



Forum

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Hong Kong Dispute Resolution Advisor: An Alternative to Conventional Dispute Review Boards?

By Peter Caldwell and Kurt Dettman

Introduction

Hong Kong is a vibrant place with a dynamic construction industry. It has been said, with some element of justification, that “Hong Kong will be wonderful when it is finished”. Throughout Hong Kong, tower cranes are part of the urban landscape as old buildings are replaced by new. New railways, roads, tunnels and all other kinds of construction work continue apace. According to Government statistics, the turnover of the industry is estimated to reach US\$15 billion in 2011.

Hong Kong has for a decade and a half been a special administrative region of the People’s Republic of China, but continues to operate with a high degree of autonomy including its common law legal system and courts independent of the P. R. C. courts. The rule of law is respected and construction contracts are subject to international norms of interpretation and application.

Much has been written internationally about the standing dispute group for the construction of the Hong Kong International Airport at Chek Lap Kok. The new airport opened for commercial operations in 1998 but most references to the use of Dispute Boards, outside of the do-

mestic Hong Kong market, list the airport board as the only example of a dispute board in Hong Kong.

In fact, the Hong Kong Dispute Resolution Advisor (DRA) system has been in use for two decades on Hong Kong Government funded projects. DRAs have been appointed on a large number of complex projects and the results have been outstandingly good, from both a dispute prevention and dispute resolution standpoint.

This paper is intended to introduce the DRA system to a wider audience and to compare the DRA model with the Dispute Review Board (DRB) model. The authors would like to start a dialogue within the Dispute Review Board¹ community of practice on whether certain features of the Hong Kong DRA model should be considered by owners when establishing DRB programs.

History

The prototype of the DRA system was designed for use on a Hong Kong Government Architectural Services Department project to extend and improve the Queen Mary Hospital. Queen Mary is the teaching hospital for Hong Kong University Faculty of Medicine and with about 1,400 beds is one of the region’s largest.

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¹The authors in this paper focus on Dispute Review Boards as contrasted with Dispute Adjudication Boards under the FIDIC suite of contracts. The adjudicative nature of the DAB model is materially different from the mediation-based DRA model, so the authors have chosen to focus on the DRB model given its greater emphasis on dispute prevention and non-binding dispute resolution. The authors also are aware of the California Department of Transportation (Caltrans) DRA model that functions like a “single person” person DRB. This is mentioned so as not to cause any confusion in terminology since, as described in this paper, the Hong Kong DRA model is quite different from the Caltrans DRA model.

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President's Page

Dear Members, Supporters and Friends of the DRBF,

As every year, the Presidency of the DRBF has changed at the occasion of the Annual Conference, this year held in the very home of the DRBF, Seattle. Therefore you will see the new face on this and the next three editions of the *Forum*.

First I would like to express thanks to Jack Norton, now immediate Past President, for his work for the DRBF as President Elect and President. Under his lead the "Outreach Programme" of Region 1 was successfully implemented in North America. Region 2 launched its first step into South America by having held the Annual International Conference in May this year in Sao Paulo, Brazil. Its success lay in attracting the majority of the participants coming from Brazil.

The regular daily duties of a President are not equally spectacular, but demand devotion to our cause, time and energy. Thank you, Jack. While you will now have more time to wait for the big fish to bite, your continued input is required and welcome.

There was a further change in the Executive Board. The position of Secretary changed from Bill Baker to Murray Armes.

Bill is a long term member of the DRBF, carrier of the Al Mathews Award, has served as its President, committee chair and long term Secretary. He also deserves the DRBF's gratitude for his unrelenting support and spirit, which I herewith express.

I welcome Murray to the Executive Board and last not least Roger Brown, the new President Elect.

At the return on boat through the marvelous Puget Sound from the Al Mathew's Award Gala Dinner, held at the Longhouse on Blake Island, this year's Award was given to Graeme Peck. Graeme is a long term member of the DRBF and the driving force of the establishment of the Australian Chapter. He and his equally devoted colleagues are presently engaged in the organization of the 12th Annual International Conference in Sydney, Australia.

The Annual Conference was a success. It attracted 100 participants, for the first time also a good number from Canada, where the number of Dispute Boards is rapidly increasing. The conference theme concentrated on "Vertical Construction". The presentations were impressive. Those members that could not attend are advised to view them on the DRBF website.

I was particularly fascinated by the well prepared mock hearing, which resulted in bringing the disputing parties to the table with the likely outcome of an amicable settlement of their differences, just as it should be in real life. Equally fascinated I was by the presentation of BIM, Building Information Modeling, at a life project in Seattle. Its impact on dispute avoidance through minimization of the need for variations or change orders will surely be huge.

My thanks go to the organizers and all presenters.

What are our plans for the year ahead?

Our foremost mission is to increase and improve the use of Dispute Boards worldwide. While the number of DBs is actually increasing, there are still obstacles to be overcome, in particular in the international market. At those public works contracts, where the funding for the project is arranged through credits from the major Multilateral Development Banks (MDBs), the provision for DBs in the contracts is mandatory upon the public owners through the procurement guidelines of these MDBs.

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As the value of DBs is often not understood or appreciated, obstacles are created to disturb the process to the limit of complete failure.

Through the efforts of our Country Representative for Japan, Prof. Toshihiko Omoto, JICA, the Japanese International Cooperation Agency, has been made aware of this situation and has been convinced that it can only be overcome through information and training of the potential, yet reluctant users. It has therefore agreed to fund a programme of information and training of users in those countries where JICA funding is received. That will surely improve the acceptance of the process and as a result the outcome of the projects. The DRBF has offered its assistance.

With that example we shall undertake efforts with more MDBs to set up similar programmes.

To be able to take a role in the development and execution of such programmes the DRBF needs to have its own proprietary materials for teaching and training.

Chris Miers, Chair of the International Training Committee, is leading the effort to complete a DRBF owned 5-days training kit within the twelve months to come.

The DB process has proven most valuable in avoiding and resolving disputes in the construction industry. It is considered that its positive attributes can be equally beneficial in other industries where the contractual relationships are of longer terms, like process engineering, manufacturing etc.

To introduce the process there it needs professionals with a background in such industries. I have asked Deborah Mastin to take the chair of a new committee established for that purpose, which she has accepted. Ideas are welcome. In particular contacts to decision makers of possible users would be of great interest. Please do not hesitate to contact Deborah or me if you believe you can contribute here.

The other plans of my Address to the Electorate are not forgotten, but need further thoughts. I hope to be able to report on them soon.

Do not forget to visit our website in order to be informed in time of events in which you would like to participate.

Finally I would like to encourage all of you, wherever you are, to come forward with proposals and suggestions. Also criticisms, if these are accompanied with proposals for improvement.



Volker Jurowich
President
DRBF Executive Board of Directors



Meeting in the DRBF's Seattle office (L to R): Jim Donaldson, Lori Jenkins, Volker Jurowich, Ann McGough, and Steve Fox.

Executive Board of Directors

The members of the Executive Board of Directors are:

- Volker Jurowich, President
- Roger Brown, President Elect
- John C. Norton, Immediate Past President
- Murray Armes, Secretary
- James P. Donaldson, Treasurer
- Doug Holen, Director and President, Region 1 Board
- Richard Appuhn, Director and President, Region 2 Board
- Romano Allione, Past President
- James J. Brady, Past President
- Peter M. Douglass, Director, Past President
- Gwyn Owen, Director, Past President
- Joe Sperry, PE, Founder, Honorary Director

The Executive Committee meets monthly. Recent topics have included:

- Creation of an ‘Introductory’ membership in the DRBF.
- Whether to endorse Consensus DOCS.
- Establishment of Region 3 in Australasia.

Summaries of the Executive Board meetings are available to all DRBF members on the DRBF web site. To access the **Board of Directors Meeting Minutes Summary**, go to www.drbf.org. Click on the **Member Login** button, and then click on **DRBF Board of Directors**.

Executive Board of Directors Meeting Schedule:

- November 29, 2011 by conference call
- December 16, 2011 by conference call
- January 20, 2012 by conference call

The Board of Regions 1 and 2 also meet on a monthly basis. Questions for the Executive or Regional Boards should be addressed to the Board President, care of:

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
 Email: info@drbf.org Web: www.drbf.org

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- Doug Holen, President
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- Kurt Dettman
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Region 2

Board of Directors

- Richard Appuhn, President
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Forum Editor: Ann McGough

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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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***Thank you for
your support!***

DRBF Region 1 Board of Directors Holds Interim Election

At the September meeting of the Region 1 Board of Directors, the Board welcomed newly elected member Don Henderson, and Deborah Mastin became President Elect. The Board appointed Kurt Dettman to complete the remainder of Deborah's term as a general Board member. Kurt will serve for two years in this position. The Board also agreed to expand the Region 1 Board by one additional general member position. Therefore, in agreement with the DRBF bylaws, the DRBF will hold an interim election for one position on the Region 1 Board of Directors.

The DRBF Region 1 Election Committee invites all members to propose candidates to serve on the Region 1 Board. To be considered, candidates must meet the following criteria:

- a) Each candidate must have a proposer and a seconder. Candidate, proposer and seconder must be members of the DRBF at least 3 years.
- b) The candidate must be, or commit to become, a sustaining member of the DRBF.
- c) The candidate must provide a CV and a statement to the membership. The statement should include a description of their DRB experience, such as membership on DRBF committees, DRBF conference and workshop participation, DRB promotional efforts, and information on the number DRBs served on, if applicable. The statement should also address what the candidate's focus and approach would be in relation to their term as a member of the Region 1 Board of Directors.

Election details:

- a) All Region 1 members have a vote for the Region 1 Board of Directors.
- b) Voting is done by e-mail. Nominations are due by Nov. 30, and ballots will be distributed by December 9. Voting deadline is Dec. 30. New Board members will serve beginning Jan. 2, 2012.
- c) Term ends at the Annual Meeting and Conference, usually held in the fall.

Proposals may be sent to the DRBF office:

DRBF
Board of Directors Elections Committee
19550 International Blvd. So Suite 314
Seattle, Washington 98188 USA
Email: info@drb.org
Fax 206-878-3338

**Nominations are
due by
November 30, 2011**



Ethics in Today's World of DRBs:

DRB member announces before a regularly scheduled DRB meeting that she has received a job offer from the contractor to being in 20 days.

By Jim Phillips Ph. D.

Before discussing the ethics issue posed in the previous edition of the Forum, I want to thank Dan McMillan, Bill Edgerton and Dan Meyer for the presentation they made at the DRBF's Annual Meeting and Conference in Seattle last month. Due to a last minute scheduling conflict triggered by Hurricane Irene, I was unable to attend and these gentlemen, by all accounts, gave an excellent presentation to the membership. Also, because of a last minute medical complication, Allen Thompson was unable to participate. I trust you are feeling much better Allen! Thanks again Dan, Bill and Dan!

From the attendee feedback, it is clear that the Ethics Panel discussion provided practical, "real world" discussion and information that was useful and important to practitioners. There were also comments suggesting that the Ethics Presentation at next year's conference be afforded more time on the conference agenda. I am confident that these comments will be taken into account in the planning process for next year's event in New York.

The question posed in the last Forum, regarding a sitting member announcing the receipt of a job offer from the contractor who is a party to the project on which the DRB is sitting, is truly alarming because it indicates not only a lack of neutrality by the Board member, but that this bias has been ongoing during the work of the DRB. We have to assume that there have been ongoing discussions between the parties about an employment position, and that this has not been disclosed to the DRB or to the owner.

It also indicates that it is highly likely that the contractor has been attempting to "game" the DRB process by attempting to influence the opinion of the Board member in question on issues that have come before the DRB and the Formal Recommendations

that have been issued by engaging in employment conversations with the Board member.

