



Forum

Volume 6, Issue 4

October, 2002

Prove It!—The Challenge of Quantifying DRB Cost Savings

By
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Arbitration, Inc., and
Gena Slaughter, Attorney**

“...[I]f the use of Dispute Review Boards is to dramatically expand this is precisely the type of quantifiable evidence we must have.”

The Dispute Review Board process saves owners and contractors substantial sums on construction projects. We prevent disputes from metastasizing into unnecessary litigation or arbitration. Intuitively, we know that these claims are correct. But where is the proof? What evidence exists to establish and document these asserted savings? All of us with any significant construction experience know with moral certainty that there are significant cost benefits in the use of Dispute Review Boards. But, how much are those savings? What are the sources of those savings? What can be reasonably documented as the estimated "savings" sufficient to provide justification for reducing a proposed bid?

The issues that must be addressed are: Should a contractor bid lower on a particular project where there will be a Dispute Review Board? How much lower can a contractor safely bid than on a similar project without a Dispute Review Board? What amount of reductions in the bid submissions should an owner reasonably expect when they mandate the use of a Dispute Review Board? Finally, and most critically, what objective evidence justifies those conclusions?

At present, this information is simply not available. We do have extensive anecdotal evidence claiming, for example, a 17 percent cost savings per contract by one state Department of Transportation. Another state agency has claimed that it saved between \$5 and \$7 million on a highway project. Numerous state, federal and international agencies require the use

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President's Page

By all accounts, the 6th Annual Meeting in Orlando was a grand success. Following the annual business meeting at which Peter Chapman was elected President-Elect and Bob Rubin, Sammie Guy, and John Nichols were elected to the Board of Directors, over seventy members attended a series of three breakout discussion groups. Be sure to check the summaries of these sessions in this issue of the *Forum*. Again, my thanks to those members who served so ably as facilitators.

Over lunch members listened to Bob Burluson of the Florida Transportation Builders Association describe the introduction, and ensuing successes, of the Florida DOT's DRB program. Bob cited an extremely favorable report of the Florida Inspector General on this program, and it will be a valuable marketing tool for the Foundation.

Over dinner, out-going President Jack Woolf announced the recipients of this year's Al Mathews Award for the individuals who have contributed the most to foster the DRB concept: Joe Sperry, Bob Smith, and Bob Matyas. These three distinguished gentlemen, along with Al Mathews, co-authored the DRB Handbook, which was the genesis of today's Foundation.

Of far-reaching importance to the Foundation and its membership was the signing of a Memorandum of Cooperation between the DRBF and CIETAC (Chinese International Economic and Trade Arbitration Centre). In preparation for the 2008 Olympics Games in Beijing, China is anticipating a \$50+ billion investment in public sector buildings and infrastructure, and related private sector development. This Memorandum of Cooperation encompasses joint efforts between the two organizations and their respective members in a number of areas, including research, training, technical assistance, and development of DRBs. While I provided the ceremonial flourish, Peter Chapman and Gordon Jaynes did the real groundwork.

Breaking with its tradition of convening immediately after the annual meeting, the Board of Directors met on Friday. We covered a lot of territory: from adopting a new lay-out for the *Forum*, and a DRBF Code of Ethics, to reviewing our membership, training, and strategic plan initiatives. Next year's annual meeting is scheduled for Washington, D.C. on October 18 and 19, 2003. The "International Meeting", which has now become an annual event, is tentatively scheduled in two parts: part one will be in Paris in May for DRB practitioners, followed by part two in China in June for owners, contractors, and other DRB users and potential users.

The Board, by a narrow majority, approved the concept of allowing limited professional advertising (i.e. business card format) in the *Forum*. Member comments on this subject are earnestly requested and will be reviewed before any policy is implemented.

I am excited about serving as President of your Foundation for the next year. There is more experience and talent among our membership than in any other organization promoting DRB's world wide, and I hope to draw upon these resources to accelerate efforts during the upcoming year to advance the Foundation's goals and objectives. This is your Foundation and I encourage all of you to contact me or any of the officers and directors with your opinions, suggestions, and concerns. If a matter would be of interest to our membership at large, I would encourage you to also include your thoughts in a letter to the editor of the *Forum*. □

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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 editor.

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Marketing

During the past year, members of the DRBF have undertaken a series of initiatives in an effort to promote the DRB process to users in the construction industry. This is a summary of those efforts.

In the international arena, a Memorandum of Cooperation has been developed with the CIETAC (Chinese International Economic and Trade Arbitration Centre) to advance the use of DRB's in China. The 2nd International DRBF Meeting was held in Rome on 25 May 2002. Results were published in the July 2002 *Forum*. On October 3, a presentation on DRB's was done in Mexico City for the Centro de Arbitraje de Mexico (Center for Adjudication of Mexico). The Foundation office is in the process of providing information to 26 identified organizations in British Columbia, including public works agencies, construction associations, construction consultants, engineering and construction associations, construction lawyers that practice and promote ADR.

In Florida, a statewide meeting of DRBF members was held which resulted in the formation of the Florida Chapter of the DRBF. At the Florida Transportation Builders Association/Florida Department of Transportation Conference held in Orlando (800+ attendees) two Breakout Sessions were held promoting and discussing Dispute Resolution Boards. And the Florida chapter is currently developing a brochure to set forth the message of the DRBF concept within the State.

There were many individual presentations on the DRB process done by Foundation members over the past year, including to the Federal GSA Annual Conference of Project Mangers in New York City, Swinerton Management and Consulting, the California State University System, and the Moles. In addition, personal discussions and meetings promoting the DRB process were held with the California Dept. of Transportation (Caltrans), the Bay Area Rapid Transit District (BART), and the City of Seattle (WA). Formal and/or semi-

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Letters and E-mail to the DRBF

DRBF and the World Cup 2002

It's not often that the DRBF shares the stage with something as high-profile as The World Cup, but that's what happened this year in Pakistan!

Thanks to sponsorship by the All Pakistan Contractors Association, a two-day seminar on the 1999 FIDIC Conditions and their Dispute Board procedure was held in Islamabad's new Serena Hotel, and the last day's program overlapped with the World Cup Final, so arrangements were made to interrupt the seminar with large screen projection of the live telecast of the Final, with the seminar resuming after the game was over. It made for a very long programme, but very happy attendees!

The seminars were arranged by Mr. Justice (Ret'd.) Khalil-ur-Rehman Khan, formerly a Justice of Pakistan's Supreme

Court, and presently Rector of the International Islamic University of Islamabad, who serves on a Dispute Board which I chair for the giant Ghazi Barotha Hydropower Project on the Indus River in Pakistan. For presentations on the FIDIC *Conditions* and their Dispute Board concept, I spoke on behalf of the DRBF.

