spread the word about DRBF membership. The Foundation's web site provides complete details and membership applications. □

Training Workshop Calendar

The Dispute Resolution Board Foundation is offering training in conjunction with the following conferences this spring:

April 29, 2008
Northeast Regional Conference
Boston, MA

May 5-6, 2008
International Conference
Cape Town, SA

May 22, 2008
Northwest Regional Conference
Seattle, WA

Visit www.drb.org for details!

Ethics in Today's World of DRBs: Referral of Disputes to the DRB and *Ex Parte* Communications



By Jim Phillips Ph. D.

The question posed in the last issue of the Forum involved two issues: an *ex parte* conversation between a

contractor's representative and one DRB member, and the appropriate response by the DRB when a contractor attempts to bring a dispute for a DRB recommendation when the contract documents are inconsistent as to when either party may refer a dispute to the DRB.

The question of *ex parte* communication has been addressed previously in this column in recent issues of the Forum, but it is of such significance that it warrants a brief discussion here. Canon 2 of the DRB Code of Ethics specifically prohibits *ex parte* communications as follows: "...[e]ven the appearance of a conflict of interest should be avoided. There shall be no *ex parte* communication with the parties except as provided in the DRB's Operating Procedures."

While the Operating Procedures for many DRB's allow *ex parte* communication between the DRB Chair and the parties for scheduling and administrative reasons, typically they prohibit one DRB member from any communication with a party outside the meeting or hearing process when all DRB members and parties are present and can hear the statements made. The reason for this is that despite an innocuous or innocent conversation between a Board member and one party, such communication does

give rise to an appearance of impartiality from the standpoint of the other party who may not know the content of the conversation and either learns about it later or observes it while it's occurring.

In the example given from the last issue, the question was raised about a conversation between a party and a DRB member during a break in a regularly scheduled meeting regarding the propriety of the other party's actions. This type of conversation should be avoided by the DRB member at all times. One approach to resolve this particular issue would be for the DRB member to not respond in any way to the contractor and advise the Chair of the conversation. The Chair could then disclose it as soon as the meeting resumes and ask the parties how they would like to resolve the matter raised by this *ex parte* conversation. Full disclosure will cure any appearance of bias or partiality by the DRB, and may even operate to dissuade any further efforts to conduct *ex parte* communication by either party.

As to the other issue raised in the last Forum, the question of when a dispute is properly referred to the DRB, there are several factors to be considered. The factual scenario recites an ambiguity in the contract documents; one specification allows a dispute to be referred by either party at "any time," while another specification requires the satisfaction of several notice requirements before a dispute can be properly referred. The scenario goes on to

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**Southern
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Bill Carlson

present the scenario, that in order to “beat” the notice specification, the contractor intends to cobble several disputes, some that have satisfied the notice requirement and some that have not, into one “mega” dispute.

Canon 5 of the Code of Ethics provides that “...[t]he DRB shall impartially consider all disputes referred to it.” On its face, this seems to suggest that the DRB should hear this dispute in question. On the other hand, the owner could object, arguing that the contractor has waived their right under the notice specification to bring a dispute to the DRB, and that therefore the dispute is not properly before the DRB.

Other than Canon 5, the Dispute Resolution Board Foundation’s Code of Ethics does not directly address this issue. The comments to Canon 5 in the DRBF Manual state in part that “...[t]he paramount purpose of the DRB process is impartial consideration of all disputes referred...” Based on that language, it appears that at least there is a presumption in favor of the DRB hearing a dispute that is referred.

In the Foundation’s Practices and Procedures Manual, Section 3, Chapter 6, Section 3.6.6 addresses the issues of disputes over the authority of the DRB to hear disputes. This section provides in part “...[s]ometimes the parties contend that the DRB is not authorized to hear a dispute...” for such reasons as the contract precedents have not been completed, because of limits in the specifications or other reasons.

This section suggests that in these situations ‘...the DRB should consider the nature of the disagreement regarding the authority issue and the nature of the dispute, and then decide whether the wiser

course is to proceed with a hearing, or to encourage the parties to resolve the authority issue...” before the DRB hearing. It goes on to suggest that the DRB could even hear the authority issue.