Canon I of the DRBF's Code of Ethics provides in part that Board members should disclose "any interest or relationship" that would be viewed as affecting their impartiality and that this duty to disclose is ongoing throughout the life of the project. Clearly even a discussion of potential employment by a DRB member and a contractor is an interest that must be disclosed. I would think that the owner would be interested in learning about such conversations irrespective of whether the Board member went to work for the contractor or not.

Canon II provides that a Board member's conduct should be "above reproach" and that even the appearance of impropriety should be avoided. Moreover, the Canon prohibits "ex parte" communications between the DRB and the parties. Clearly, in this case, both of these prongs of Canon II have been breached. Moreover, Section 3.4.4 of the DRBF's Practices and Procedures Manual, which discusses the duties of a Board member between meetings and hearings, provides that the member should notify the Chair of "any potential conflicts of interest that develop." This requirement has been breached in this case as well.

The question now becomes what action should the Chair take? Section 3.4.4 of the Manual also sets forth as a duty of the Chair of the DRB to investigate any Board member misconduct and develop a plan with the other DRB member to correct the misconduct.

In my opinion, the first step for the Chair would be to check in with the contractor to verify that this is in fact the case. If it is true, I think the series of events and conversations must be disclosed to the owner. As a formality, the owner could waive the objection to any bias, depending on whether the

Board member decides not to accept the offer of employment.

It is possible, however not likely, that the contractor would waive the objection. If the contractor does so, then the question becomes should the Board member resign? If the DRB chooses to accept the offer of employment, then, in my opinion, the Board member must resign from the DRB. If the Board member turns down the offer of employment, and the owner does not waive the objection, the Board member should resign.

The larger question remains, what damage has been done to the integrity of the DRB process in this case? Section 3.8 of the Manual provides that if the DRB decides that one of the members is an “obstacle” to the dispute resolution process, then the member in question should resign for the benefit of the project. In this case, unless the owner has no problem with what has transpired, the Board member must resign.

While the larger ramifications from this case are beyond the scope of this discussion, it should be mentioned that there may some contractual legal remedies for the owner to consider if he/she believes that previous Formal Recommendations have been tainted by bias. This would be a very serious blow to the integrity of the DRB process.

As noted, the essence of the DRB process is the impartiality of the DRB and the confidence the parties have in the neutrality of Board members. This Board member and the contractor clearly ignored the integrity of the process.

NEXT ETHICS CHALLENGE

Assume you are sitting on a DRB and that the Board has been sitting in a Formal Hearing, hearing several disputes. Both parties presented their positions; including referencing specific sections of the contract documents that each contends should result in their prevailing on the disputes at issue. Assume further that the Board has adjourned at the conclusion of the hearing to consider the parties’ positions and arguments. During the course of the Board’s deliberations and review, one member finds a contract provi-

sion, not cited by either party, that the Board agrees determines the outcomes of the disputes.

What should the DRB do?

Ethics Commentary or Question?

Please contact:

Jim Phillips
 DRBF Ethics Committee Chair
 P: 804-289-8192
 E: jphillip@richmond.edu

**12th Annual International Conference
 May 3-5, 2012
 Dockside Conference Centre
 Sydney, Australia**

**THE BENEFITS OF DISPUTE
 BOARDS TO MAJOR PROJECTS**

Hosted for the first time in Sydney and organized by the Australasian Chapter of the Dispute Resolution Board Foundation, the conference will bring together speakers and delegates from across Australia, Europe, North and South America, Asia, the Middle East and Africa.

An optional one day training program prior to the conference will introduce those interested in becoming involved with DBs (owners, contract drafters, potential DB panel members) to the mechanics and subtleties of the DB concepts and processes.

An event not to be missed!

For complete information and registration, visit the conference website:
www.drba.com.au/conference/

(continued from page 1)

Previous experience of similar large scale refurbishing works at an existing hospital indicated that the potential for disputes was greater than on other projects of similar size. The DRA for the project was appointed in December 1991 and the project was completed with all potential disputes being resolved within the system.

Initially the system was used exclusively by the Architectural Services Department on its larger projects but in 2003 it was adopted by the Hong Kong Housing Authority for building and associated piling contracts and was further extended in 2005 to some major civil engineering projects. In addition a DRA was appointed to the extension of the Hong Kong Exhibition and Convention Centre and for several other projects being developed by quasi-government organizations.

To date approximately 188 DRAs have been appointed on works at a value approaching US\$16 billion.

The Role of the DRA

The DRA is a one-person standing board set up in the conventional manner at the commencement of a construction project. In all cases, the DRA is appointed by agreement between the owner and the contractor immediately after the construction contract is signed. The DRA's fees are paid equally by the parties.

DRAs are selected for their experience in the construction industry and for their mediation skills. Many are also familiar with the arbitration process.

The prototype of the DRA system, although having many similarities to a DRB, does not require the DRA to provide an opinion on the merits of any dispute and has been likened to a standing mediator rather than an adjudicator. A DRA is not only permitted to meet with the various stakeholders separately, but is encouraged to do so. There is no procedure for a DRA to conduct a formal hearing.

In Hong Kong, as in many other jurisdictions, there has been increased use of mediation. Most of the mediation training conducted in Hong Kong has been geared to the use of facilitative mediation, as contrasted to evaluative mediation. Thus, the people who were appointed as DRAs on early projects saw their role as facilitating the resolution of potential disputes without expressing any views on the merits as they saw them. In recent years several of the appointed DRAs have seen their role as more evaluative, and it is this more evaluative model that now appears to be becoming the norm. If the DRA adopts an evaluative mediation technique the distinction

between the DRA system and the DRB system becomes less marked and it is on this basis that the authors consider the DRA system falls within the ambit and interest of the DRBF.

Most of the projects on which the system has been used require the DRA to exercise two related but distinct roles:

The first role is as an informal dispute avoider and resolver. Having become familiar with the project, the contractual arrangements and the key personnel, the DRA makes regular site visits and meets with the owner's and the contractor's site management. As the DRAs have all been residents of Hong Kong these site visits are usually at least once each month. Meetings are often arranged to coincide with monthly progress meetings to allow the DRA the opportunity to identify potential areas of dispute and ensure that they are addressed as early as possible.

The second role that the DRA may be required to undertake occurs only if the informal dispute resolution process fails to resolve a dispute. The DRA is then expected to assist the parties to structure a suitable formal dispute resolution mechanism to resolve the dispute. This may take the form of any of a range of ADR techniques including a mini-trial involving senior personnel from contractor and owner, or expert determination by a person appointed with the assistance of the DRA. The backstop method of final resolution is by short-form arbitration and even here the DRA is expected to assist with the appointment of the arbitrator.

This second role as dispute manager has not been included in the more recent civil engineering projects but is still being included on projects managed by the Architectural Services Department and the Housing Authority.

On more recent projects the DRA remains in place until the rectification of any defects and the settlement of the final account.

Results

One commentator has estimated that on a typical HK\$500 million contract the cost of a DRA could be expected to be around 0.05% of the construction cost.²

As noted above DRAs have been appointed on works with a total value approaching US\$1billion. Some of these projects are ongoing but at this time only one project has had a dispute referred to arbitration. Thus, the DRA process has results that compare favorably to the DRB process (98% settlement rate).

² See Christopher Morgan, The Contracts Group Hong Kong, <http://www.cannonway.com/web/page.php?page=20>.

Key Differences Between DRBs and DRAs

The following are the key differences between the classic DRB model and the Hong Kong DRA model:

First, the DRB process, although it promotes flexibility of administrative process, still relies on basic formalities such as, for example, the “no ex parte communications” rule that applies under most Three-Party Agreements. The DRA process, because of its genesis as a standing mediator, emphasizes informality of administration, including private meetings with each party. As in mediation, these private meetings enable the DRA to gain insights that would be unlikely to be shared in a formal DRB process.

Second, although the DRB has dispute prevention functions (for example, regular site meetings where issues are discussed and the use of the informal advisory opinion process), the DRB maintains its “distance” from the parties as it may be called upon to render a formal findings and recommendations. By contrast, the DRA combines its on-site participation role with that of a mediator role in communications and interactions with the parties. The authors note that to the extent that evaluative mediation is used, the DRA process becomes more like the DRB advisory opinion process—but even here the DRB advisory opinion process focuses on the substantive merits of the dispute rather than party risk exposure, interests and potential compromises that would be part of a mediation process.

Third, the DRB issues formal findings and recommendations on the merits of the dispute after considering the parties’ position papers and holding a hearing. Even though under the DRB model the findings and recommendations are non-binding, they nonetheless represent the DRB’s opinion on the relative merits of the parties’ positions, not a compromise outcome that might be reached in the DRA mediation process (even if based on the DRA’s evaluative feedback).

Fourth, the DRB does not play the dispute manager role as DRAs do on some Hong Kong projects. Sometimes on DRB projects the parties will provide for other ADR processes before or after the DRB process, but the DRB, unlike the DRA, does not play a role in that process. The authors note, however, that under the DRB process the parties often engage in settlement discussions even if they do not “officially” accept the DRB’s non-binding findings and recommendations. Thus, as a practical matter, this distinction between DRBs and DRAs may not ultimately be as great since the desired outcome of both processes is, after all, to get disputes resolved by the parties without lengthy and costly litigation.

Observations and Conclusions

There is often a perception that construction disputes are primarily technical or contractual and are therefore more amenable to adjudicative resolution. However, in the authors’ view, personality clashes or project management problems often create the environment in which small technical problems are allowed to develop into major disputes, inspiring the parties to scrutinize contractual terms to find a technical and/or legal basis for the dispute.

Disputes that are caused primarily by management deficiencies rather than by either technical or contractual problems may be better resolved by more of a mediation-like process than by an adjudicative process. The essence of the DRA system is that it facilitates the early identification and resolution of such problems that may be more difficult to resolve once elevated to a conventional ADR process.

The authors do not propose that the DRA model wholly supplant the very successful DRB process. However, given the equally successful track record in resolving disputes on major construction projects in Hong Kong, the authors propose that elements of the Hong Kong DRA process at least be considered by project owners when designing their dispute prevention and dispute resolution systems. For example, the DRB Advisory Opinion process could include more flexibility in proposing a “settlement” approach, still preserving the parties’ right to bring a formal claim to the DRB. Another example might be for the DRB to assist the parties on pre- and post-DRB resolution process options depending on the type and nature of the disputed issues. Careful thought needs to be given, of course, to the details of both processes to ensure that roles and responsibilities are carefully defined, but consideration of what may appear to be “outside the box” DRA concepts could become viable elements of the conventional DRB process.

About the Authors:

Peter Scott Caldwell has a consulting engineering practice (Caldwell Ltd.) based in Hong Kong, specialising in procurement strategy, project management, contractual claims and dispute management. He has been appointed as mediator, conciliator, adjudicator, arbitrator and DRB member in Hong Kong and in other Asian countries, and can be reached at psc@pscaldwell.com.

Kurt Dettman is the principal of Constructive Dispute Resolutions, an ADR practice specializing in all aspects of dispute avoidance and resolution in the construction industry. He is a member of the DRBF Region 1 Board of Directors, serves as the Region 1 Director of Outreach/Training, and co-chairs the DRBF Transportation and Energy Committees. He can be reached at kdettman@c-adr.com.

KEEP IT SIMPLE: HOW TO ORGANISE A DRBF REGIONAL MEETING

By Murray Armes

“Why don’t you organise a regional meeting in the UK for the members there?” I was asked in the autumn of 2007. Although I thought it would be good to do so I had no idea how to go about doing it. Having by then worked on the DRBF international conference committee for some time I was only too well aware of the time and effort that went into an international conference, as well as the possible financial risks. There was no way I was going to be able to replicate one of those and frankly I had neither the time nor the resources to do so. So, I worked out how to put together something that was smaller, simpler, cheaper and, much less stressful for me, the organiser.