The programme was open on the first day to Government employees only, but the second day was open to the entire industry. Presentations were made by representatives of The World Bank and the Asian Development Bank, and moderators of the discussions included such distinguished persons as the Federal Minister of Law, Justice, Human Rights & Parliamentary Affairs, the immediate past Foreign

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Summaries of Annual Meeting Breakout Sessions

Summary of Breakout Session Marketing: Strategy and Structure

This group was tasked with addressing three topics: 1. How to Sell the DRB process; 2. The value of insurance as a member benefit; and 3. Suggestions for changes in the DRB Manual.

After two sessions of brainstorming, the third breakout group developed a framework for identifying the marketing strategy that the DRBF should follow for the upcoming year. This included the following three topics:

- Identification and Understanding of the DRB Process and target markets.
- Strategies to promote the use of DRBs.
- Specific Needs and Action Items to be undertaken.

In order to knowledgeably promote the process, it is necessary to identify the benefits to the users, as well as the arguments typically used by detractors as reasons why DRB's should not be used. The following were identified as benefits:

- It improves cash flow for contractors, because disputes are settled in a more timely manner
- Saves time and money, primarily because disputes are resolved earlier without having to hire claims consultants and attorneys
- Improves communication between the parties, not only for the specific dispute, but in all future activities
- Contributes to claims avoidance, not merely resolution
- Saves resources by allowing participants to work on more productive work rather than spending time resolving claims in court
- Reduces conflict on the jobsite
- Results in less risk to designers and construction managers because claims are settled with less antagonism

- Provides political cover for unpopular decisions

The following were identified as reasons given for not using DRB's:

- Cost to implement, primarily for regular meetings when no disputes were scheduled
- Loss of control. Takes the control away from those typically used to having it, primarily corporate counsel.
- Decisions have been biased against owners, perhaps because many DRB members were formerly contractors
- Organizational resistance to change.

The federal contracting officer structure as well as other organizational bureaucracies won't support different methods.

- The lack of an appeals process
- It exposes your case to the other party before a court hearing

To understand the target markets, the world was divided into a group of potential "users," and a group of "influencers." Users included:

- Owners
- Contractors
- Subcontractors
- Suppliers
- Lawyers
- Architects/Engineers/Construction Managers/Other consultants

And influencers included:

- Banks
- Government funding agencies: federal, state and local
- Insurance companies and sureties
- Schools
- Airport authorities
- Private companies
- Academia
- Form document preparers: AIA, EJCDC, AGC, etc.

After recognizing these target markets, the group identified a list of marketing

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strategies that could be used to promote the process. They included:

- Hire marketing expertise, in the form of lobbyists, P.R. firms, and/or marketing support staff
- Piggyback on other organizations, such as the AUA and RETC, in the use of their lobbyists, and/or at trade shows and conventions
- Influence students, by either including DRB's as part of the curricula at colleges and universities, and/or creating a membership category for students (like ASCE)
- Use the 2003 Annual meeting in Washington, D.C. as a vehicle for increasing the visibility of DRB's with federal agencies. Also encourage members attending the meeting to use it as an opportunity to visit their representatives on the Hill to discuss the benefits of the DRB process
- Encourage the establishment of state chapters, as a way to get more local knowledge and input to state and local governments
- Encourage members to publish articles in trade magazines for various industries, and give presentations to agencies and other member organizations

In order to facilitate these strategies, it was recognized that the DRBF needs certain materials and/or research to make the above strategies more effective:

- Brochure that promotes the DRB process. The Florida Chapter has developed a mock-up of a tri-fold brochure for use in Florida.
- Statistical results of the process (history). Some of this exists, and there is a mechanism for adding data to the database, but needs some explanation as to what it means.
- Hard data on the cost/benefit ratio of using DRB's. Some of this may come from current studies underway by the U. of Florida and an upcoming questionnaire in the *Forum*. The Florida Inspector General's report on the benefits of using DRB's is available, and there may be ways of developing this

from other jurisdictions.

- Data from the World Bank on success rate, etc.
- Information on the ultimate disposition (trial, arbitration, whatever) from projects where the DRB recommendations have not been accepted by the parties. Was the DRB recommendation upheld?
- Autopsy results on the DRB process on a job-by-job basis. Case histories on successes. Testimonials from DRB users.
- Sales messages, brochures, etc. on CD optical media, in addition to hard copy
- An update of the www.drb.org website.

Recognizing that many of these actions would require funding that may exceed that currently available from the DRBF budget, the following was a list of what the participants thought would be the best use of the limited funds:

- Brochure
- Mailing (postage)
- Expertise (public relations, marketing, lobbyist)
- Travel to give presentations, etc.
- Trade Shows

Each group session was advised that the DRBF had done some preliminary investigation concerning the availability for insurance for members who sit on boards. A straw poll was taken and about 75% of each group was tentatively in favor of the Foundation procuring insurance to cover all members, if the cost of such insurance resulted in approx \$50 increase in annual dues. It was noted that the exact coverage is yet to be determined, since underwriters are unfamiliar with the service, and therefore the risks. There was discussion as to whether the coverage should be liability insurance to protect members from judgments, or a form of pre-paid legal fees which could provide some legal support. Some members were concerned that having insurance would encourage users to file suit, whereas not having the coverage would discourage such suits.

Each group participated in a brainstorming session to identify ideas for incorporation into a revision of the DRB Manual. The primary comments included the follow-

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ing:

- A commentary on the guide specification, to illustrate why it was prepared the way it was, and why such policies and practices are recommended. It was noted that other organizations have similar commentaries to guide users who wish to make changes.
- Discussion on case studies was thought not to be helpful, although discussion on lessons learned from past projects was important to include. Needs some discussion on differences in practices used in various agencies.
- The narrative format that refers to predecessor manuals was thought to be difficult to read, although it was acknowledged that some reference to what was changed from the previous version was helpful
- Advantages and/or disadvantages of the binding nature of the DRB process, or the lack thereof
- Expansion of the use of DRBs into other part of the construction industry suggests that more emphasis should be added on buildings and process plants
- An updated discussion of the use of DRBs in the international arena.
- Discussion of conflicts of interest, to include guidelines on what is a conflict, a checklist or form to fill in, examples of disclosure statements, and recommendations on how conflicts should be mitigated if/when they occur.
- Discussion of DRB variations, including: informal DRBs (DRB-lite), regional DRBs (single owner, multiple contracts), and single-member DRBs.
- Background information which would serve as education for readers not familiar with the process, including a history of law and the place of DRBs in the legal arena.
- How DRBs and partnering work together
- A discussion of special problems associated with subcontractor and supplier disputes.
- A chapter on practices which are unique to state Departments of Transportation.