In the factual scenario presented, the contractor is suggesting by his/her actions, by advising one DRB member that he/she is attempting to “beat” the process, by cobbling disputes that there is awareness that some of the disputes possibly should not be heard. This presents the challenge to the DRB. While Canon 5 and the Manual suggests a presumption in favor of the DRB hearing all disputes that are referred, Canon 2 provides that the “[c]onduct of Board members shall be above reproach.” In this instance if the DRB knowingly goes on to hear this “mega” dispute, the owner may very well lose faith in the integrity of the process. This should be avoided.

I think the better course in this instance would be for the Board to hear the issue of the authority of the DRB to hear the dispute so that both parties have an opportunity to fully explain their positions. This will, as in the case of fully disclosing an *ex parte* communication, in my opinion operate to “chill” either party from “gaming” the DRB process.

As I have discussed in this column before, the cornerstones of the DRB process are impartiality and fairness. By fairness I mean providing each party an equal opportunity to have their disputes heard under the terms of the contract. Any actions by either party that undermine the DRB’s ability to provide such a forum should be disclosed to all. This will build the trust necessary to ensure the integrity of the DRB process.

(continued on page 8)

Next Ethics Challenge

Assume you are a DRB member on a site tour of the project with other board members and the contractor and owner representatives. While you are walking around observing the construction site, you observe one DRB member talking privately with the owner's representative in very low voices. As soon as you approach within listening range, they both stop the conversation and walk in opposite directions.

Later that day the same Board member advises you that he has been hired by the owner to do some "outside" consulting.

**What would you do if you
were that DRB member?**

The DRBF's Ethics Committee invites all readers to submit comments or reactions to the articles that appear in this column. Please feel free to email Committee Chair Jim Phillips at jphillip@richmond.edu if you have any comments about this article.

Also, the DRBF has established an interactive ethics advice process that allows members and interested parties to call in or email their ethics questions/concerns for the Foundation's advisory opinion. Members are encouraged to take advantage of this opportunity should the need arise.

Please send your thoughts on this issue, or problems you have faced with a DRB, to the DRBF:

Email: home@drb.org

Phone: 888-523-5208 or 206-878-3336

2008 AICA Annual Conference

The 2008 AICA annual conference is being held on the afternoon of Thursday, April 17 at the Chamber of Shipping in London, EC1. The keynote speech will be given by The Rt. Hon. Sir Anthony Evans QC, a former High Court Judge and Justice of the Court of Appeal in the UK and Bermuda. He will be followed by presentations from Derek Roebuck looking at the history of dispute resolution, Sean Brannigan who will be giving a case law update, and Neill Stansbury on unethical behaviour and criminal acts.

The half-day conference is £95 for AICA, NSCC and Adjudication Society members and £120 for non-members, which includes the opportunity to network over drinks and canapés at the end of the event.

The AICA conference will appeal to everyone with an interest in adjudication including adjudicators, clients, contractors, lawyers and quantity surveyors. For more information and to download a booking form, visit the AICA website at www.aica-adjudication.co.uk.

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Membership
Contributors
to the DRBF**

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Pete Douglass

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Romano Allione
William B. Baker
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Volker Jurowich
Kerry Lawrence
Harold McKittrick P.E.
Robert Smith P.E., Esq.

**Do you know
someone who
might be
interested in
joining the
DRBF?**

The DRBF attracts new members as the DRB process advances into new industries and regions throughout the world. Help us expand by sharing information with your colleagues.

Complete membership information, as well as conference and training details, can be found on our web site or contact the main office for details.

WELCOME TO NEW DRBF MEMBERS

MEMBER ADDITIONS NOVEMBER 2007 THROUGH DECEMBER 2007

Oumer Ahmed
Ethiopian Roads Authority
Addis Ababa, ETHIOPIA

Eloy E. Bello IV
Jimenez Gonzales Liwanag Bello Valdez
Caluya & Fernandez (JGLaw)
Makati City, PHILIPPINES

Lyda Bier
Mr.dr.L.Bier advocaat
Vught, NETHERLANDS

Bevan Brown
Transport Infrastructure Development Corp.
St. Leonards, NSW AUSTRALIA