Regional meetings provide an important opportunity for members of the DRBF to keep in touch, keep up to date and to network. Regional meetings provide an opportunity for those who do not want, or are not able to travel to the large international conferences. It is normally up to the country reps to organise such meetings and when first faced with this I thought it was going to be a daunting job, but it doesn’t have to be. I will share some of my experiences below and I hope it will encourage you to take the plunge.

Firstly, a regional meeting does not have to follow the format of one of the large international conferences. On the contrary a smaller events designed to attract mainly local members should not attempt to compete with the large conferences and take audiences away from them. It should offer a different, smaller scale and personal experience. One of the biggest advantages of keeping a regional meeting simple is that it keeps the costs (and financial risks) down and does not require the large and dedicated committee required to organise an international event.

The first objective is to decide who your target audience is and what would be of use to them. Is the event for DRBF members, or for an invited audience of non members, or a mixture of the two? Secondly, how long is the event to be? Personally I think regional meetings should be primarily for DRBF members but that does not preclude guests and potential members who are not. I opted for a half day format because it is possible to have well focussed sessions without the need for a complex programme. It takes a surprising amount of extra effort to run a one day event! The half day format allows time for delegates to travel and many will be happy to give up half a day of their time, whereas a day or more represents a commitment that some cannot make.

When I organised my first event in the UK it was the first time anything like this had been done specifically for the DRBF. I had no idea if anyone at all would show up! So, for my first event I recruited some of the big names in the DRBF to come and talk to delegates. The established members in the DRBF will help in his way if time permits them to do so, so do not be afraid to ask them. It also helps if you create an agenda which will of interest to your delegates and that will depend on their experience and needs.

There are several types of event format you could adopt. Firstly, there is the seminar format where a single speaker presents to the delegates. Secondly there is the workshop style format where the delegates take part in one or more interactive workshop sessions. Finally, I have heard of informal events where small groups members get together socially for a drink or a meal and a discussion. I started with the seminar format, but having delegates with a mix of experience it is sometimes difficult to strike a balance between teaching those unfamiliar with DBs and retaining the interest of the more experienced members. One solution to this is to adopt the workshop format in which beginners can participate and learn and where seasoned practitioners give the less experienced the benefit of their experience. Workshops can be designed so that he experienced also learn from an interchange of ideas. For the last two years I have included a short seminar session on a topical subject, then split the delegates up into three small groups for them to participate in three workshops in rotation, all finished off with a Q&A session at the end. If you have a smaller group, you may be able to run a workshop without splitting the groups and using breakout rooms.

Having settled on the format, agenda and speakers, you now need to consider the venue. The type of venue will depend on the numbers you think your event will attract. For my first event as I have said, I had no idea how many, if

any would turn up. Even when you have been organising these events for a few years there is always some uncertainty about numbers. Your largest single cost is likely to be the venue. If your event is in seminar format you need a single room large enough for all the delegates, if you are holding a workshop style event you may also need breakout rooms and that can get expensive!

However, it is likely that you will have companies in your area that would be prepared to host the event at little or possibly no cost to the DRBF. For my first meeting I managed to find a law firm that was prepared to sponsor the event by making a meeting room available and provide catering and have done this ever since. An event like this can provide useful publicity for the host and if you live in a large city the chances are there are several companies that would be prepared to do this. There was no fee for members for that first event and registration was handled largely by me alone and the sponsor law firm.

Many members cannot attend the international events and there is a lot to be said for making a regional event free to members of the DRBF, so that it becomes another benefit of membership. If you do offer the event free though expect a number of those who have registered not to turn up. However, I have found that charging a modest fee, of say, \$50 means that people are more likely to attend. The other advantage of making a small charge is that the registration can be done using Cvent and the DRBF website for which there is a nominal charge to administer. Ann McGough will set up a registration site for you and this frees you from dealing with registrations and collecting money, all of which is done via the DRBF website.

Ann will also help you with publicity by emailing members in your country, region or even the whole membership. Charging a fee also means you can make a financial contribution to the host's costs, which makes it more attractive to the host, although some hosts will still provide the facilities at no cost to the DRBF, in which case the DRBF coffers benefit. I have found that by charging a small fee and by attracting a host organisation all four of my events have been self funding and also involved the DRBF in no advance funding or financial risk.

Although the target audience for my events is primarily from the UK, each year we have had some members from Europe and even further afield. It goes to show that provided you have a good agenda, good speakers and it is well organised, even a half day event, provided it is of high quality, means that members from other countries will be prepared to travel to it and adds to the diversity of experience of the delegates.

If you have not yet organised a regional event in your country and you have, say, 25 members in your locality, I urge you to do so. The four UK meetings have attracted between 30 and 60 delegates each year which is a nice manageable number. The keys to success are:

- Decide on your target audience
- Decide on the format: lecture style or workshop (or an informal discussion group)
- Find a venue, if possible an organisation that will freely provide accommodation and catering
- Decide on the length of the event, remember this does not have to be an international conference and bear in mind the travel arrangements of the target audience. Half a day is ideal
- Decide on a programme
- Find your speakers (this is never usually a problem!)
- Make a small charge to encourage attendance, help defray costs and/or to contribute to DRBF funds

Above all keep it simple because it takes the pressure off you. Remember nothing succeeds like success and you are more likely to have a successful event if it is something you can easily manage. As you get more experienced and confident you can always try a more complex event the following year.

Finally, please remember that if you are in Region2, you must put a proposal for any regional events to the Region 2 Board of Directors and seek approval. This is not aimed at limiting what you do, but is to ensure that events do not overlap and compete with each other and to ensure you have all the support you need to make yours successful.

If you are thinking of organising a regional event and would like some advice you are welcome to contact me on marmes@probyn-miers.com. Good luck!!

Part 2: Dispute Adjudication in Civil Law Countries: Phantom or Effective Dispute Resolution Method?

Part One was published in the August issue of the Forum. Members can access the full article in the Library on the DRBF website.

By Dr. Götz-Sebastian Hök

IV. Legal nature of dispute adjudication

In some countries like in England and Wales dispute adjudication is a well-known feature and has experienced a legal shape²⁸. However, in most jurisdictions dispute adjudication is not subject to any particular or specific legislation or case law whilst arbitration is²⁹. Hence, in particular Civil Law practitioners do not have a clear definition of dispute adjudication³⁰ and accordingly there is no obvious legal framework which might help to deal with it. The first step for Civil Law practitioners in taming an unknown animal like dispute adjudication is therefore to qualify or characterize the agreement before it. If it falls within the limits of one of the nominate contracts³¹ its content will be largely determined by the appropriate default rules (lois supplétives). Even if it is qualified as innominate contract its incidents will often be determined by reference to that or more of the nominate contracts to which it is most analogous. In both legal systems, the French and the German one, the starting point is that the incidents of a contract are fixed by law, subject to the parties' power to vary them³². In Germany it is of first importance that the judge in filling any gap spells out the logical or normative implications of the contractual framework set out by the parties³³. I would add that the default rules are understood as a part of the logical and usual (legal) implications of the contract set out by the parties. Another

primary task of the courts is to apply law but not to create law.

Thus, only if we have been able to identify the very nature of dispute adjudication, existing specific legislation or case law can and shall be applied on it. Accordingly at least under Civil law it is much helpful to know the legal character of dispute adjudication helping us to classify it³⁴. Now, what is dispute adjudication like? What are its essential or characterizing elements? It is suggested that Dispute Adjudication can be described as a hybrid phenomenon as follows:

1. Dispute adjudication is based on an agreement (governed by the proper law of the contract) whereby the Parties to it agree that a third party (the DB) shall give an opinion on a subject matter (a matter of fact or an element of a legal relationship), opinion which they agree in advance shall be binding on them.
2. But it should be added that the third party shall form its opinion on what is unilaterally submitted to it as a dispute, being bound to hear both parties and to form its opinion not only based on its professional knowledge but subject to the law and the contract from which the subject matter of the dispute (for ex: a claim) has arisen³⁵.
3. Last but not least the adjudicator shall not act as an arbitrator³⁶, hence being deliberately exempted from the duties of an arbitrator albeit not having been appointed to act as an "amiable compositeur".³⁷

²⁸ See for England, and Wales (HGCRA 1996), Scotland (HGCRA 1996), Northern Ireland (HGCRA 1996), Singapore (Building and Construction Industry Security of Payment Act 2006 (Chapter 30B)). Also in some jurisdictions in Australia (see New South Wales *Building and Construction Industry Security of Payment Act* 1999) dispute adjudication is a defined means of dispute resolution having a legal basis.

²⁹ See Articles 106 et seq. Algerian Code of Civil and Administrative Procedure; Brazilian Law No 9.307, 1996; Chinese Arbitration Act 1994; English Arbitration Act 1996; Indian Arbitration and Conciliation Act 1996; Section 1025 et seq. German Civil Procedure Code, see Articles 1442 to 1527 French New Civil Procedure Code (as per decree n° 2011-48 dated January 13, 2011); Sections 1020-1076 Dutch Civil procedure rules (Wetboek van Burgerlijke Rechtsvordering); Spanish Arbitration Act (Ley 60/2003 de 23 de diciembre, de Arbitraje).

³⁰ However, it should be noted that for example in Germany dispute adjudication has been discussed intensively and that the German Institution of Arbitration (DIS) has recently published its own Adjudication Rules, see Harbst (2010) 26 Construction Law Journal, 698 et seq.

³¹ „Nominate“ contracts can be described as the opposite of „innominate“ contracts. A nominate contract is in fact a contract having characteristic elements similar to a type of contract defined by law, for example "locatio conductio operis" (contract for works) opposed to "locatio conductio operarum" (contract for services).

³² Nicholas, *The French Law of Contract*, 2nd edition, at page 49 for French law

³³ Markesinis/Unberath/Johnston, *The German Law of Contract*, 2nd edition, 141

³⁴ It is however worthwhile to note that also English courts do search for the legal nature of a legal phenomenon, for example in order to determine whether a certifier (or Engineer exercising certifying powers) is exempted from liability or not, see *Sutcliffe v. Thackrah* [1974] A.C. 727 = (1974) 4 BLR 16

³⁵ Sub-Clause 20.4 FIDIC 1999 in conjunction with the Dispute Adjudication Agreement and the related Procedural Rules

³⁶ Sub-Clause 20.4 FIDIC 1999

³⁷ Though it is questionable that the exemption is unlimited.

4. It has the nature of an agreement *sui generis*.

1. Development of dispute adjudication

Dispute adjudication is nothing really new. It has a long tradition and history. Already in the 19th century Engineers had such or similar powers to adjudicate as adjudicators have today. Since their inception FIDIC forms of contract empower a third person (the Engineer) to make decision on disputes. Not surprising that this role gave rise to various comments from courts.

In the early 1850 Chancery case of *M'Intosh v. The Great Western Railway Company*³⁸ the Engineer, one I. K. Brunel, whose duty it was to measure and certify the value of certain works, had purportedly hidden the fact that he was a shareholder in the railway, and had consistently undercertified the value of the works or failed to certify. Fraud was alleged. The issue of a certificate was argued to constitute a precondition to the contractual entitlement of the company to payments. The employer contended that Brunel was an agent whilst the contractor argued that he was an arbitrator or judge. The Lord Chancellor did not refer to the representation that Brunel was an arbitrator, but held that "...this is clearly a case in which the contractor cannot obtain what he is entitled to at law; and that his inability to do so has arisen from the acts of the Defendants, or their agent ...".