These ideas will be made available to the authors who are planning the Manual revision.

Summary of Breakout Session The 'Global Picture'

Facilitators: Peter Chapman (UK), John Bradshaw (UK/US), Frank McDonough (US)

The attendees of this session comprised:

- 16% owners
- 55% contractors
- 40 consultant engineers
- 35% persons who regard DRB appointments as a major source of their income.
- 50% who have served on DRB
- 5% who had served on a DRB outside the US
- 45% who had worked overseas at some point in their career.

And if that adds up to more than 100% it just goes to show how versatile the DRBF membership is.

The session began with a review of global developments involving DRBs. Mention was made of the World Bank bidding documents, FIDIC standard form contracts and other positive support from the international lending institutions. DRBs in long-term concession projects was discussed with special mention of how these are operating within the UK.

The problem of "meddling" with the standard form contracts insofar as the operation of DRBs was raised. General consensus is that such meddling was highly detrimental to the benefits and advantages of the DRB process. Examples of meddling to the standard international forms include the following:

- Removal of the routine visits to site: this renders the DRB no more than an adjudication tribunal and the advantage of familiarisation, informal operations and the like is lost to the parties.
- Removal of the retainer: this ignores the "price" of a member's availability

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Construction Dispute Review Board Manual by Matyas, Mathews, Smith and Sperry

An essential reference for all construction professionals, this book shows you how to use Dispute Resolution Boards to solve construction disputes on the job, avoid claims and thereby reduce project costs. Whether you're an owner, contractor, construction manager, attorney or construction lender, this time- and money-saving sourcebook offers you the most complete guidance now available on the successful establishment and practice of a DRB during construction.

**\$45.00 plus \$4
postage/handling.
Contact the
Foundation to order.**

Other News

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FDOT Inspector General Supports DRBs

The Office of Inspector General for the Florida Department of Transportation just released a draft report of an audit of Dispute Resolution Boards evaluating the performance of DRBs and assessing their effectiveness in resolving construction disputes on Florida Department of Transportation projects.

The audit found "...[t]he DRB process appears to be effective in assisting in the resolution of disputes, leading to more timely completion of projects, reduced cost overruns, and avoidance of claims. Utilizing DRBs on larger projects can serve to motivate greater cooperation between parties resulting in fewer unresolved claims and a reduced litigation potential."

The audit also found that those projects with DRBs experienced smaller percentage time and cost overruns when compared to projects without DRBs. For a copy of the report, call John Shriner at FDOT at 850-414-4149.

Patricia Galloway Elected President-elect of Civil Engineering Society

Long-time DRBF member Patricia Galloway has been elected President-elect of ASCE. A sustaining member of the Foundation since 1996, Galloway is chief executive officer and president of the Nielson-Wurster Group, Inc., based in Princeton, New Jersey, and the first woman to be elected to serve as president of the ASCE in its 150-year history.

Tacoma Narrows Bridge Project to Have DRB

Ground was broken on October 5 for construction of the second Tacoma Narrows Bridge in Tacoma, Washington. The \$615-million, design/build project is the first suspension bridge project in the United States in 40 years according to DRBF member Bob Berry. William Peckham and Ray Dodson have been

selected as the first two DRB members with the third to be named shortly.

DRB Discussion Group Now on Yahoo

Rick Faulkner has established a discussion group on Yahoo. The newsgroup was set up to exchange ideas, thoughts and information about Dispute Resolution Boards, adjudication and construction ADR. You can post a message at: Dispute_Review_Boards@yahoogroups.com, and you can subscribe at: Dispute_Review_Boards-subscribe@yahoogroups.com.

Spreading the Word

Larry Rogers will be doing a presentation about DRBs to the Damage Prevention Conference in San Diego in December. The Conference addresses safety issues and construction dispute resolution in the underground utility industry.

John Nichols and Bernie Smith will do a presentation at the 2002 FWHA Steel Bridge Conference for the Western States in Salt Lake City in December. £

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

**Deadline for the
next issue is
December 15, 2002.**

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of Dispute Review Boards and are very pleased with their performance. Yet, none of these agencies has produced or published hard data quantifying the cost savings directly generated by or attributable to the use of a Dispute Review Board. However, if the use of Dispute Review Boards is to dramatically expand this is precisely the type of quantifiable evidence we must have.

A decade ago the same lack of information plagued the proponents of mediation. The insurance industry in particular sought some type of quantifiable basis for determining whether mediation was cost-effective. One of the authors devised a simple, one-page mediation report that was quick and easy to fill out, yet provided the requisite information. It is now time for us to assemble the data necessary to quantify what, if any, cost savings may be directly and/or indirectly attributable to the use of Dispute Review Boards.

The first portion of this analysis will require us to examine the costs associated with the litigation or arbitration of a typical construction dispute. Those costs may be divided into two general areas. First are the external costs to the parties of participation in litigation or arbitration. The second is the internal cost to each of the parties directly related to participation in litigation or arbitration. The external costs of litigation include the cost of attorney fees, expert witnesses, discovery expenditures and court costs. The internal cost to the parties encompasses the salaries, benefits, taxes and related expenses of managers and employees who are assigned to work on the preparation of litigation files and related discovery, the lost productivity of those employees and the lost opportunity costs of not having those employees available to pursue new projects or business opportunities. Many parties do not account for the hourly cost of superfluous employee activities or realize that just one single hour of a job superintendent and a secretary's time to respond to a discovery request costs at least \$50.00. The superintendent's "one day" deposition with preparation and document review time can eas-

ily cost \$1,000.00. Worse yet, these expenses often occur years after the project is completed and when those expenses are no longer directly assignable to that job. Accounting for simply the time dedicated to these activities readily explains why the internal costs to a party of litigation are often estimated to be equal to the cost of the outside legal fees. Furthermore, none of these categories include the inherently difficult to quantify risks of litigation such as monetary damage exposures or collateral damage to reputation related to participation in litigation, i.e. the Bill Clinton Consequence.

We recognize that in the substantial number of cases where the DRB was successful in resolving all of the disputes without any hearings, this information will of necessity be based on the good faith evaluations of the Board members. However, the fact that the Board was highly successful should not diminish the value of its contribution or fail to account for it. So, even if you resolved all disputes informally, please submit the information to us.

Finally, this is an attempt by one experienced Dispute Review Board member and another lawyer with construction litigation and arbitration experience to devise a method for calculating the potential savings we think may be attributable to DRBs. If you are satisfied with this form, please take a few minutes to fill it out for any project(s) you have the information for and send it to us. We will compile the results and submit it for later publication. However, we recognize that you the experienced membership may have useful suggestions. You are expressly invited to add your suggestions and comments to this endeavor. Together we can devise a method of calculating the concrete, demonstrable benefits of using DRBs and encourage their greater use.