Peter Curtis
Ladymead Projects Ltd.
Guildford, UK

Roberto N. Dio
Castillo Laman Tan Pantaleon & San Jose
Makati City, PHILIPPINES

Ian Foulds
Van Oord Gulf FZE
Dubai, UAE

Daniel B. Furlong
Sebastopol, CA USA

Marcia Haber Kamine
Beverly Hills, CA USA

John McSheaffrey
Gardiner & Theobald Fairway
Dubai, UAE

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PMG Consulting Engineers
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Sheehan, Sheehan and Stelzner, P.A.
Albuquerque, NM USA

Michael Tonkin
IMGG
Dubai, UAE

**Expand Your Involvement in the
Dispute Resolution Board Foundation**

There are many ways to expand your involvement in the DRBF. Join a committee or become active in local efforts through a regional chapter or by contacting your regional or country representative. The DRB movement is growing rapidly, and we need energetic, enthusiastic and knowledgeable members to help us advance the cause. With a variety of committees, you are sure to find something that suits your interests and talents.

Complete contact information for all committee chairs and regional or country representatives is available on the DRBF web site:

www.drb.org



8th Annual International Conference

May 2-4, 2008

Cape Town International Convention Centre

Cape Town, South Africa

The Dispute Resolution Board Foundation will hold its 8th Annual International Conference May 2 - 4, 2008 in Cape Town, South Africa. The distinguished panel of speakers includes government officials in Africa, representatives from Multilateral Development Banks (MDB), owner representatives, contractors, engineers and Dispute Board practitioners. The conference will be conducted in English with simultaneous translation into French. Delegates will be encouraged to take an active part in the discussions and will be able to network and make new contacts. Afternoons are free for networking or touring the region, and on Saturday evening there will be a Gala Dinner at the Spier Wine Estate in Stellenbosch.

Registration and Reservations

Conference registration fees are €300 for DRBF members (€155 for African state residents), €350 for non-members (€175 for African state residents). Registration forms for the conference, training workshop, and conference hotel can be obtained from the DRBF office or downloaded at www.drb.org.

New to the conference this year, delegates who register by **March 31, 2008** will be included in all interactive conference networking and promotional materials. Don't miss out - register today!

Official Conference Travel Resources

The International Conference planning committee has negotiated special rates with several travel resources to assist delegates with transportation, accommodations, and tours in the region.

Airline: Soho Travel of London, England has negotiated preferential fares with South African Airways for attendees booking their reservations through Soho Travel. South African Airways flies to South Africa from North and South America, the United Kingdom and Continental Europe, the Middle and Far East, and Australia and New Zealand. The airline is a member of Star Alliance and can offer convenient connections from all over the world. Soho Travel can also assist conference delegates with intra-South Africa and other intra-Africa arrangements if desired. Contact Account Executive Colin Whitbread at Soho Travel by phone +44 207 631 0100, fax +44 207 436 3831 or email sales@sohotravel.co.uk, and be sure to mention you are attending the DRBF International Conference.

Tour Operator: The Travel Link will arrange half-day tours in the Cape Town area on Friday and Saturday afternoons. Descriptions of the tours are available on the DRBF web site, and includes such popular attractions as the Cape Peninsula, Table Mountain, the winelands, Robben Island, and more. Travel Link will have a travel desk at the at the conference to assist with travel and tour arrangements, and can also arrange hotel transfer service from the Cape Town Airport. The Travel Link can also assist delegates in arranging private tours in Southern Africa. Contact the company by phone +27 (11) 327 3282, fax +27 (11) 327 3400 or email lorenn@worldspan.co.za, or visit their website www.fellengtours.co.za.

Hotel: The host hotel for the conference and workshops is the Southern Sun Waterfront. Delegates are encouraged to make reservations early to take advantage of group rates: single rooms are R1 175.00 and doubles are R1 330.00, including breakfast. A reservation form is available on the DRBF website, or contact the hotel by phone +27 21 409 4000 fax +27 21 409 4777 or email waterfront@southern.sun.com.

Space is limited! Secure your space by registering early.
Visit www.drb.org to download conference and hotel registration forms and complete conference details.