2. The Engineer's role

For a long time it was commonplace to believe that when the Engineer carried out certain duties under the contract he or she was acting as a quasi-arbitrator or in other words with judicial powers. He or she was said to be acting in a quasi-judicial capacity. More than one hundred years later the English House of Lords put an end to this misunderstanding by the well known case of *Sutcliffe v. Thackrah*³⁹. In *Sutcliffe v. Thackrah* the House of Lords held that an architect issuing interim certificates was not immune from suit in negligence. The speeches in the House of Lords contain many valuable statements about the duties of an architect when acting as certifier or decision-maker. At p. 737 Lord Reid said this:

It has often been said, I think rightly, that the architect has two different types of function to perform. In many matters he is bound to act on his client's instructions whether he agrees with them or not, but

in many other matters requiring professional skill he must form and act on his own opinion. Many matters may arise in the course of the execution of a building contract where a decision has to be made which will affect the amount of money which the contractor gets. Under the RIBA contract many such decisions have to be made by the architect and the parties agree to accept his decisions. For example, he decides whether the contractor should be reimbursed for loss under clause 11 (variation), clause 24 (disturbance), or clause 34 (antiquities), whether he should be allowed extra time (clause 23) or when work ought reasonably to have been completed (clause 22). And, perhaps most important, he has to decide whether work is defective. These decisions will be reflected in the amounts contained in certificates issued by the architect. The building owner and the contractor make their contract on the understanding that in all such matters the architect will act in a fair and unbiased manner, and it must therefore be implicit in the owner's contract with the architect that he shall not only exercise due care and skill but also reach such decisions fairly, holding the balance between his client and the contractor".⁴⁰

At page 737H Lord Reid described the argument that, as all persons carrying out judicial functions must act fairly, therefore all persons who must act fairly are carrying out judicial functions as completely illogical. Hence, for an Engineer to be immune from negligence claims the contract must require from him to act as an independent quasi-arbitrator. For the rules of natural justice to apply, there must be something in the nature of a judicial situation. In *Amec Civil Engineering Ltd v. Secretary of State for Transport*⁴¹ the Court of Appeal had to consider the ambit of the duty of an engineer in making a decision over a dispute referred to him under Clause 66 of the ICE Conditions.

Amec were responsible for renovation works to the Thelwell Viaduct, which carries the M6 motorway across the Manchester Ship Canal. When defects were found in roller bearings used the employer wrote to Amec asking them to accept liability. When Amec did not do so, the employer referred the dispute to the engineer for determination in accordance with Clause 66 ICE conditions. The engineer decided in a matter of days that Amec was liable for the defects. Amec were

³⁸ 19 Law J. Rep. (n.s.) Chanc. 374.

³⁹ [1974] A.C. 727 = (1974) 4 BLR 16

⁴⁰ *Total (U) Ltd v. Buramba General Agencies* (Arbitration Application No. 3 of 1998) [1998] UGHC 8 (11 June 1998)

⁴¹ [2005] BLR 227

dissatisfied with this decision and referred the dispute to arbitration. Amec complained that the arbitrator had no jurisdiction because the engineer's decision was invalid in that it had not been reached by a fair process – in particular the engineer had made his decision without giving Amec the opportunity to make submissions. The Court of Appeal (with May LJ giving the leading judgment) held that there was no difference between the engineer's duty under Clause 66 and his duty when carrying out his other independent functions. According to Justice May the engineer had to act independently, honestly and fairly – but he did not have to apply the rules of natural justice. By contrast Rix LJ was of the view that the engineer's role under Clause 66 did differ from his other roles and that he had been wrong not to have heard both sides before reaching his decision on the dispute. Accordingly he was of the view that the engineer was obliged to comply with the rules of natural justice when determining a dispute under Clause 66. However, the disagreement between May LJ and Rix LJ did not affect the outcome of the appeal.

3. FIDIC dispute resolution framework

A short overview of the features of Clause 20 of the FIDIC Conditions of Contract is beneficial for a proper understanding of the contractual framework for resolving disputes between the parties. The procedure for dispute resolutions by the DAB under Clause 20 of the Conditions of Contract comprises various specific steps.

In accordance with Sub-Clause 20.4 a DAB shall give its decision within 84 days after receiving a referral, or within such other period as may be proposed by the DAB and approved by both Parties. The decision shall be reasoned and shall state that it is given under this Sub-Clause. The decision shall be binding on both Parties, who shall promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitral award. Unless the Contract has already been abandoned, repudiated or terminated, the Contractor shall continue to proceed with the Works in accordance with the Contract. If either Party is dissatisfied with the DAB's decision, then either Party may, within 28 days after receiving the decision, give notice to the other Party of its dissatisfaction. If the DAB fails to give its decision within the period of 84 days (or otherwise approved) after receiving such reference, then either Party may, within 28

days after this period has expired, give notice to the other Party of its dissatisfaction. In either event, this notice of dissatisfaction shall state that it is given under this Sub-Clause, and shall set out the matter in dispute and the reason(s) for dissatisfaction. If the DAB has given its decision as to a matter in dispute to both Parties, and no notice of dissatisfaction has been given by either Party within 28 days after it received the DAB's decision, then the decision shall become final and binding upon both Parties.

Except as stated in Sub-Clause 20.7 [*Failure to Comply with Dispute Adjudication Board's Decision*] and Sub-Clause 20.8 [*Expiry of Dispute Adjudication Board's Appointment*] neither Party shall be entitled to commence arbitration of a dispute unless a notice of dissatisfaction has been given in accordance with this Sub-Clause. Under Sub-Clause 20.6 arbitration is allowed only if there is dispute in respect of which the DAB's decision has not become final and binding. Under Sub-Clause 20.7 arbitration is allowed only for "final and binding" decisions for enforcement of the decision of the DAB. In the former case the purpose of the arbitration is to, *inter alia*, review and revise the decision of the DAB. Under Sub-Clause 20.8 arbitration is allowed if there is no DAB in place. The wording in Sub-Clause 20.6 justifies the conclusion that before a dispute can be subject to arbitration, it must first have been referred to the DAB. The opening words of the first sentence of Sub-Clause 20.6 makes clear that a "dispute" that may be submitted to arbitration under Sub-Clause 20.6 is one that has been referred to the DAB.⁴² This principle has also been recognised by Indian courts though in a more general form. It has been held that a court must first ensure that the remedies provided for in the Contract itself are exhausted.⁴³

4. Purpose and aims of dispute adjudication

In the words of an eminent former German Federal Supreme Court judge English dispute adjudication primarily does not solve the issue of complex construction disputes but the probability of blocking the running construction process and consequential extortion strategies.⁴⁴ Previously, in line with this observation and in respect of a FIDIC 1987 contract it has been held that the whole contractual system is aimed at the early resolution of any queries at the time the claim arises, and

⁴² PT Perusahaan Gas Negara (Persero) TBK v. CRW Joint Operation [2010] SGHC 202 citing Glover/Hughes, *The New FIDIC Red Book*, note 20-046;

⁴³ *M/S SRI SAI EARTH WORKS PVT LTD v. ITALIAN THAI DEV. PUBLIC CO LTD*, January 12, 2009 relying on a previous decision of the Supreme Court of India in the case of *Northern Railway Administration v. Patel Engineering Company Ltd.*, 2008 (11) Scale 500

⁴⁴ Quack 2010 ZBR 211, 212

with the strong likelihood that plant, manpower, experts and witnesses are still on site. It is designed to avoid prolonged disputes.⁴⁵

However, the purpose of dispute adjudication may encompass substantive goals. English statutory adjudication was to introduce a speedy mechanism for settling disputes in construction contracts on a provisional interim basis, and requiring the decisions of adjudicators to be enforced pending the final determination of disputes by arbitration, litigation or agreement.⁴⁶ Also English statutory adjudication provides a means of meeting the legitimate cash-flow requirements of contractors and their sub-contractors.⁴⁷ Contractual adjudication may encompass similar and even additional goals.

5. Expert determination v. Quasi-judicial dispute resolution

In most Civil Law countries dispute adjudication will frequently and overhasty become classified as either expert determination or arbitration as there is legal framework for both of it. Interesting cases in this respect are the 2003 South Africa case of *Welihockyj and Others v. Advtech Limited and Others*⁴⁸ and a 1994 German case with which the Court of Appeal Hamburg⁴⁹ had to deal.

In the German case the parties had agreed on dispute resolution provisions. It is probably interesting to know that the ruling language of the contract was English. The relevant clauses conferred comprehensive adjudication powers to a three member panel whose decisions should be final and binding on the parties. Access to state court jurisdiction was limited to urgent cases. The panel had powers to establish procedural rules as to the conduct of the proceedings and evidence hearing. The enforcement of any decisions of the panel was left to the state courts. Before the courts the defendant invoked arbitration whilst counsels of the claimant contended that expert determination was agreed on.⁵⁰ In the court's view it was decisive that according to the contracting wording the

decision should be final and binding, this being a characteristic element of arbitration. A further point of consideration was that the panel had similar powers to establish procedural rules than arbitrators have under Section 1035 Civil Procedure Code whilst this section does not apply to expert determination.⁵¹ Accordingly the court concluded that the parties intended to become heard and they did not simply expect the panel to form a professional opinion. Finally the court relied on the fact that the enforcement of any decision on claims was left to the state courts who do not have powers to enforce expert determinations without hearing the parties. Accordingly the court held that in this case arbitration was agreed on rather than expert determination.

In the South African case⁵², the court was faced with a contractual provision stating that disputes would be resolved by "an independent person acting as expert and not as arbitrator". The reported judgment dealt with the question of whether the dispute between the parties would have to be settled by way of arbitration rather than by way of litigation. Section 1 of the South African Arbitration Act 1965 defines arbitration agreement as a written agreement providing for the reference to arbitration of any existing dispute or any future dispute relating to a matter specified in the agreement whether an arbitrator is named or designated therein or not. The South African court held that whether arbitration or expert investigation is contemplated depends not only on the wording of the reference, but also on the manner in which the presiding officer arrives at a decision, the nature of the dispute and the extent of the dispute. In the relevant circumstances there were references to fraud and a complicated but apparently flawed investigation was undertaken. The judge concluded that there was nothing in the agreement which was counter-indicative, including the references to an "expert", and held that the contract clause in question was actually an arbitration clause.

Both cases show that Civil Law courts have problems

⁴⁵ *Her Majesty's Attorney General for the Falklands Islands v. Gordon Forbes Construction (Falklands) Ltd* [2003] BLR 280

⁴⁶ *Macob Civil Engineering Ltd v. Morrison Construction Ltd* [1999] EWHC Technology 254 (12th February, 1999)

⁴⁷ *Carillion Construction Ltd v. Devonport Royal Dockyard Ltd* [2006] BLR 15

⁴⁸ 2003 (6) SA 737 (W)

⁴⁹ Court of Appeal Hamburg IBR 1998, 175 - Mandelkow

⁵⁰ The practical consequences of classifying the agreement as expert determination are that under German law expert determination is subject to the challenge of a manifest inequity or error (*offenbare Unbilligkeit oder Unrichtigkeit*) whilst the expert has full discretion how to conduct the procedure and he is not bound to hear the Parties, see Stein/Jonas/Schlosser, *Commentary on the Civil Procedure Code*, 22nd edition, Tübingen 2002, before Section 1025 note 23 (dominant doctrine); dissenting Habscheid, *Liber Americum Laufke*, 1971, 304 et seq.