We think that a potential way to assemble this data could be to ask the members of past and present Dispute Review Boards to examine and analyze the records of

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DRBs and disputes they are personally knowledgeable of. Based specifically upon the information available from the records of those DRBs, for each separate project with disputes that resulted in either informal recommendations or formal hearing, please fill out the following analysis form:

Dispute Resolution Cost Analysis

- 1. Was the project public or private? _____ Was the DRB in place timely? _____
- 2. What was the total value of the contract? _____

Informal Resolutions

- 3. Did the DRB “informally” resolve any disputes without a formal hearing? _____
- 4. If so, how many disputes were “informally” resolved? _____
- 5. Did the “informal” resolution eliminate all of the project disputes? _____
- 6. If not, did the “informal” resolutions reduce the number of disputes referred to a formal hearing? _____
- 7. If so, what percentage of the disputes settled without a formal hearing? _____

Formal Recommendations

For all disputes in which a formal hearing was held and recommendation(s) issued, please state:

- 8. The number of disputes that were “entitlement” issues only. _____
- 9. The percentage of disputes that were “entitlement” issues only. _____
- 10. The number of disputes that were “entitlement” only. _____
- 11. The percentage of disputes that were “quantum” only. _____
- 12. The number of disputes that were “entitlement and quantum”. _____
- 13. The number of hours/days estimated for the trial of the disputes in court. _____
- 14. The number of expert witnesses needed to present the disputes in court. _____
- 15. The number of the lay witnesses needed to present the disputes in court. _____
- 16. The number of months or years before the dispute was likely to reach trial. _____
- 17. The number of Owners’ expert reports or depositions likely to be used to prepare the dispute for court. _____
- 18. The number of Contractor’s expert reports or depositions likely to be used to prepare the dispute for court. _____
- 19. The anticipated cost of the Owner’s experts’ reports and depositions. _____
- 20. The anticipated cost of the Contractor’s experts’ reports and depositions. _____
- 21. The number of the Owner’s lay witness depositions likely to be used to prepare the dispute for court. _____ Estimated cost of the depositions. _____
- 22. The number of the Contractor’s lay witness depositions likely to be used to prepare the dispute for court. _____ Estimated cost of the depositions. _____
- 23. The Owner’s estimate of their likely litigation budget for that particular dispute, if presented in a court. _____
- 24. The Contractor’s estimate of their likely litigation budget for that particular dispute, if presented in a court. _____
- 25. The Owner’s estimate of their likely external attorney fees for that particular dispute, if presented to a court. _____
- 26. The Contractor’s estimate of their likely external attorney fees for that particular dispute, if presented to a court. _____
- 27. The Owner’s estimate of their likely internal costs for the preparation and presentation of that particular dispute to a court. _____
- 28. The Contractor’s estimate of their likely internal costs for the preparation and presentation of that particular dispute to a court. _____
- 29. The Owner’s estimate of days of project delay if the dispute remained unresolved. _____
- 30. The Contractor’s estimate of days of project delay if the dispute remained unresolved. _____
- 31. The Owner’s estimate of additional project cost related to the dispute remaining unresolved. _____
- 32. The Contractor’s estimate of additional project cost related to the dispute remaining unresolved. _____
- 33. The Owner’s estimate of the value attributable to the unavailability of the project if the dispute remains unre-

(Continued on page 10)

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solved. _____

34. The Contractor's estimate of the value attributable to the unavailability of the project if the dispute remains unresolved. _____

35. The Owner's estimate of delay damages or loss of contract bonus attributable to the dispute remaining unresolved. _____

36. The Contractor's estimate of delay damages or loss of contract bonus attributable to the dispute remaining unresolved. _____

37. The Owner's estimate of the cost savings, if any, attributable to the DRB. _____

38. The Contractor's estimate of the savings, if any, attributable to the DRB. _____

39. The Owner's estimate of cost overrun savings, if any, due to the DRB. _____

40. The Contractor's estimate of cost overrun savings, if any, due to the DRB. _____

41. DRB member's estimate of cost overrun savings, if any, due to the DRB. _____

42. The Owner's estimate of time-overrun savings, if any, due to the DRB. _____

43. The Contractor's estimate of time-overrun savings, if any, due to the DRB. _____

44. DRB member's estimate of time-overrun savings, if any, due to the DRB. _____

45. The draft Florida D.O.T. Inspector General's Report on DRBs recently stated that: "it appears the DRB process is effective and valuable in assisting in the resolution of disputes, leading to more timely completion of projects, reduced cost overruns and avoidance of claims."

Is this statement consistent with your experience with DRBs? Yes _____ No _____

Richard Faulkner may be contacted at: National@mindspring.com , snail mail at 6116 North Central Expressway, Suite 250, Dallas Texas 75206. Tel. 214-361-0810 or 1-800 2WIN-WIN. Gena Slaughter may be contacted at: GenaSlaughter@yahoo.com , post at 6688 North Central Expressway, Suite 600, Dallas, Texas 75206. Tel.

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and will lead to DRB members choosing not to be available when they are required to resolve disputes.

- Removal of the indemnity from suit: this will prevent the more responsible professionals accepting such appointments and may, in time, dilute the quality of DRBs.
- Removal of the admissibility of the DRB recommendation/decision in future litigation: the admissibility of the DRB recommendation/decision is seen as a very powerful tool in encouraging the parties to settle amicably on the basis of the DRB's views.
- Etc.

The session discussed the differences found in countries outside the US, particularly the application of local law and the vexed question of whether DRBs are better for the inclusion of a lawyer on the board. It was generally accepted that the right kind of lawyer (!) could prove to be useful on international boards, particularly where knowledge of the local law could be important in reaching correct recommendations

and decisions. The dangers is that the DRB process could, under the influence of lawyers, evolve into another form of arbitration or litigation. Suggested that the right for the DRB to appoint assessors (legal or specialist technical) should always be provided in the contract document as this can provide the necessary legal or other support without such specialists being member of the DRB.

The discussion moved on to whether lawyers should be allowed to "present" cases before a DRB. General agreement was that engineers should present engineering disputes but that if a particular dispute had a significant legal aspect to it, no reason why lawyers should not present on behalf of a party. Due notice of the involvement of an external lawyer as presenter should be given to avoid the other party being caught unaware at the hearing.

Of particular interest was the differences between the procedures when the DRB was to render a non-binding recommendation (US style) and a binding (in the interim) decision (non US style, e.g., FIDIC, World Bank, etc.). I was clear that

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the procedures and the level of “formality” will be different if the end result is that sums of money may change hands on the decision of the DRB. This discussion reflected a similar discussion held during the Rome 2002 conference. In the case of binding decisions, due process/natural justice was a necessity whereas under the informal recommendation system, more flexibility could be permitted.