Dispute Resolution in Africa Conference Highlights

Friday, May 2 - Introduction

Keynote Address: Danny Jordaan, CEO, World Cup 2010 South Africa Local Organizing Committee
Dispute Avoidance: What does the DB Process Offer?
Port of Ehoala Project in Madagascar
DB's for International Chamber of Commerce
Lenders' Experience with FIDIC and MDB Harmonized Editions
Dispute Resolution for MDB's, IBRD Speaker
MDB Harmonized Edition for AfDB Financed Projects

Saturday, May 3 - Practical Experience in Africa

Practical Experience in Francophone Africa
Leboulanger et Associés
Falque & Associés
Frilet et Associés
Practical Experience in Southern and Anglophone Africa
Trans-Caledon Tunnel Authority
PIU in Sudan

Gala Dinner – *Moyo*, and African theme venue located at the Spier Wine Estate in Stellenbosch

Sunday, May 4 - Practical Applications in the Dispute Resolution Process

Delegates will be invited to divide themselves into four breakout session groups, exploring each topic for 25 minutes and then following with summaries from each session moderator and open floor discussion.

Session A: Constituting a DB under MDB/FIDIC
Session B: Organizing Periodic Site Visits
Session C: Referrals and Advisory Role of DB
Session D: The Costs of Dispute Boards

Affiliating Organizations



Sponsor Organizations





**Training Workshop:
Successful Use of Dispute Boards
Under FIDIC MDB Harmonized
Conditions for Construction
May 5-6, 2008
Cape Town, South Africa**



Co-presented by the DRBF and FIDIC, this comprehensive workshop begins with a plenary session focused on Clause 20 and five problematical areas of international civil works contracts. The session is followed by approximately 15 hours of interactive training in small groups, each led by an experienced DRBF tutor. Dispute scenarios will cover the five frequently problematical areas:

- Contract risks involving care of works, insurance, possession of site, taking over and defects liability
- Contract risks involving design, ground conditions and climatic conditions
- Programming delays, extensions of time, and use of critical path delay analysis
- Variation orders, instructions and pricing
- Cost fluctuations and price variation using a contract formula based on published indices

The workshop will be led by DRBF members Murray Armes, James Brady, Andy Griffiths, Gordon Jaynes, Toshihiko Omoto, Marianne Ramey and Robert Smith.

Accreditation

The DRBF is proud to announce the training workshop may qualify participants for credits towards their continuing professional development programs. Please contact the organizations individually for details.

Accrediting Organizations:

American Arbitration Association
Chartered Institute of Arbitrators
French Bar Association
Institution of Civil Engineers
Institution of Civil Engineering Surveyors
Royal Institution of Chartered Surveyors
Royal Institution of British Architects
UK Bar Council

Space is limited, so register today!

DOES YOUR COUNTRY NEED YOU?



By John Madden, Chair
International Committee

Does your country need a Country Representative of the Dispute Resolution Board Foundation? The success of the DRBF and the use of Dispute Boards is expanding faster than ever before. The newly-formed International Committee is working to organize a world-wide network of leaders through appointment of DRBF Country Representatives (CRs) around the globe.

Larry Delmore, our former executive director, used to tell the story of how he would judge his success by how often people in the construction industry referred to him as “The DRB Guy.” Larry took pride in that. The Country Representatives will be a strong network of talented people “on the ground” across the globe – “The DRB Guy” in their respective countries and the point person for leading the construction industry in the rapid expansion of the Dispute Board (DB) concept. You may wish to be in the forefront of this sweeping movement.

This network of CRs will be the touchstone for information on DB use and practice in each specific country, but will also help initiate education, training and the expansion of DB use in the CR’s home country and boost DRBF membership, which would have benefits not just to the DRBF, but to DB users and the CRs in each country as well.

Thus, we are looking for dedicated DRBF members who are interested and willing to volunteer to serve as their country’s representative. Potential CRs must be a DRBF member in good

standing having been an active member for at least two years (unless waived by the DRBF Board); must have served on at least one DB or have equivalent experience; must have a minimum of twenty years experience in the construction industry, including experience in dispute resolution and contract administration; and must have the ability to communicate electronically.

The benefits of being a CR include increased exposure of serving as the DRBF leader in your country – the voice and the face of the DRBF on the local level, and the personal satisfaction of being in the forefront of the booming international success of the DB concept – it is sweeping the world and you could be a part of that success!