⁵¹ Pursuant to Section 794 para 1 no 4a execution is levied on account of an arbitral award declared enforceable in accordance with Section 1060 Civil Procedure Code

⁵² *Welihockyj and Others v. Advtech Limited and Others* 2003 (6) SA 737 (W)

to understand dispute adjudication being something different than arbitration or expert determination. Though of course there are similarities between dispute adjudication and arbitration it is not the same and it is not intended to be the same. FIDIC forms of contract expressly stipulate that the adjudicator shall not act as an arbitrator. Also an adjudicator's decision shall become binding but not always final and binding. The FIDIC standard forms provide for additional arbitration and a decision of the adjudicator will only become final and binding if the parties accept it or unless they do not give a notice of dissatisfaction. Hence, any adjudicator's decision will be given subject to further arbitration.

6. Enforceability

As adjudication was designed to give rise to a quick and inexpensive dispute resolution procedure it would be contrary to this purpose if adjudicators' decisions were not generally enforced summarily.⁵³ However, enforceability is not in itself a reason of dispute adjudication. Unlimited enforceability would contradict the laws. Hence, the adjudicator shall only give a decision on matters for which jurisdiction was conferred to it. Also the rules of natural justice⁵⁴ including the contradictory (adversary) principle and the right to be heard generally apply to adjudication. However, the speed with which an adjudication must be carried out and completed, and the temporary nature of any consequential decision, means that the enforcement of a decision is "not to be thwarted by an overly-sensitive concern for procedural niceties".⁵⁵

7. Summary

In a nutshell FIDIC contracts suggest a contractual agreement aimed at the provision of a forum of discussion and debate and at the early resolution of any queries. The parties shall submit the facts and arguments to an adjudicator who shall conduct the hearings. The adjudicator is required to act independently and shall be unbiased. The parties of the agreement intend that the adjudicator shall hear the parties and that he shall form his professional opinion with regard to the merits of the case

though it may investigate the merits on its own by visiting the site and requesting further information from the parties. After 84 days the adjudicator shall give a reasoned decision on the contractual matter. Under such a Dispute (Adjudication) Board Agreement the parties engage themselves to conform to the DAB decision.⁵⁶ Under the FIDIC regime dispute adjudication is a condition precedent of arbitration.

Irrespective of the above in Germany it has been argued that the adjudicator has merely the role of an expert who shall form a professional opinion on the subject matter or dispute⁵⁷ ignoring the fact that the adjudicator shall hear the parties and that "it is accepted that the adjudicator has to conduct the proceedings in accordance with the rules of natural justice or as fairly as the limitations imposed by law permit".⁵⁸ Contrariwise expert determination under German law does not require consideration of any procedural rules.⁵⁹ However, in the terms of a FIDIC contract the adjudicator is not only making an expert determination but he is a judicial decision maker.⁶⁰ Support for this view comes from Canada, where in 1953, the Ontario Court of Appeal was involved in a case where the conduct of an engineer who acted as both agent for the owner and also as certifier of payment certificates had to be considered. The court held that, as certifier, the engineer is required to act judicially and in an independent and unbiased manner. In this regard, the court said at page 23.⁶¹

Where, as here, the engineer's certificate is a condition precedent to payment, the engineer occupies two positions: first, one as agent of the owner under the contract; second, a quasi-judicial position as certifier between the parties: *Hudson on Building Contracts*, 7th ed., p. 286. The two positions are distinct and separate. Different duties attach to them and different consequences flow from the performance or breach of those duties. Under the law of principal and agent he may, within the scope of his duties, bind his principal. As certifier deciding between the parties he must act judicially... To act judicially as certifier re-

⁵³ Amec Group Ltd v. Thames Water Utilities Ltd [2010] EWHC 419 (TCC) (24 February 2010)

⁵⁴ Discaint Project Services Limited v. Opecprime Developments Limited [2001] BLR 287 and RSL (South West) Limited v. Stansell Limited [2003] EWHC 1390 (TCC)

⁵⁵ His Honour Judge Humphrey Lloyd QC in Balfour Beatty Limited v. London Borough of Lambeth [2002] EWHC 597 (TCC)

⁵⁶ Nammour, Droit et pratique de l'arbitrage interne et international, note 74

⁵⁷ Lembcke IBR 2008, 1198 as to the English law; Lembcke IBR 2008, 1014, also Greger/Stubbe, Schiedsgutachten, note 193 et seq.

⁵⁸ see Glencot Development & Design Co Ltd v. Ben Barrett & Son (Contractors) Ltd [2001] BLR 207, at page 218

⁵⁹ Court of Appeal Düsseldorf IBR 2008, 485 – Lembcke; see also Court of Appeal Celle, NJW-RR 1995, 1046 and further judgments quoted by Schlosser in: Stein/Jonas/Schlosser, Commentary on Civil Procedure Code, 22nd edition, before Section 1025 note 23

⁶⁰ His Honour Judge Humphrey Lloyd QC in Balfour Beatty v. The London Borough of Lambeth [2002] BLR page 288 at page 301

⁶¹ Brennan Paving Co. Ltd. v. Oshawa [1953] 3 D.L.R. 16.

quires him, where the question arises, to consider and give effect to any conduct on his part as agent *vis-à-vis* the contractor which has bound the owner as his principal to the advantage of the contractor. In this connection he must act qua certifier as independently as if some other person rather than himself had been the agent of the owner under the contract. All that seems crystal clear to me.

It has been said⁶² that generally, “courts are institutions empowered to deploy processes like evidentiary hearings and cross-examination in order disinterestedly and rationally to solve specific disputes between parties as to whether and how particular events did or did not occur and whether they amount to transgressions of pre-existing legal norms. Their decisions attain legitimacy by demonstrating a rational connection among the norms, the evidence on the record, and the outcome. Once presented with a justiciable controversy, courts are not free to ignore it; the parties cannot be told to go away because the judges would prefer to devote their energy and resources to more (or less) pressing problems”. I agree.

A Dispute Adjudication Board has similar duties though by its very nature dispute adjudication is of course less formal and it is often said, with some justification, that construction adjudications provide in many cases only 'rough' justice. Irrespective the adjudicator shall: (i) sufficiently appreciate the nature of any issue referred to him before giving a decision on that issue, including the submissions of each party; and (ii) be satisfied that he could do broad justice between the parties. Acting as a judicial institution he shall not ignore the principles of natural justice and make sure that he has jurisdiction on the subject matter referred to him. Under Civil Law the

relevant test is whether dispute adjudication contradicts with any basic or fundamental rights under the Constitutions.

Under German law the substantial basic right established in article 19 para. 4 first sentence of the German Constitution establishes a direct right to an effective procedure for the enforcement of any entitlement.⁶⁴ The constitutional right to an effective procedure means that the courts shall enforce the constitutional rights. In this regard procedural law is essential. Accordingly procedural law shall be construed and applied in the light of the basic rights.⁶⁵ In case of doubt the construction of the law shall prevail which enables the court to enforce the basic rights.⁶⁶ Essential requirements of civil procedure are equality (see article 3 German Constitution) and natural justice (the right to be heard, see article 103 para 1 German Constitution). In a summary worldwide there is an accepted basic right to a fair procedure.⁶⁷ On the other hand substantive law deals with the review of expert determinations (binding advise). Pursuant to Section 319 Civil Code an expert determination in the sense of binding advise is not binding if it is manifestly wrong. There is extensive case law as to definition of what is manifestly wrong,⁶⁸ e.g. lack of a verifiable reasoning,⁶⁹ use inappropriate evaluation methods⁷⁰ and serious procedural deficiencies (if the parties have agreed on particular rules).⁷¹ To some extent both, substantive and procedural requirements, seem to merge to one legal framework, which applies to dispute adjudication.⁷² Accordingly FIDIC dispute adjudication has a mixed nature and it is suggested that it should be dealt as having a legal nature *sui generis*.

In this regard it is somewhat interesting what a South African court has concluded in *Chelsea West*.⁷³

⁶² Babcock v. Sherwood School District, 88J, 193 Or App 449, 453, 90 P3d 1036, rev den, 337 Or 556 (2004) (Oregon Court of Appeal)

⁶³ Amec Group Ltd v. Thames Water Utilities Ltd [2010] EWHC 419 (TCC) (24 February 2010)

⁶⁴ German Federal Constitutional Court, BVerfGE 49, 252, 257

⁶⁵ Similar in South Africa where Section 39(2) of the Constitution provides as follows: “When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

⁶⁶ German Federal Constitutional Court, BVerfGE 49, 252, 257

⁶⁷ Habscheid has therefore strongly criticised a decision by the Court of Appeal Hamburg, AWD 1966, 120 et seq. holding that arbitrators can be declared to become mere experts being then exempted from the duty to conduct a fair hearing; see Habscheid KTS 1967, 3 et seq.

⁶⁸ German Federal Supreme Court, BGHZ 43, 374; BGHZ 81, 229, 237

⁶⁹ Court of Appeal Düsseldorf NJW-RR 2000, 279

⁷⁰ Court of Appeal Cologne NJW-RR 1997, 412

⁷¹ Court of Appeal Schleswig NZM 2000, 338

⁷² More restrictive apparently Schlosser who is in favor of the application of arbitration law on expert determination to the extent it is aimed at the resolution of disputes, see Stein/Jonas/Schlosser, Commentary on Civil Procedure Code, 22nd edition, before Section 1025 notes 32 et seq.

⁷³ *Chelsea West (Pty) Ltd and Another v. Roodebloem Investments (Pty) Ltd and Another* 1994 (1) SA 837 (C) at 843E.

The position of an arbitrator in the true sense is very different [from that of a valuer]. He acts in a quasi-judicial capacity and must conduct himself accordingly. Whilst not obliged to observe the precision and forms of a court of law, the arbitrator must proceed in such a manner ‘...as to ensure a fair administration of justice between the parties’... This includes the duty to afford the parties a proper hearing. Inherent therein is that the arbitrator must not examine parties or witnesses or conduct a hearing in the absence of one or either of the parties. If he does so he commits an irregularity which will result in his award being set aside. This rule has been established in a long line of cases...

The South African Constitutional Court has added that alternative dispute resolution procedures do not require the same standard of fairness than before the state courts. It noted:

The final question that arises is what the approach of a Court should be to the question of fairness. First, we must recognise that fairness in arbitration proceedings should not be equated with the process established in the Uniform Rules of Court for the conduct of proceedings before our courts. Secondly, there is no reason why an investigative procedure should not be pursued as long as it is pursued fairly. The international conventions make clear that the manner of proceeding in arbitration is to be determined by agreement between the parties and, in default of that, by the arbitrator. Thirdly, the process to be followed should be discerned in the first place from the terms of the arbitration agreement itself. Courts should be respectful of the intentions of the parties in relation to procedure. In so doing, they should bear in mind the purposes of private arbitration which include the fast and cost-effective resolution of disputes. If courts are too quick to find fault with the manner in which an arbitration has been conducted, and too willing to conclude that the faulty procedure is unfair or constitutes a gross irregularity within the meaning of Section 33(1) [Arbitration Act 1965], the goals of private arbitration may well be defeated.”

The South African court decision provides a basis for the view that the goals of private arbitration or adjudication serve a valuable purpose in determining the required standard of fairness and natural justice. Similar authority does exist in Germany. The State has no motive to limit the exercise of private adjudication or arbitration,⁷⁴ unless it has implications that go substantially beyond the narrow interests of the parties. The German Constitution however requires that nobody will be prevented from access to the courts except if otherwise agreed by the parties of the dispute.⁷⁵ Section 1042 para. 3 German Civil Procedure Code recognises the principle of contractual freedom with two reservations (see Section 1042 para 1) such as the duty to treat the parties equally and the right to be heard. Accordingly alternative dispute resolution shall be voluntary only, a certain procedural standard must be ensured and the adjudicator shall be impartial.⁷⁶ The arbitrator shall proceed in accordance with the agreed procedural rules and Sections 1025 et seq. German Civil Procedure Code. As a rule German arbitral tribunals shall hear the parties in accordance with the standards which apply to state courts.⁷⁷ However, it is suggested that dispute adjudication does not require to meet such a high standard to the extent it does not replace the adjudication of the dispute by either arbitral tribunal or state courts. This suggestion is based on the German authorities as to Section 319 Civil Code which in principle allow an independent third person to proceed to the determination of a claim including the decision on legal issues without having heard the parties at all⁷⁸ unless the parties themselves have agreed on a hearing or the right to become heard.⁷⁹

V. Applicable Law

Whilst as to arbitration there is a lot of authority as to which law applies to the arbitral agreement (the arbitration clause) and which law applies to the subject matter of the dispute there is only very little guidance and authority as to the applicable laws regarding dispute adjudication. However, it is quite important to know which law applies as to the adjudication clause and the procedure.