The debate “binding or not-binding” raged on. The comment was made that one size may not necessarily fit all and this was accepted as being particularly true for international DRBs. In certain jurisdictions, a non-binding recommendation would serve the purpose adequately well with the parties using the recommendation as a basis for their consensual settlement. In other jurisdictions, there is a clear need for the DRB to give a binding decision as anything less would be ignored by one or other party.

Discussions outlined the challenges to working overseas, perhaps in a very remote location within the developing world. The cultural differences were debated with the need to educate the owner organisation to accept the DRB process and for the DRB members to understand particular difficulties that may exist within owner organisations in the processing of claims.

Questions that arise when a DRB is set up were raised. Delay in the DRB set-up is regularly experienced and the suggestions made to overcome this included the levy of LD against a contractor who failed to proceed with an appointment and the automatic entitlement to EOT to the contractor in the event of the owner’s delay. Draconian measures maybe, but they might prove effective in extreme cases.

The subject of admissibility was addressed a length. Delegates considered that admissibility was extremely important in the international arena and that the significance of a DRB would be seriously, perhaps mortally weakened if recommendations/decisions were made inadmissible. In the event of arbitration, delegates be-

lieved that the arbitral tribunal would want to know what the DRB’s views were and should be availed of this opportunity.

The “one size does not fit all” concept was further discussed in the context of how rigid the procedures of the DRB should be. A call for flexibility was heard as some sovereign owners would require a DRB to operate in a certain way and would resist practices that are commonplace in other parts of the world.

The various discussions during this breakout session yet again showed that a need existed for a “best practice” guide that could be adopted by the DRBF and, hopefully, accepted by the funding institutions, owners, consultants and contractors alike. It was agreed that an attempt should be made to produce such a guide, linked with any work being done towards updating the DRBF Manual, and that this guide should be ready for final ratification by the DRBF at the 2003 conference.

The facilitators would like to thank the delegates for providing such stimulating and positive input into the sessions. □

Member resumes on-line

As a member of the DRBF, you can post a short resume free of charge on the DRBF website. Let others know that you are interested in serving on DRBs. Go to the Foundation website and get your resume posted now.

Just go to **www.drb.org** and click on “Member Resumes” and “add resume”

Integrating DRBs into Construction Management Training

by
**Dan Fauchier, President
Fauchier Group**

Abstract: Just as Dispute Resolution Boards (DRBs) become an integral process in projects using them, so also they can become an integral component of teaching state-of-the-art construction management principles. The writer describes how he currently utilizes mock Dispute Resolution Boards in specialized construction management training for supervisors, managers and administrators of project owners and designers as well as construction companies. He reports that mock DRBs used in role-playing exercises, both illustrate their easy use in resolving disputes and allow participants to quickly gain a comfort level, potentially leading to DRBs being specified in more upcoming projects.

It just makes sense

Anyone who has been part of a management team on a problem-plagued project, regardless of size, knows how helpless it can feel when the other side “just won’t listen to reason” and small issues balloon into major disputes like an overloaded truck whose brakes fail on a downhill slope. Reason soon takes a backseat to emotion and the early fatalities are clear thinking and open dialog.

For several years I’ve been teaching construction management classes for California university extensions including UCSD and SDSU; for industry associations like Associated General Contractors, American Subcontractors Association and Engineering and General Contractors Association; and for national training institutes like Power Summit and Saddle Island Institute. In these classes I’ve made it *standard practice* to spend fifteen or twenty minutes explaining DRBs and

providing DRBF specifications, agreements, and foundation materials including membership application forms. In so doing, we have reached literally hundreds, now thousands of practicing engineers, construction managers, chief executives and directors of public and private owners, contractors, subcontractors and architects all over North America with the DRB message.

After reviewing statistics from the DRB Foundation database regarding the effectiveness of DRBs in avoiding lawsuits, the reaction of industry leaders attending these workshops and classes has been predictable and nearly universal: What a great idea! Why haven’t I heard of this before? How can I make it work on my projects?

But is hearing about a good thing enough to motivate adoption?

Learn to do by doing

In recent months, I’ve taken this an educational step further, incorporating elaborate role-playing scenarios to illustrate how to research, format and analyze a construction claim (including in the early stages of the dispute) and how to utilize contemporaneous time frame CPM scheduling analysis to identify potential critical construction delays and to apportion responsibility among several concurrent sources. I have also begun to structure these role-playing exercises with student-led presentations to model DRB panels (and, yes, we select three panelists with “gray hair or no-hair” to sit on the mock panels). As a result, not only do these students practice the techniques being taught, but they also experience the easy genius of the DRB in practice. Subtly, the industry leaders attending these sessions experience DRBs as the industry-acceptable, state-of-the-art resolution

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Board of Directors Telephonic Meeting Schedule

The Board has scheduled telephonic meetings for:

November 8, 2002
January 10, 2003
March 14, 2003
May 9, 2003
July 11, 2003
September 12, 2003.

If you have something you would like the Board to discuss or consider, notify Brison Shipley or one of the Directors.

THE DRB PROCESS—A VIEW FROM THE TRENCHES

by
John Bradshaw
J.B. Bradshaw Construction
Engineering

This paper was originally presented at the conference entitled “Ten Years of DRB Success at China’s Ertan Dam” on September 19, 2001—ed.

As Contracts Manager for the Ertan Joint Venture it was my responsibility to prepare and present the JVs Contractual problems in front of the DRB. My comments will touch on some detailed aspects of the DRB process which are significant from the point of view of someone engaged in the activity. Since I have also been involved with DRB’s in Ghazi Barotha Pakistan, Xiaolangdi and Wanjiazhai in P.R.China, my comments take into account also these experiences.

While lending Agencies do not involve themselves in the detailed relations between Employers and Contractors, they nevertheless have the interest in smoothly administered projects—projects that complete on time, are technically satisfactory, and which do not end up in long drawn out arbitration or litigation.

The bold move by the World Bank of introducing a DRB at Ertan clearly had this objective of assisting the diverse Parties administer the FIDIC Contracts—which is a form of contract that requires quite a lot of administering. That the DRB process ultimately proved successful is being recognized today—what should not be forgotten is that the road had some significant bumps in it—bumps which would not have been overcome without the wisdom and experience of the individuals making up the Board itself.

As someone who has been closely involved with several Boards, including their set up, I emphasize the advisability of carefully selecting the individual members comprising the Board to have relevant experi-

ence. In any Board the Chairman plays a pivotal role. While it is important to get DRB Boards into effective operation as soon after the start of the Project as possible, the Board selection should not be unduly rushed. Instead, other ways need to be incorporated into the procurement process to achieve this objective—possibly by designating the Board members in advance or by providing a short-list prior to Tender.