This volunteer leadership position should take about eight to ten hours a month. Country Representatives will have the opportunity to share their experience in the *Forum* newsletter and with the DRBF Board through quarterly reports. The DRBF will support local activities when possible, including the distribution of press releases about the appointment of the Country Representative and other newsworthy activities occurring in the region.

If you have an interest in serving as a CR, please promptly forward your request for consideration, along with your CV including DB experience and training, to John Madden, Chair, International Committee, at his e-mail address: JohnPMadden@cs.com.

About the Author: Prof. John Madden is a civil engineer and solicitor/attorney based in Dublin, Ireland and New York City and serves exclusively as a DB member, arbitrator and mediator for the construction industry. □

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The DRB Landscape in China



Country Rep:
Hongwei Zhao

The use of the dispute board mechanism for dispute resolution has been known in China for almost twenty years. The concept and mechanism was first introduced on the Ertan Hydropower Project in 1990. From then on, the concept and was further promoted and used on three other projects: the Xiaolangdi Multipurpose Dam Project, the Yellow River Diversion Project and the Kunming Zhangjiuhe River Water Diversion & Water Supply Project.

The first three projects were all partially financed by The World Bank, and the last one (so far) was partially financed by a commercial loan from Bank of Tokyo-Mitsubishi Co. Ltd.

At that time, contracts for civil works were based on FIDIC's standard form of contract. For the general conditions, the 4th edition of 'Conditions of Contract for Construction' was adopted.

In consideration of the complexity of the works and variations and claims to be encountered, as suggested by the World Bank or similar organizations, the employer and contractors agreed to establish the DRB for avoiding and solving of disputes.

The DRB gave their independent and professional assessment, and the DRB tried best to make both parties eliminate misunderstanding through numerous talks. Actually, the DRB's recommendations and suggestions have established a platform which helped both parties finding their way to the settlement of disputes.

Based on the use of DRBs in the above four projects, it is believed that the following learning and experience have been gained, particularly with respect to how the DRB plays a key role in the successful settlement of disputes:

- **The DRB's independence is a very important factor in getting both parties' confidence.** Under 4th FIDIC Contract for Construction, the engineer is suspected of acting on behalf of the employer, which usually prevents the contractor from reaching agreement with the employer, even the employer's proposal is constructive.
- **The DRB's knowledge and experience can complement the contract.** For projects of huge size and with various components, it is very common that variations and unexpected things happen, which may go beyond the scope of original contract. Then the DRB provides a unique and valuable proposal and/or suggestion which may help both parties in reaching supplementary agreement.
- **The DRB's interpretation of the contract (not only on a strict contractual approach, but also in the spirit of the FIDIC type of contract and normal practice on international contracts) is necessarily required for solving those disputes that arise of different interpretation and understanding of the contract by parties.** It seems like that most disputes occur due to different ideas and opinion about clauses of the contract, and those contrary understandings and behavior can be frequently found in international construction

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Thailand
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United Arab Emirates
Hamish F. MacDonald

United Kingdom
Murray Armes

contracts resulting from various cultural backgrounds and experiences.

- **The flexibility in the DRB’s approach will encourage both parties to contact and look for the amicable way for settlement.** On the one hand, DRBs will give professional advice from the point of the contract and the law; on the other hand, DRBs endeavor to make parties understand each other and to find the way between them.

With the above learning and experience in mind, the DRBF (partially through DRBF’s representative in China) successfully collaborated with the World Bank Institute (WBI) in Washington DC, and the International Development Law Organization in Rome, Italy, (IDLO) to produce a four-way simultaneous satellite link among: Beijing, China; Hanoi, Viet Nam; Bangkok, Thailand; and Washington, DC. The session is one in a series of Policy Dialogues conducted by WBI and IDLO, aimed at high level officials in developing countries. The three hour Dispute Board session was held on 09 December 2005 (see previous article in the *Forum*, Volume 10 Issue 2, p. 12).

The discussion explored existing systems of dispute resolution in the three countries, their advantages and disadvantages in respect of mixed nationality usage, and compared their operations with those of Dispute Boards. Special attention was given to the dispute provisions of the “Procurement of Works” documents of the Multilateral Development Banks, led by the World Bank, which involved examination also of the 1999 “suite” of FIDIC Conditions of Contract. In addition, there were discussions of the International Chamber of Commerce Rules for Dispute Boards.