As dispute adjudication is based on an agreement one could believe that the proper law of the related contract should govern adjudication. However, an adjudication

74 Zöller/Geimer, ZPO, before Section 1025 note 3.

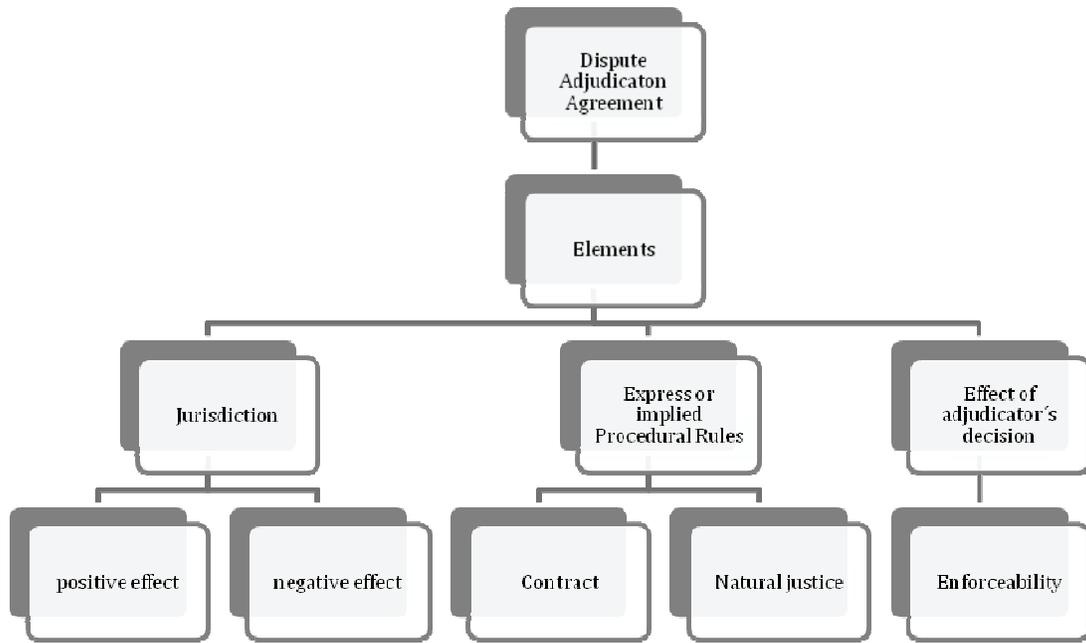
75 Zöller/Geimer, ZPO, before Section 1025 note 4

76 Zöller/Geimer, ZPO, before Section 1025 note 4

77 Court of Appeal Frankfurt SchiedsVZ 2006, 220, 223; see Zöller/Geimer, ZPO, Section 142 note 5

78 German Federal Supreme Court BGHZ 6, 335; German Federal Supreme Court BGHZ 9, 195

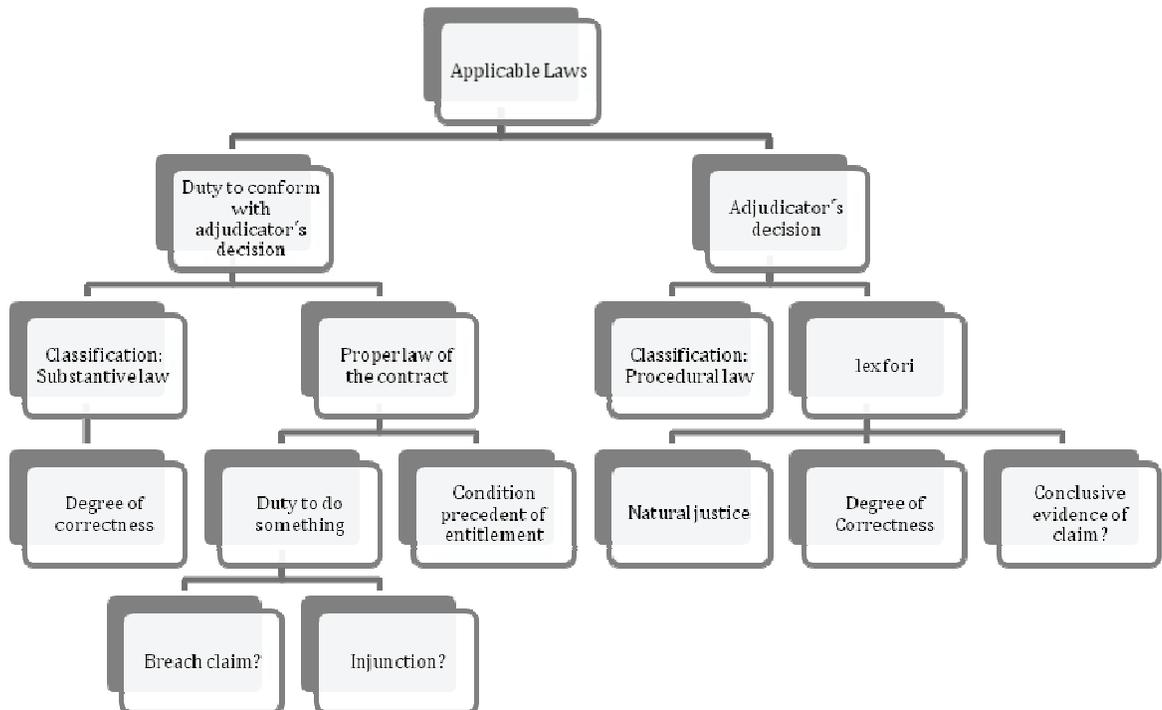
79 Court of Appeal Schleswig NZM 2000, 338; see Palandt/Grüneberg, BGB, Section 319 notes 5 et seq.



clause addresses various procedural aspects such as the jurisdiction of courts, the enforcement of DAB decisions and the requirement of natural justice. Hence, it comes into consideration to apply the lex fori of the board. However, there is not a seat of adjudication as such. Also any decision of a DAB is not enforceable as such. Rather the parties agree to conform with any such decision. Finally under FIDIC an adjudicator's decision is only provisionally binding and subject to further review by an arbitral tribunal. Whether the adjudicator has complied with the rules of natural justice and whether he had jurisdiction will be assessed in arbitration. The arbitral

court has a situs and will apply its lex fori as to the standards of natural justice and the scope of jurisdiction. Hence, it is submitted that as to the jurisdiction of the DAB and as to natural justice standards the lex fori of the arbitral tribunal shall apply. It is also appropriate to apply the lex fori of the arbitral tribunal as to issue with regard to the question whether parties may ignore the adjudication clause by referring the dispute directly to arbitration.⁸⁰

On the other hand the DAB does not make a decision which has acquired the authority of *res judicata*. It



simply gives a decision which is binding on the parties by virtue of a contractual clause. Thus it is suggested that the question whether a DAB decision will be binding on the parties should be answered by applying the proper law of the contract. In other words the governing law of the contract shall determine how the decision of the adjudicator shall be enforced. In so far there are three possible solutions: Either the DAB decision is a condition precedent of the claimant's entitlement⁸¹ or there is a duty to comply with the decision in itself⁸² or at least the adjudicator's decision could be dealt with as mere full or conclusive evidence for the existence of a claim.⁸³ In the first case the arbitral court has to enforce the original claim. In the second case the arbitral court has to enforce the duty to comply with the adjudicator's decision. However, in both cases it will depend on the governing law of the contract whether the arbitral tribunal will enforce the DAB decision. In the latter case the effect of a binding adjudicator's decision would be such that the claim is not subject to further evidence. In any case it is preferable to understand an adjudicator's decision as a condition precedent of the claim which shall be enforced before the arbitral court. The reason for this can be ascribed in the fact that the laws have quite often problems to enforce a duty to do something.

Of course it may happen that the adjudicator breaches the rules of natural justice. If so, there is subject to the governing law still the duty to comply with the adjudicator's decision. But it is then questionable whether there is a claim (lack of a condition precedent due to lack of valid decision) or whether the decision is enforceable (lack of a valid decision). This is a mere procedural issue on which the *lex fori* applies. The *lex fori* must determine whether the DAB had jurisdiction and whether it complied with the requirements of natural justice. Hence the *lex fori* establishes whether the character and purpose of dispute adjudication may justify to ignore errors in the decision and to which extent this is acceptable.

VI. Constraints

1. Specific Legislation

To the extent dispute adjudication falls under specific and particular legislation like in Singapore or England the law may provide guidance as to details of dispute adjudication and the enforceability of any adjudicator's decisions. In any case the laws in Singapore and England permit dispute adjudication though of course in the particular light of the relevant law. In England Lord Reid concluded in *Ballast plc v. The Burrell Co (Construction Management) Ltd*⁸⁴ that it "cannot be appropriate for the courts to undertake an investigation into the merits of the dispute in order to ascertain whether the adjudicator has reached the same decision as a court would have done. The High Court Singapore⁸⁵ has recently held:

[It] must have recognised that the adjudication procedure provided a somewhat rough and ready type of justice. This was because compliance with the timelines imposed on the process might lead to a lack of depth in the submissions and matters considered. This inbuilt limitation on the procedure had been commented on in relation to earlier regimes imposed in other jurisdictions. As Chow in *Security of Payments and Construction Adjudication* puts it (at p 503): In particular, consideration will be accorded to the time frame within which an adjudicator is required to arrive at his determination and the consequence that the adjudicator cannot possibly provide the level of analysis of the facts and law relating to the dispute which is frequently expected upon a full curial hearing. This must have been why the Legislature decided in our case to introduce the adjudication review procedure. The adjudication review procedure provides the parties with an opportunity to re-argue their respective cases with regard both to the facts and the law. The review adjudicator is able to go into the substantive merits of the original adjudicator's decision. The adjudication review procedure is therefore a species of appeal albeit limited to cases in which a particular monetary qualification is reached.

The judge then determined the existence of the following basic requirements of dispute adjudication under the

⁸⁰ Hök, Zur international privat- und verfahrensrechtlichen Behandlung des Schiedsgutachtens und DAB Spruches, ZfBR 2008, 323 et seq.

⁸¹ In *Glencot Development and Design Co Ltd v. Ben Barrett & Son (Contractors) Ltd* [2001] BLR 207 at 33 it has been held that an adjudicator's decision does not create a cause of action as such; it is merely an expression as to liability and quantum about the dispute that has arisen under the contract.

⁸² In *VHE Construction plc v. RBSTB Trust Co Ltd* [2000] EWHC Technology 181 (13th January, 2000) at 55 it has been held that the obligation to "comply with" a decision which requires the payment of a sum of money has a greater effect than to make that sum a simple debt.