Good members can only be effective if also the terms under which they are to operate are reasonably fair. In Xiaolangdi it was decided to set up a single DRB Board for the three main Contracts which had already been let. As the person appointed by these separate Contractors to draft the DRB Agreement with the Employer, I came to well understand the currents motivating those who prepare these documents.

On several World Bank Projects that I am familiar with, each of the DRB Agreements are significantly different from each other. However they are all reasonably “fair”. Instead, DRB agreements on some other projects are not so fair. This is a worrying trend for the long term success of the process.

During the procurement process every effort should be made to avoid introducing bias into the DRB process—this is especially important since the DRB can only succeed through being seen to be fair by both sides because the “result” of the DRB is a non-binding recommendation. There are those who find this non-binding status tiresome and who advocate making DRB recommendations binding. While some good reasons for advocating such a step exist, I perceive dangers in this approach due to the inevitable operation of human nature!

Just as there are those who would change the DRB process into a binding process, there are those who instead wish to isolate the DRB process from future dispute proceedings (arbitration). Effectively this

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Should the *Forum* carry advertising?

The Board of Directors is currently considering whether to carry advertising in the *Forum*. While advertising can generate income to offset publication costs, the main concern is the appropriateness of advertising for a professional organization such as the Foundation.

The Board would like to know what you think. E-mail Brison Shipley at: bshipley@attbi.com or the office at: home@drb.org.

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turns the DRB into an elaborate partnering story. This is an equally worrying trend because there is a tremendous effort required to operate the DRB process during the Project. If the DRB proceedings and knowledge of the DRB Board members is excluded from arbitration the DRB process is sidelined. I know of contracts (not World Bank financed) where the DRB process has already been dealt this blow.

The DRB process derives much of its “zing” from the fact that the Board members are a mixture of engineers and “legal people”, that they have **relevant** experience and visit the Project regularly, and so become familiar with it and the personalities involved **before** troubles start. They are taken seriously—but not **that** seriously. Were DRB Recommendations to be “finally binding” it is regrettably easy to predict that the whole atmosphere would change and the process would rapidly become bogged down in the same “stuff” that pervades arbitration proceedings. This would make a difficult process yet more difficult to operate.

Except for relatively small value disputes, and regarding “interim” awards, it is probable that making DRB recommendations mandatory could eventually damage the process. The key function is to let the experience of the Board members be absorbed by the project management—additional formality will reduce this possibility.

Instead of “binding” recommendations, time can do a lot to assist in the **voluntary acceptance** of the DRB recommendations. DRBs usually contrive to give both sides some bad news, and bad news, like bitter pills, takes time to be swallowed. While a deadline for acceptance is necessary it can be counterproductive to require parties to formally accept or reject DRB recommendations in a short time. Time heals most wounds, so in this respect two months is much better than two weeks.

Timing of the DRB visits to the site is also important. Most DRB agreements mandate two or three visits each year for site inspection, and this is good. However

most agreements also provide for the hearing of disputes within so many days of their notification. Though desirable this is found to be unworkable in practice.

On the subject of timing, although not generally a part of the DRB provisions it has been found very helpful (even necessary) to agree on the dates of DRB visits far in advance. For DRB members themselves this forward planning is an important necessity, but also for the project itself this timetable provides a key framework around which the necessary sequence of contractual events is constructed. So useful is this practice that I cannot think of any real disadvantage which it has. The likelihood of an outbreak of “settlement fever” increases as the preset dread date of DRB arrival nears.

It is an unfortunate reality of life that on most projects the top management of the parties from both sides only get to learn in detail the full facts of a dispute when they read the DRB position papers—or more often—when (or if) they sit in at the hearings. It would be better if it was mandatory for these “big cheeses” to attend the DRB hearings—and better yet if they had to certify to the DRB at the time of submission of position papers that they have personally read the submission. In this way a greater percentage of disputes would settle before the DRB convenes for a hearing and before loss of face becomes a serious issue.

The original Ertan DRB agreement forbade DRB individual members from discussing with the parties and also forbade the DRB board itself from meeting with either party separately. While obviously written into the agreement to preserve impartiality and to demonstrate fairness, this second provision was found a hindrance to the most effective operation of the Board.

The parties eventually agreed to waive the latter restriction in favor of one in which both parties were entitled to separate meetings of equal duration with the DRB. The DRB thereby entered a useful role performed by marriage counselors of listening to beefs about the other side. They were able to gently guide the parties in real time situations without loss of face. A very useful function.

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formal presentations were done as part of proposal efforts to the following owner agencies: New York City Transit Authority (NY), New York City Dept. of Environmental Protection (NY), the City of Indianapolis (IN), the City of Portland (OR), the City of Atlanta (GA), King County (WA), the San Diego County Water Authority (CA), the Massachusetts Bay Transportation Authority (MA), the San Francisco Municipal Railway (CA), and the Greater Vancouver Water District (BC).

In an effort to publish the success of the DRB process, papers are scheduled to be presented at the 2002 FWHA Steel Bridge Conference for the Western States in December, 2002, and at the Association for the Advancement of Cost Engineers conference in June 2003. The DRBF has been successful at promoting the DRB concept at the following industry conferences: The American Underground Association (2002 in Seattle, and 2004 in Atlanta), the Rapid Excavation Tunneling Conference (2003 in New Orleans), and the Association of Engineering Geologists (2002).

Bill Edgerton

International

The last 12 months have been a particularly interesting and exciting period for DRBs internationally.

I will commence with a summary of the second international conference and then move on to the various current initiatives in other parts of the world.

Rome 2002

In May 2002, approximately 60 DRBF members and others attended the second international DRBF conference in Rome, Italy. The conference was organised by myself and Dr Igor Leto, the DRBF representative for Italy and a Board member of the Foundation. The conference was deliberately discursive so that the views, experience and opinions of the delegates could be shared. Over 75 % of the delegates made direct contributions to the day's discussions.

The topics discussed were wide and various and a full report is contained in the last edition of the *Forum*. There was consider-

able enthusiasm for further international conferences and plans are afoot concerning 2003. It is proposed that the 2003 International Conference be held in Paris over the weekend of 24/25th May 2003.

The Rome conference made a profit of about \$2000 and generated several new members for the DRBF.