It was hoped that this Policy Dialogue would lead to future training on successful use of Dispute Boards in China. However, very slow progress has been made since then. The following steps, with strong support from the DRBF, need to be done in China:

- **Knowledge of DRBs.** To have general knowledge about DRBs; for example, its main function, advantages and disadvantages, procedure for member selection and DRB operation.
- **Training for local DRB members.** DRB recommendations are not binding on both parties, his successful operation depends mostly on his knowledge, experience and ability.
- **Establishing of DRB organization.** We need one organization and some people with enthusiasm to keep doing this hard work.
- **Adoption of DRBs in construction contracts,** and establishment of DRB at the beginning of the project.

About the Author: In July 2007, Hongwei Zhao was appointed Country Representative in China, a position he continues to hold.

Mr. Zhao has been involved in many international hydro projects in China, including the Xiaolangdi Multipurpose Dam Project, one of the largest construction projects in the world today. His academic training in business administration (China) and project management (UK) has improved his ability in analyzing and solving problems. He has, through his work, obtained experience with the technical aspects of hydropower and the legal procedures for construction disputes.

Mr. Zhao believes the Country Representative position is a very significant role and carries with it many responsibilities. He hopes to work with others toward sharing ideas, notes of accomplishments and work towards achieving the primary objectives of expanding the understanding of DRBs, promoting their use, and providing assistance to parties within China. He can be reached by email at zhwxld@hotmail.com. □

New Country Representative Shares Vision for UK

By Murray Armes

At the last DRBF Conference it was announced that I was to be the new Country Rep for the UK, and a similar announcement was made at the Adjudication Society Conference in London in November 2007. I want to tell you a little bit about me and my ambitions for the DRBF in the UK and Europe.

Firstly, I would like to say a big thank you to Peter Chapman who has held this post for the last ten years and who has left me some very large boots to fill. I hope that if the need arises Peter will still be able to lend us his expertise and experience and to help fly the flag for the DRBF.

I am an architect by profession (at the Adjudication Society Conference, Gwyn Owen light-heartedly suggested that he did not know what architects did, so I hope after reading this he might get some idea!) and have practised that profession for over 25 years. In fact it is probably longer than that because I designed my first project, a small house extension for my parents, at the tender age of 15. Having graduated from Sheffield University I was involved in some large projects in the UK, as well as spending time in the Middle East and also working on a large project destined for Hong Kong. After that I spent some time designing theatres and arts projects, then a spell in interior design before setting up my own practice in 1990. Earlier this year I joined forces with Probyn Miers and I am now a director of that company....but more of that later.

I became interested in dispute resolu-

tion through a strong belief in dispute avoidance. Although when acting as contract administrator the independence of architects and engineers is often questioned, I have often found myself effectively mediating between the employer, main- and sub- contractors in order to find solutions to problems before they became disputes. Of the 200 or so projects my practice was involved with, just two ended in disputes and only one of those progressed to adjudication, none to litigation. The problem for me was that although my clients came to expect this service, they did not expect to pay anything for it. From their point of view it was just something else that architects did. As we know all too well, most architects and indeed most other construction professionals, do not!

I completed a two year MSc in Construction Law and Arbitration at King's College in London in 2003 where we were constantly told that disputes in the construction industry were inevitable. I could not persuade them otherwise but I knew that it did not have to be that way. During the second year of that course Peter Chapman came and gave a lecture about Dispute Boards and I realised then that the process he was talking about had a lot in common with my own interests. I followed his advice and attended the DRBF Conference in Washington DC in 2003 and it must have been good because I have attended every year since and most of the International Conferences as well. Becoming a familiar face has its advantages, but sometimes you are also asked to help and so it was that I was asked to serve as treasurer for the International Conference in Bucharest and I have since volunteered to take on the same role for the Cape Town Conference. I also agreed

Murray Armes can be contacted at:

Probyn Miers Ltd
Hamilton House
1 Temple Avenue
London Ec4Y 0HA
ENGLAND

T: 44 207 583 2244
F: 44 207 583 2255
E: marmes@probyn-miers.com

to be a tutor for the workshop which will focus on the FIDIC MDB Contract.