⁸³ See German Empire Supreme Court decision, 23.5.1919, RGZ 96, 57

⁸⁴ [2001] BLR 529

⁸⁵ *SEF Construction Pte Ltd v. Skoy Connected Ptd Ltd* [2010] 1 SLR 733 at [38]

Singapore Act.⁸⁶

- (a) the existence of a contract between the claimant and the respondent, to which the SOP Act applies (s 4);
- (b) the service by the claimant on the respondent of a payment claim (s 10);
- (c) the making of an adjudication application by the claimant to an authorised nominating body (s 13);
- (d) the reference of the application to an eligible adjudicator who agrees to determine the adjudication application (s 14);
- (e) the determination by the adjudicator of the application within the specified period by determining the adjudicated amount (if any) to be paid by the respondent to the claimant; the date on which the adjudicated amount is payable; the interest payable on the adjudicated amount and the proportion of the costs payable by each party to the adjudication (s 17(1) and (2));
- (f) whether the adjudicator acted independently and impartially and in a timely manner and complied with the principles of natural justice in accordance with s 16(3); and
- (g) in the case where a review adjudicator or panel of adjudicators has been appointed, whether the same conditions existed, *mutandis mutandi*, as under (a) to (f) above.

In *Sungdo Engineering & Construction (S) Pte Ltd v. Italcor Pte Ltd*,⁸⁷ a payment claim was made in the form of a one-page letter accompanied by 164 pages of supporting documents. The one-page letter requested early payment and was signed off with “greetings of the season”. It was held that the letter could not amount to a payment claim under the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed). Justice Lee Sei Kin took the view that a payment claim should not be thought as valid merely because it “satisfies all the requirements under the Act”: to be a valid payment claim it must also be *intended* as a payment claim.⁸⁸

2. General Law

If there is no such complementary or mandatory legislation dispute adjudication remains what it is. It is an agreement whereunder a third person shall adjudicate a dispute referred to it by the parties of the contract.

Whether the general laws permit or allow private adjudication or not has to be checked first. In this regard the matter of arbitrability comes into play. To the extent the subject matter of the dispute may be referred to arbitration there is a strong likelihood that dispute adjudication is also permissible. The matter of arbitrability is addressed in the final part of Article II(1) of the 1958 New York Convention which requires that the arbitration agreement concerns “a subject matter capable of settlement by arbitration”. The matter of arbitrability is also stated as a ground for refusal of enforcement of the arbitral award in Article V(2)(a) of the former Convention, which provides that the court may refuse enforcement on its own motion if it finds that “the subject matter of the difference is not capable of settlement by arbitration under the law of that country”. Moreover in some countries like Argentina, Brazil, Uruguay and Paraguay the term conciliation involves a judge.⁸⁹ To which extent dispute adjudication falls under this type of legislation has to be analysed separately.

The binding effect of dispute adjudication decisions seems at a first sight to be exclusively subject to (the) contract. However, as the laws may put constraints on the exercise of contractual freedom they may also set out standards in respect of the binding effect of third party determinations. This is the case in various countries like in Germany (Sections 317 et seq. German Civil Code), Greece (371 Greek Civil Code), France (Article 1592 French Civil Code) or Brazil (Article 485 Brazilian Civil Code).

Somehow the question is whether the third party’s discretion has to be exercised *arbitrium boni viri*, ‘with the judgment of a fair-minded person’? This set an objective standard, with which the courts would not normally interfere unless it was of the view that the decision was so unreasonable, improper, irregular or incorrect that it would give rise to obvious unfairness.⁹⁰ Or, in other words, the court will have power to correct and adjust a manifestly erroneous determination, as it is the case in Germany (see Section 319 German Civil Code) and Italy (Article 1349 para. 1 Italian Civil Code). However, if the third party’s discretion is broader like in case of an *arbitrium merum* agreement, the court would not normally interfere unless it was of the view that the third party acted in bad faith. The more powerful position of the third person in case of *arbitrium merum* requires a

⁸⁶ *SEF Construction Pte Ltd v. Skoy Connected Ptd Ltd* [2010] 1 SLR 733 at [45].

⁸⁷ [2010] SGHC 105

⁸⁸ *Sungdo Engineering & Construction (S) Pte Ltd v. Italcor Pte Ltd* [2010] SGHC 105 at [20]

⁸⁹ Oteiza in: Cadiet/Clay/Jeuland, *Médiation et arbitrage*, note 208

⁹⁰ See *De Lange v. ABSA Makelaars (Edms) Bpk* (262/09) [2010] ZASCA 21; [2010] 3 All SA 403 (SCA); (2010) 31 ILJ 885 (SCA) (23 March 2010)

more trustful relation between the parties and the determination maker. It is perceived to be selected intuitu personae thus not being replaceable by a judge.⁹¹

Anyway, the laws will only sanction dispute adjudication if it does not deprive the parties in full of access to the courts. Hence it must be a complementary dispute resolution method rather than an exclusive one. To this extent it is acceptable that a dispute adjudicator shall give a quick and sometimes summary decision; thus he may exercise more or less rough justice. However, it shall comply with the principles of natural justice and it shall not travel beyond the jurisdiction conferred to it. In other terms he shall exercise discretion *arbitrium boni viri*.

3. Enforceability

The critical issue of dispute adjudication is the enforceability of DAB decisions. As DAB decisions are only provisionally binding the courts may feel it being inappropriate to enforce them. Also the question arises whether the particular domestic law provides for appropriate tools to do so.

Under Sub-Clause 20.7 FIDIC 1999 a Party may refer to arbitration the failure of the other Party to comply with a *final* and binding DAB decision. This Sub-Clause expressly excludes the application of Sub-Clauses 20.4 and 20.5 ... to such a reference. Thus, the failure to comply with the decision of the DAB may be referred directly to arbitration as soon as the decision has become final, without any need for the failure itself to be referred back to the DAB or having to wait for 56 days ... to attempt to reach an amicable settlement in relation to the failure to comply. Such a reference would be by the Party in whose favour the DAB's decision had been made, seeking not to change, but to enforce it.

Under Sub-Clause 20.9 of the FIDIC Gold Book, the right of a winning party to refer directly to arbitration a failure of the losing party to comply with a decision of the DAB is not dependent on whether the decision has become final. The relevant Sub-Clause in the Gold Book reads as follows:

In the event that a Party fails to comply with any de-

cision of the DAB, whether binding or final and binding, then the other Party may, without prejudice to any other rights it may have, refer the failure itself to arbitration under Sub-Clause 20.8 [*Arbitration*] for summary or other expedited relief, as may be appropriate. ...

Hence, the Gold Book provides for a “contractually mandated award with temporary finality” and, effectively, “the same tribunal [is not precluded] from returning to the same issues that it would, necessarily, have specifically reserved for its own further consideration on the full merits.” In contrast, the 1999 Red Book does not contain such an express right and power as described. Notably, the gap in Sub-Clause 20.7 as originally identified by Prof Bunni has been already filled and will be incorporated in future editions of other FIDIC contract forms.

The current practise of ICC arbitral tribunals is to grant an interim award if any of the parties do not conform with a DAB decision which has not yet become final.⁹² It may be possible to apply at a national court for enforcement of such a decision as an interim or a conservatory measure as permitted by Article 23 of the ICC Arbitration Rules.⁹³ However it is questionable whether such an interim award may be become recognised and enforced under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

An order for interim measures is essentially temporary in nature; it is not an award which is always final. Ground *e* of Article V(1) New York Convention 1958 provides in the first place that enforcement of an award can be refused if the party against whom the award is invoked proves that the award has not yet become “binding”. It has been argued that the Convention only applies to final and binding awards.⁹⁴ However, the better view is that provisional measures should be and are enforceable as arbitral awards because they are final in the sense that they dispose of a request for relief pending the conclusion of the arbitration.⁹⁵

However, the South African Constitutional Court⁹⁶ has emphasised that notwithstanding the parallels drawn

⁹¹ Antonioli, Principles of European Contract law and Italian Law, The Hague 2005, 294

⁹² Seppälä 2009 ICLR 414 et seq. referring to ICC case No 10619

⁹³ see e.g. Sub-Clause 5.4 of the ICC's Dispute Board Rules which recognizes court enforcement

⁹⁴ Resort Condominiums Int'l Inc v. Bolwell, XX Y.B. Commercial Arbitration 628 (Queensland S.Ct. 1993) (1995).

⁹⁵ Born, International Commercial Arbitration, 2023

⁹⁶ Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another (CCT 97/07) [2009] ZACC 6; 2009 (4) SA 529 (CC) ; 2009 (6) BCLR 527 (CC) (20 March 2009)

between arbitrations and court proceedings in the authorities referred to, it is not suggested, that (in the light of the South African Constitution⁹⁷) the same level of procedural fairness required in court proceedings is to be required in arbitration proceedings. It is accepted that the concept of fairness in arbitrations is context-related. Hence it is submitted that dispute adjudication can be designed as a quick and rough procedure whereunder a DAB may proceed less formally and with complementary investigative powers.

A further issue, is not whether one or other interpretation of the determination is the correct one but whether the determination is one which is valid in law.⁹⁸ In the latter case the Court then continued to say:

It is submitted that in general the requirements for a valid arbitral award are equally applicable to an expert determination and we were referred to a number of authorities in which these requirements are set out. In summary, what is required is that all issues submitted must be resolved in a manner that achieves finality and certainty. The award or determination may therefore not reserve a decision on an issue before the arbitrator or expert for another to resolve. It must also be capable of implementation. On the other hand, what must be determined are the matters submitted and no more. Depending on the questions, therefore, the determination may not necessarily result in a final resolution of a dispute between the parties. Accordingly, a court will be slow to find non-compliance with the substantive requirements and an award or determination will 'be construed liberally and in accordance with the dictates of commonsense'. This must be particularly so when the questions for determination are themselves lacking in precision. A question as to what steps are to be taken to achieve a particular result is perhaps a good example. A court will, therefore, as far as possible construe an award or determination so that it is valid rather than invalid. It will not be astute to look for defects.

As observed by Bingham J⁹⁹ in the context of an arbitration award:

'... as a matter of general approach, the Courts strive to uphold arbitration awards. They do not approach them with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults in awards and with the objective of upsetting or frustrating the process of arbitration. Far from it. The approach is to read an arbitration award in a reasonable and commercial way expecting, as is usually the case, that there will be no substantial fault that can be found with it.'

Where uncertainty in meaning does emerge regard may be had, as in the case of the interpretation of contracts, to the extrinsic circumstances surrounding or leading up to the award or determination.¹⁰⁰

VII. Conclusions

In Germany there is a proverb which says: "what the farmer doesn't know, he won't eat". The situation is a bit similar as to the use of dispute adjudication in Civil law countries where this type of dispute resolution method is predominantly unknown. The suggestion therefore is that civil law practitioners should taste it before making their judgment on it. However, to begin with we need more information about it. In other words what are the ingredients of dispute adjudication and does it serve for?

Potentially under Civil Law legal consequences having similar effects as (English) dispute adjudication can only be simulated by contract in the sense of reciprocal obligations.¹⁰¹ However, in principle the precepts, which govern the procedure in judicial proceedings apply to alternative dispute resolution procedures.¹⁰² On the other hand the required level of procedural fairness in dispute adjudication can be determined in a context related way.

Efficient dispute adjudication implicates a tension be-

⁹⁷ Section 34 of the South African Constitution reads as follows: "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum." Article 103 para 1 of the German Constitution similarly says: „In the courts every person shall be entitled to a hearing in accordance with law“.