Developing Countries and the DRBF

To encourage world-wide membership of the DRBF, it has been agreed that a special rate of membership, costing (currently) \$25 per annum, will be made available to persons of and residing in developing countries. The condition for such membership is that the member is connected to the e-mail system so that copies of the *Forum* can be dispatched electronically and thus the Foundation does not incur the costs of printing, postage and packing. Thus, this special arrangement will not cost the DRBF anything and will, hopefully, encourage membership growth in areas where standard rates of membership would be prohibitive. Using the World Bank guidelines, 140 countries have been classified as developing countries and thus qualifying for the special rate. Full details are obtainable from DRBF HQ or from myself. Please do all you can in promoting the DRBF in these developing countries as it is in these parts of the world where many major infrastructure projects are likely to occur and the where the benefits of the DRB process can be realised.

China

From a meeting held in Paris in August 2002 with delegates from China, it has been possible for a Memorandum of Co-operation to be agreed between the DRBF and CIETAC (China International Economic Trade Arbitration Centre). The idea is for the DRBF to be represented in China by CIETAC and for the two organisations to work together to promote DRBs in China. Several successful DRBs have been operating in China over the last 10 years and the Chinese government appears favourably inclined towards the DRB concept.

A delegation from the DRBF is planning to visit China in the relatively near future in order to cement relationships and progress matters further—particularly in connection

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Brison Shipley (with Peter Chapman) executes Memorandum of Cooperation with CIETAC

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with the construction projects linked to the Beijing Olympic Games in 2008.

Australia

Plans are in progress for FIDIC training courses and assessment workshops to be run in Australia

Peru/Latin America

Discussions have commenced with individuals in Peru aimed at FIDIC Training courses and assessment workshops. Possibly the extent of this initiative can extend pan-Latin America.

South Africa

Discussions are well advanced with individuals and organisations in South Africa concerned with Adjudication and DRBs. FIDIC training courses and assessment workshops are planned.

Vietnam

Richard Francisco, the DRBF Country Representative in Vietnam, has made significant in-roads into the governmental organisations in Vietnam in his promotion of the DRB concept in Vietnam. Vietnam is a fast-developing nation with massive infrastructure plans.

France

Further to an initial meeting in Paris in August 2002, a further meeting between the DRBF and France-based members is planned for early November 2002. The object of this meeting is to further promote the DRB concept in France and with French companies working outside France. FIDIC training courses and assessment workshops are likely to follow. As mentioned, the 2003 International Conference is planned for Paris in May 2003.

Pakistan

A very successful seminar was held in Pakistan in July 2002. The seminar featured the concept and operation of DRBs as well as other topics associated with major projects. Gordon Jaynes represented the DRBF. The organiser of the conference was (Ret'd) Justice Khan who has recently agreed to become the DRBF Representative in Pakistan.

ICC

A Task Force has been established under the ICC Commission on Arbitration, headquartered in Paris, France, to promote DRBs and to draft model DRB provisions for use in international contracts. Several members of the DRBF are serving on this Task Force which next meets in Paris in November.

FIDIC APA

FIDIC, the international association of consulting engineers headquartered in Geneva, Switzerland, has three standing members of the Assessment Panel for Adjudicators (APA). These are Messrs. Chapman, Leto and Jaynes—all very active in the DRBF. The APA is responsible for assessing those persons who wish to be included on the FIDIC President's List of Approved Adjudicators from which FIDIC will select DRB and DAB members when called upon to make appointments. An assessment workshop is planned in the UK (Cambridge) for early 2003.

Institute of Civil Engineers ICE (UK) DRB Task Force

A task force was established some years ago to train and qualify people for

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Do you have a question or concerns about DRBs in general or the DRB you are working on? Consult with one of the Hotline Committee members:

Joe Sperry
Auburn, CA
530-878-7305

Daniel F. Meyer
Chicago, IL
847-295-9197

Jim Donaldson
Seattle, WA
206-525-5216

Bill Baker
Calistoga, CA
707-942-5886

Norman Nadel
New York, NY
914-279-5516

Ray Henn
Denver, CO
303-534-1100

Roger Brown
Portland, OR
503-628-1707

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inclusion on the ICE DRB President's list. Recently, the task force was re-established so the list can be revitalised and further training given to listees. The three members on the ICE task force (Messrs Owen, Chapman and Totterdill) are all active DRBF members. Currently, DRBs are gaining ground in the UK and Ireland with projects such as the Channel Tunnel High Speed Rail Link to London, several large long-term concession projects having chosen DRBs as their principal means of dispute resolution.

In the UK, the statutory adjudication, part of the UK law since 1998, continues to thrive. This means of early dispute resolution has eclipsed domestic arbitration and has gained a secure foothold within the construction industry.

Country Representatives

The DRBF has country representatives in a number of countries. Our target is to double this representation over the next two years so if you are—or know anyone—resident in a country currently unrepresented, please let me know. Country representatives are responsible for building a DRBF presence in the country and reporting on experience in their country on the use of dispute boards. The representatives are vital links to flying the DRBF flag around the world

Acknowledgement

I would like to make particular mention to the support and encouragement received from other DRBF Board members, in particular to Jack Woolf and Brison Shipley; to Gordon Jaynes, Igor Leto and Pierre Genton. I thank them all.

Peter Chapman □

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mechanisms they are, and not just some idea in a book.

Mock DRBs are an excellent teaching tool

Just as Dispute Resolution Boards become an integral process in those projects on which they are used, so also they can become an integral component of teaching state-of-the-art construction management principles. Mock presentation scenarios allow participants to role-play opposite sides of frequently encountered areas of disagreement. Participants in mock hearings must dig into written material for the same hard evidence required in real project disputes and, under the pressures of time, overcome the same confused thinking that exists in the ever present “now” on live projects.

Students presenting “cases” to a mock DRB seem to experience similar real-world expectations that they will receive wise recommendations from the panelists—which suggests that panelists should be chosen from among the older and more experienced among the study group. In my experience over the past year, I have found that active participation in “mock” DRBs can lead more public and private owner groups to specify DRBs in upcoming projects, because they feel that they “know” the process better than if they had only heard or read about it.