I still work as an architect, but a large proportion of my time is now taken up with sitting as an adjudicator and acting as an expert witness, together with forensic work on projects that have gone wrong, either technically or through some failing in the provision of professional services. I hope to complete my arbitration training and become a Chartered Arbitrator in 2008, although there are now very few construction industry arbitrations in the UK due to the popularity of adjudication. There is also an increasing demand for Dispute Board members, although that form of dispute avoidance/resolution is not yet common in the UK, so the projects tend to be in Eastern Europe or further afield.

As I mentioned before I am now a director in the London based firm Probyn Miers which is a firm of architects specialising in work related to construction industry dispute resolution, and hopefully in the future dispute avoidance as well. Although the firm has historically worked mainly in the UK, we are currently working in Eastern Europe, South America and East Africa. We have eight consultants and are looking to expand.

As the new DRBF UK representative I want the construction industry in that country to know that disputes in the industry are not inevitable and there is a method of dispute resolution that has a unique feature: that of dispute avoidance.

Although DBs are not yet common in the UK I want to implement an idea first given to me by Gordon Jaynes: to organise a regular meeting of UK members, probably in the summer of 2008. There are now quite a few of us and I think it would be well worthwhile getting together to see how we can promote the process. I envision a half day meeting to exchange stories and put our heads together. If you are reading this from the UK then do please let me know what you think about this idea.

I am also aware the EU is interested in Dispute Boards but has inevitably been asking for a list of potential board members for EU funded projects in Eastern Europe and Africa, something the DRBF is now addressing. I am aware that William Buyse has been coordinating efforts with the EU and I hope to be able to offer him assistance from the UK. As I will be



Peter Chapman (right) congratulates Murray Armes on taking the reins as UK Country Representative, a position Chapman previously held for 10 years.

getting my introduction to implementing DRBF training in Cape Town, I hope we will be able to offer some formal training in the UK in conjunction with Dick Appuhn, who is organising DRBF training from his base in Italy.

Finally, we have the DRBF ten year plan to implement.

Looking back at the above I am increasingly aware that the task ahead of me is not just a one man job. So those of you based in the UK who are reading this, do please let me know if you are able to help because there is a lot to do! I look forward to hearing from you and from anyone in the DRBF who has good ideas they think I should be considering. □

(continued from page 1)

A number of foreign delegates also attended the Forum.

Mr. Michael Roberto P. Reyes, the incumbent President of the Council of Engineering Consultants of the Philippines (CECOPHIL), the National Member Association of FIDIC, gave the opening remarks for the Forum where he related the background of how the event was conceptualized, which was basically patterned after a similar event held during the 7th DRBF Conference in Bucharest, Romania in May 2007.

During said event, FIDIC General Manager Peter Boswell, DRBF President-Elect Gwyn Owen, and Salvador P. Castro, Jr. agreed to hold FIDIC seminars in the Philippines with DRBF-Philippines taking the lead in association with CECOPHIL.

The speakers, who agreed to provide their insights on the subject pro bono, were: **Mr. Robert Cochrane**, who spoke of the UK experience using DB/DAB; **Ms. Melanie Meilhac**, representing ICC –Paris and who discussed the various ICC Rules on ADR, particularly on Dispute Boards; and **Mr. Mark Entwistle** for the DRBF, who was unable to make it due to conflict with his earlier schedule. Mr. Entwistle was, however, able to email his Power Point presentation which was distributed to the participants. **Mr. Salvador Castro, Jr.**, DRBF – Philippines Country Representative spoke on behalf of Mr. Entwistle and presented an update on the International Conditions of Contract where DAB/DB are being used. Following the speakers' presentations, a lively exchange of ideas and opinions was moderated by **Ms. Daisy Arce** and **Mr. Arthur Autea**, both members of the Board of Trustees of PDRCI and the DRBF.

In his closing remarks, **Mr. Eduardo Ceniza**, DRBF member and president of the Philippine Dispute Resolution Center Inc. (PDRCI), the arbitration arm of the Philippine Chamber of Commerce and Industry (PDRCI), synthesized the proceedings by identifying the barriers and challenges to the use of DRB/DAB/DB in the Philippines.