⁹⁸ See SA Breweries Ltd. v. Shoprite Holdings Ltd. (476/06) [2007] ZASCA 103; [2007] SCA 103 (RSA); [2008] 1 All SA 337 (SCA); 2008 (1) SA 203 (SCA) (14 September 2007)

⁹⁹ Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd [1985] 275 Estates Gazette 1134 (Queen's Bench Division (Commercial Court))

¹⁰⁰ SA Breweries Ltd. v. Shoprite Holdings Ltd. (476/06) [2007] ZASCA 103; [2007] SCA 103 (RSA); [2008] 1 All SA 337 (SCA); 2008 (1) SA 203 (SCA) (14 September 2007) citing Firestone South Africa (Pty) Ltd v. Gentiruco AG 1977 (4) SA 298 (A) at 304

¹⁰¹ Quack 2010 ZfBR 211, 212

¹⁰² Shipple v. Morkel and Another 1977 (1) SA 429 (C) at 434A-E.

tween the rival goals of speed and accuracy. The balancing element is fairness. The dispute must be resolved in a manner that achieves finality (in the sense that all questions as to the pending dispute must be settled) and certainty. Finality in its strict sense (meaning that not further recourse to arbitration or the courts is possible) is replaced by arbitral supervision. Each jurisdiction develops its own balance between these elements. The systems may vary. For example in South Africa an informal, investigative process, where the arbitrator receives evidence, prepares a schedule of quantities based on the evidence he receives, gives both parties a copy of the schedule or a letter setting out his concerns and gives each an opportunity to comment is permitted.¹⁰³ Anyway, dispute adjudication is a very flexible instrument which is aimed at the early resolution of queries by experts. Lack of finality in dispute adjudication requires even more power of persuasion than arbitration. Hence, the success of dispute adjudication lies with the quality and experience of the adjudicators who must give convincing arguments for any of their decisions.

There is no need for special legislation in order to experience or practise dispute adjudication to the extent it is agreed on and it does not oust the parties from access to the either arbitration or state court proceedings. The existing legal framework as to the jurisdiction of alternative dispute resolution bodies and natural justice is a sufficient basis for dispute adjudication. The enforceability of DAB decisions depends on the applicable law. To the extent that the arbitration clause is sufficiently broad (see FIDIC Gold Book) DAB decisions seem to be enforceable worldwide. The standards of natural justice and procedural fairness can be lower than of those that must be applied by state courts.

However, it should be noted that dispute adjudication should be embedded in a contract which is not only aimed at the early and rapid resolution of upcoming disputes but which should also ensure that the parties manage their contract properly keeping records in time and thus making sure that the DAB has a proper and appropriate factual basis for making a decision.¹⁰⁴ Frequently Civil law construction contracts (such as the German VOB/B) are not suitable for use with dispute adjudication clauses. However, this is not a legal issue and should encourage the project stakeholders to review their contracts rather than to abide by old fashioned contract documents and traditional court proceedings.

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¹⁰³ Lufuno Mphaphuli & Associates (Pty) Ltd v. Andrews and Another (CCT 97/07) [2009] ZACC 6; 2009 (4) SA 529 (CC); 2009 (6) BCLR 527 (CC) (20 March 2009)

¹⁰⁴ See Sub-Clauses 4.21, 8.3, 20.1 etc. FIDIC 1999

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3rd Bucharest Regional Conference Report

By Alina Oprea

You would have wanted to participate at the 3rd DRBF Bucharest Regional Conference on 6 and 7 October 2011...!

First, you would have wanted to meet together people whose mother languages were Romanian, English, Arabic, Italian, German, French, Polish, Japanese and, maybe, others, not declared.

Second, you would have wanted to see how the things were changed from May 2007, when the Dispute Resolution Board Foundation held its 7th Annual International Conference in Bucharest, to October 2009, when the First DRBF Bucharest Regional Conference was held, then June 2010, at the 2nd DRBF Bucharest Regional Conference and up to the present 3rd DRBF Bucharest Regional Conference...

You would have seen that the weight moved from the well known international speakers, presenting to the audience general subjects – the most successful DRBF Annual International Conference at that time - to the most interactive event – workshop and conference – that you can imagine, with many excellent professionals, both at the speakers desk and in the audience – true brain storming about How To Use The Dispute Boards, where every participant had the opportunity – and almost all took the advantage of it - to intervene, comment, expose his or her ideas and check if their opinions were correct or not.

Very experienced speakers and beginners, all received very good rates in the evaluation forms from the attendees: the subjects and speakers, as well as the organization of the event at the same very suitable hotel – Novotel, downtown Bucharest, close to everything.

Bine ati venit / welcome / marhaban / benvenuto / willkommen / soyez les bien venue / powitanie / yōkoso in our trip through the world of Dispute Boards!

I am grateful to the distinguished panel of speakers (in the order of appearance): Paul Taggart, Ramy Ihab Naguib, Bruno Gomart, Augustin Purnus, Nigel Grout, Alina Oprea, Kamal Adnan Malas, Bogdan Oprea, Augustin Purnus, Volker Jurowich, Andrei Oprea, Laurentiu Plosceanu, Florin Niculescu, Krzysztof Woznicki, Imad Al Jamal, Crenguta Leaua, Zeno Sustac, Marcello Viglino, Edward Corbett, Solange Iana and Nabil Abbas who have agreed to prepare interesting presentations for us all to discuss and improve our knowledge and experience, with no other reward than the satisfaction of spreading the word about useful and interesting things that will help improve the professionalism of each of us and the construction industry in Romania, in the region and worldwide.

On 6 and 7 October 2011 we talked about HOW TO USE DISPUTE BOARDS.

In the very interactive event, the “official” speakers and the speakers from the audience discussed about the Dispute Board concept within the frame of various Alternative Dispute Resolution methods, about the value of Dispute Boards, risk allocation in contracts, claims and disputes, and basic background on Dispute Boards – where they come from, how they function, how disputes should be presented to the DB for opinion, recommendation or decision. We talked about how and when to choose and nominate the Dispute Board members, and how to use Dispute Boards in the most efficient way – about site visits, preventing disputes, asking opinions, recommendations and decisions, what to do in hearings, what to do after receiving the opinions, recommendation or decisions; we also discussed the legal issues related to claims, disputes and Dispute Boards, and, finally, about being reasonable and elegant within the contractual relationship.

We also had plenty of networking opportunity. I find there are never enough breaks to fully meet everyone and continue the discussions from the sessions, but we did our best. We had also an exciting and tasty gala dinner in the Foyer of the meeting room on Thursday, 6th of October, in the evening, and after the conference, on 7th of October, we went at the restaurant “Vatra”, in a walking distance of the conference venue, where we tasted delicious Romanian traditional dishes and watched genuine dances from different regions of Romania – each Romanian participant took the opportunity to tell about Romanian traditions to his or her neighbours from other countries – we counted 7 nations these in that evening...

Multumesc / thank you / şukran / grazie / danke / merci / dzięki / kانشa to all the participants to the 3rd DRBF Bucharest Regional Conference, 6-7 October 2011, old and dear friends or new friends! Hope that the excellent memories will make you all spread the word and come, together with your colleagues and other professionals, to the next DRBF Bucharest Regional Conference, which will be held in 11-12 October 2012.

I am waiting you with great pleasure.

Sincerely yours,
Alina Valentina Oprea
Conference Chair
DRBF Country Representative for Romania
DRBF Region 2 Director
<http://sites.google.com/site/alinavalentinaoprea>

DRBF 15th Annual Meeting & Conference Report



Conference participants gathered for a photo greeting to send to last year's conference chair, Jim Brady.

By Roger Brown

Our home office in Seattle, Washington, rolled out the red carpet for the DRBF's 15th Annual Meeting & Conference.

The Pacific Northwest is the birthplace of the DRB process, and as such has a rich history of interesting and successful programs that use the process. It was a unique opportunity to spotlight the DRB application in vertical construction, as well as review some of case studies within the underground sector.

Preceding the conference, experienced trainers Kurt Dettman and Eric Kerness presented the Administration & Practice Workshop to those new to the process. The Advanced/Chairing Workshop was held in the afternoon, for those seeking to learn the ins and outs of serving as Chair on a DRB with Doug Holen and Roger Brown as co-trainers.

The conference kicked off with a presentation on DRBs in the vertical construction industry by Eric Smith of the University of Washington Capital Projects Department. Tony Toppenberg, Chief Estimator for Turner Construction, walked us through Building Information Modeling (BIM), a new technology that is proving to be an asset to project communications. Then Dave Marberg, Senior Construction Manager at University of Washington with a degree in theater, entertained the audience with informational and enlightening Mock Meeting between a DRB panel and the parties. This presentation focused on a real project where a large potential dispute was resolved with the DRB assisting in proactive communication and problem solving amongst the parties thus avoiding any formal issues coming to the DRB.

At lunch, Seismologist John Vidale gave an interesting look at the science of earthquakes, the challenges in predicting them, and legal problems facing the seismology community.

The afternoon sessions offered profiles of some major infrastructure projects, the Niagara Tunnel by Ernst Gschnitzer and an update on the Panama Canal from Romano Allione. Dan McMillan chaired a thought-provoking, interactive discussion on ethical challenges facing DRB members. The first day

concluded with a panel of speakers from various state Department of Transportation agencies chaired by Transportation Committee Co-Chair Eric Kerness. Veteran users and those just embarking on a DRB program exchanged ideas and experiences.

The second day of the conference brought presentations on the spread of the DRB process in Canada by DRBF Country Rep Gerald McEniry, and a look at experiences and innovations being developed in Australia by DRBA member Graeme Easton. DRBF President Volker Jurowich explained the use of the process in various regions of the world, with a special emphasis on the impact of FIDIC and ICC Rules.

Beautiful weather and unique attractions lured delegates to come in early or stay a few days to enjoy the Pacific Northwest. Optional events included a fascinating tour of the Boeing manufacturing plant on Thursday, where conference attendees saw the revolutionary new Boeing 787 Dreamliner in production, and the first plane sitting on the tarmac awaiting deliver to Al Nippon Airlines the following Monday. On Saturday afternoon and Sunday morning, tours of the University of Washington Tacoma Campus and a Sound Transit tunnel gave participants an insider's look at interesting projects by user's committed to the DRB process. Both received very high marks of appreciation from the participants, and we extend our thanks to our hosts.

As usual this annual event would not be possible without the hard work throughout the year in preparation by the DRBF staff, Lori Jenkins and Steve Fox in the Seattle office, and Ann McGough currently living in Connecticut.

Plans are already underway for next year's Annual Meeting and Conference in New York, New York. If any of you have ideas on what you would like to see on the agenda for New York please contact Committee Chair Eric Kerness Eric@kerness.com with your ideas. The DRB process is in use on some impressive projects in the city, and with new projects always being planned, we hope to introduce some new users to the process. Please mark your calendar for Sept. 29-30, 2012 and make plans to joins us!



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Graeme Peck Receives 2011 Al Mathews Award for Excellence

Graeme Maxwell Peck is recipient of the 2011 Al Mathews Award for Excellence for his outstanding and valued service in the promotion of Dispute Boards in the Construction Industry. Graeme has been a leader within the Australian construction community for more than four decades. He served for 14 years as Engineering Director at Pearson Bridge Pty. Ltd. Graeme is a founding partner of the international engineering consultancy firm, Evans & Peck, and served as Managing Director and Chairman until his retirement. He has contributed widely to the construction industry as a Visiting Fellow and Professor at the University of New South Wales; as a committee member and NSW President of the Australian Federation of Construction Contractors (now the Australian Constructors Association); and as the author of numerous papers on a variety of construction management topics. Graeme was recognized in 2004 by the Australian Constructors Association with the “Outstanding Service to the Australian Construction Industry” award.



Graeme has been an active and committed member of DRBF for many years and a driving force behind the establishment of the Australasian chapter (DRBA) in 2003. Graeme was the DRBA President from 2005 to 2009, serves on the DRBA Executive Committee as Past President and is Chair of the Organizing Committee for the 12th International Conference in Sydney in May 2012. In all his career roles, Graeme has promoted the DRB concepts of open and honest dealings, which are cornerstones of our DRB Foundation philosophy. We look forward to Graeme continuing his valuable participation and support towards the DRBF achieving its purposes and objectives!