Indeed, it may behoove our DRB Foundation to promote this idea to university construction management, engineering and architecture departments as well as to private instructors and trainers world-wide, as a way of leap-frogging these proven concepts into more a widely known and accepted resolution methodology. □

WELCOME TO NEW FOUNDATION MEMBERS

MEMBER ADDITIONS JULY THROUGH SEPTEMBER 2002

Australian Constructors Assoc.
LTD.
James David Barrett
N. Sydney, NSW AUSTRALIA

J. Whitney Bibbins
ADRWORKS
Sacramento, CA USA

James F. Butler
Smith Currie & Hancock
Atlanta, GA USA

Stephen D. Butler
Bechtel Corporation
San Francisco, CA USA

Frank Carr
Ellicott City, MD USA

Francis R. Chin
N. Miami, FL USA

Ronald E. Constantino, P.E.
Titusville, FL USA

Diablo Contractors, Inc.
Connie Jenkins
San Ramon, CA USA

James B. Gant
St. Marys, GA USA

David F. Grimm PE, PMP
Integritas Consulting – Director
Sugar Land, TX USA

Michael W. Hayslip Esq. PE,
CSP
NESTI
Dayton, OH USA

Don Henderson
Henderson Engineering Svs.
Lake Worth, FL USA

Duong Hong Hien
Vietnam CDC Hochiminh City

Ho Chi Minh City, VIETNAM

Ernest E. Holt, P.E.
Concord, CA USA

Gene Horstketter P.E.
E.A. Horstketter, P.E. Inc.
Houston, TX USA

James Leonard
Foster Wheeler Inc.
Clinton, NJ USA

Morris J. Levin, P.E. Esq.
Paramus, NJ USA

Steven I. Levin
Levin & Glasser, P.C.
New York, NY USA

Nigel D. Lowe
Nigel Lowe Holdings LTD
Perth, Perthshire UK

Hamish F. MacDonald
Hill International, Inc.
Abu Dhabi, United Arab
Emirates

John P. Madden
Canfield, Madden & Ruggiero,
LLP
New York, NY USA

Andrew J. Mayts Sr.
Palm Harbor, FL USA

John J. McDonnell, Esq., P.E.
Commonwealth of Massachusetts
Exec. Office of Transportation &
Construction
Boston, MA USA

James R. McNew
Key Largo, FL USA

Bruce F. Miller
BFM Inc.

Englewood, CO USA

Nelson V. Perez
Metric Engineering, Inc.
Miami, FL USA

Allen J. Ross
New York, NY USA

Linda L. Schwartz
Constructioneer Corp.
Pembroke Pines, FL USA

Gerald H. Stanley
G.H. Stanley, Inc.
Lutz, FL USA

Allen J. Thompson
Thompson Martin Associates,
Inc.
Miami, FL USA

Thomas R. Warne
Tom Warne and Associates,
LLC
S. Jordan, UT USA

Charles B. Wegman
URS
Ft Lauderdale, FL USA □

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Minister, the Deputy Chairman of the Planning Commission of Pakistan, and the Federal Minister for Religious Affairs.

Mr. Peter H.J. Chapman, is a recent appointee to another Dispute Board on the Ghazi Barotha Project, and it is expected that his resultant visits to Pakistan will afford increased opportunities to arrange the training being sought by both the public and the private sectors of the industry in Pakistan.

Gordon Jaynes □

(Continued from page 14)

The DRB process has some major potential benefits – it is relatively quick, brings rationality and real experience to the onsite personnel, offers short hearings, and is relatively cheap. However these virtues also leave the DRB process exposed to abuses.

DRB hearings are not arbitrations or legal proceedings, and hearing time is short. It is necessary to get the facts onto the table quickly. Little time exists for “proofs”. One of the biggest problems from my experience is where one party is being economical with the truth (not really an Ertan problem). I can only suggest that it is for the DRB Chairman to exercise his sternness in dissuading such practices. Making the process self-checking helps, but imposes great burdens on the sinned against party.

In presenting to a DRB, one of the hardest things is to be brief. The facts, especially the true ones, need also to get into the heads of the DRB members in a short time. As the presenter at DRB hearings I am always tormented to know where to start. A carefully drafted position paper has been forwarded months before, but was it understood? Was it read? How to spend the precious presentation time? Do I repeat the position paper or not?

The usual compromise is to serve up a short version of the original paper, followed by some further elaborations based on guesswork as to the tricky points requiring more clarification and upon the submitted paper from the other party, without prematurely jumping into rebuttal).

The Ertan DRB Chairman enforced some rather strict time tabling on the parties, so obliging them to be brief and to the point. While I didn't appreciate it much at the time, I now realize the wisdom of Mr Ospina's draconian restrictions.

Forced brevity wonderfully concentrates the mind.

This hearing process could be more efficient if the DRB were to issue to both Parties **before** the hearing a list of its questions based on the position papers received. This has several advantages only one of

which is to reassure the presenter that his position paper got read, but which would then allow everyone to concentrate the available time on answering the real problems actually puzzling the DRB.

Every human endeavor is subject to gamesmanship and the DRB hearing process is no exception. As regards the little activities of withholding evidence to the last minute, or arriving late “due to photocopy breakdown” it is again for the Chairman to intimidate the culprits. However, some of the little games are of a wider scope. A common one is that of simply denying the DRB to visit site—a ploy sometimes practiced here in the USA as well as abroad. Such matters can become difficult for the most pragmatic of Chairmen.

The DRB in some form is now a part of the contract disputes resolution process in most large Contracts. While the detailed operation of these Boards must remain strictly independent, there is a case for the lending agency taking steps during project procurement to ensure that its wishes regarding the operation of the Board are not thwarted by the parties. Writing into the loan agreement a requirement for periodic status reports from the Board to the lending agency upon the formal aspects of the Boards operations would, I believe, itself have a hugely beneficial effect on the process.

Above are some suggestions resulting from the experience of one person operating the process.

A final item. The Xiaolangdi Project in PRC is a major Hydro Project whose primary purpose is protection of the population living downstream from the flooding of the Yellow River. It commenced in 1994 and was successfully completed recently.

This DRB can certainly take great credit for assisting the Parties reach agreement, especially because the DRB itself commenced its operation over two years after the Main Contracts were let. The Xiaolangdi DRB gave great service to this Project and has furthered the reputation of the International DRB. □



Foundation Forum

Dispute Resolution Board Foundation
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Foundation Forum

Code of Ethics for Dispute Resolution Board Members

The following Code of Ethics was adopted by the DRBF Board of Directors at its meeting of October 4, 2002.—ed.

In order to ensure the integrity of the Dispute Resolution Board, each DRB member should take personal responsibility for adhering to the following Code of Ethics:

Cannon 1

The DRB should consider fairly and impartially, the disputes referred to it. Each member should act impartially and independently in the consideration of facts, contract provisions, and conditions surrounding any dispute.

Cannon 2

A DRB Member should disclose any interest or relationship likely to affect impartiality or which might create an appearance of

partiality or bias. The obligation to disclose is a continuing obligation.

Cannon 3

A DRB member is in a relationship of trust to the contracting parties and should not use confidential information acquired during DRB proceedings for personal advantage or divulge such information to others.

Cannon 4

A DRB member in communicating with the parties should avoid impropriety or the appearance of impropriety. Ex parte communications regarding the Project should be avoided.

Cannon 5

A DRB member should conduct the proceedings in an expeditious, diligent, fair, and impartial manner. □