- The significant barriers include: [1] the lack of knowledge on the use of DBs and its benefits to the parties, and [2] the cost of availing the services of DRB/DAB/DB since most, if not all, practitioners are foreigners to be selected from FIDIC's President's List of Adjudicators and/or ICC List of Experts.
- The challenges posed to the private and government sectors and business industry leaders is for them to evaluate and, if doable, to adopt DRB/DAB/DB as another mode of resolving conflicts or disputes, in addition to mediation/conciliation and arbitration and even litigation. To reach that goal, the following roadmap must first be hurdled:
 - [1] Conduct massive awareness and educational campaigns to promote the use of DRB/DAB/DB;
 - [2] To develop and train lawyers, engineers and professionals to be member or chair of DRB/DAB/DB with the support of DRBF, ICC and FIDIC; and
 - [3] The country should develop its own National List of Adjudicators for commercial and construction disputes.
- PDRCI with the support of ICC will develop the National Listings of Adjudicators for commercial and construction disputes.
- CECOPHIL, with the support of FIDIC, will likewise develop such listings for construction disputes.

Mr. Greg Navarro, PDRCI member of the Board of Trustees and treasurer and head of a prestigious accounting firm, took his time to contribute to the affair as the Master of Ceremonies.

Module 2 Seminar - 25 and 26 October 2007

The Forum preceded the 2-day International Contracts Training Course on the use of FIDIC Conditions of Contract specifically on claims management and resolution of disputes using DAB/DB held on 25 and 26 October 2007 at the same venue, which drew a record of 85 participants representing a wide range from the construction industry.



Salvador P. Castro, Jr., *Country Representative, DRBF*

With the intensive information campaign, the organizers were able to attract among the industry stakeholders the following participants representing a broad cross-section of the industry, such as : owners, developers, and employers; contractors and subcontractors; consulting firms and design professionals; project managers, financial institutions; law firms; government owned or controlled corporations; and ADR practitioners. A total of nine of the participants were foreigners from Singapore and Australia.

Mr. Robert A. Cochrane, an associate of ECV Ltd. and the lone resource speaker of the training course, was certainly very effective in holding the attention of the participants throughout the duration of the course. His professional experience in the subject matter of his lecture and the use of thought-provoking situations in the series of workshops were immensely important in ensuring the interest of his audience.

The interactive discussions and lively participation of the audience, sharing their queries and experiences during the open forum and exercises, were testimonials to the success of the seminar. Feedback forms were given to the participants to evaluate the effectiveness of the training course, and of the 85 participants, 68 responded. Overall, the participants gave positive comments which serve as a fitting encouragement to the organizers to pursue its training plans next year.

With the warm reception of the local industry stakeholders and the active support shown by the industry organizations during the Forum and the 2-day training course on FIDIC contracts, DRBF-Philippines is optimistic that that the 4 - Module FIDIC training course on the use of FIDIC Forms of Contract and training on DAB/DB in 2008, and the establishment of the National List of Adjudicators in 2009 would be equally successful.

The DRBF, through its Country Representative, is honored to recognize the efforts unselfishly given by those who believe in DRBF’s core objective, particularly Ms. Emma Fernandez of the DRBF-Philippine Secretariat and all the local DRBF members who in one way or another have given their time for this undertaking and the leaders of the industry organizations which supported the Forum.

About the Author: Salvador P. Castro, Jr. is the DRBF Country Representative for the Philippines. He can be reached by email at spcastro@spcastro.com. □



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19550 International Blvd. So., Suite 314
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Don't miss the opportunity to join the world's top Dispute Board practitioners in exciting Cape Town, South Africa for the DRBF's **8th Annual International Conference**. The planning committee has organized an impressive agenda (see page 11) and made allowances for delegates to maximize their visit by planning optional group tours in the afternoons and scheduling the Gala Dinner at a unique South African themed venue on the grounds of Spier Wine Estate.

The Western Cape offers spectacular views from Table Mountain and other unique attractions, including the Victoria & Alfred Waterfront, numerous beaches, Robben Island and the Cape of Good Hope. Cape Town promises a visit unlike any other, with distinctive cultural and heritage attractions and exciting wildlife and adventure opportunities nearby. Make your travel plans today!



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