



# Forum

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NOVEMBER 2009

## Initial Decision Maker = Dispute Review Board

By David Neagley, AIA, Architect

### Now the Owner and Contractor Can Choose the Initial Decision Maker

The American Institute of Architects contract documents now include a new dispute resolution concept in Section 15.2 of the 2007 AIA Document A201 “General Conditions of the Contract for Construction.” For the first time, this allows owners and contractors who use AIA documents for their building projects to select a third-party neutral to serve as the “*Initial Decision Maker*.”

### The Architect Has Traditionally Been the Initial Decision Maker

In previous versions of the AIA documents this role was filled by the architect, who is well-suited to serve as the Initial Decision Maker by virtue of familiarity with the project and knowledge of construction.

The architect’s ability to serve as a *neutral* Initial Decision Maker in disputes between the owner and contractor can come into question, however. The owner unilat-

erally selects the architect, and the owner alone pays for the architect’s design and contract administration services, creating circumstances of real or perceived bias. The architect can also be placed in conflict if asked to make an impartial decision regarding a claim that errors or omissions might exist in the design documents, or allegations that the architect has not responded in a timely manner to contractor requests.

The 1997 version of A201 was phased out in May, and the new A201 document calls for a *third-party neutral* to be named as the Initial Decision Maker (or “IDM”), in lieu of the architect, to make preliminary decisions regarding disputes between owner and contractor. This relieves the architect from this role, but the AIA Documents do not explain who should serve as the Initial Decision Maker, or who is to select and pay for the IDM’s services. It is unclear whether the IDM should be a design professional, a general contractor, a lawyer, a scientist, or something completely different.

*(continued on page 7)*

“...the more conflicts that a project is likely to have, the more beneficial the DRB process will be. Projects with built-in uncertainties that need to be resolved “on the fly” such as renovations and additions to existing structures, or buildings incorporating extensive utilities such as hospitals and research facilities, will have significantly fewer claims upon completion if they include a DRB.”

In this issue of the Forum	
INITIAL DECISION MAKER = DISPUTE REVIEW BOARD	1
DRBF UK MEETING	6
ETHICS IN TODAY’S WORLD OF DRBs: BOARD MEMBER INSISTANCE ON FAIRNESS REVISITED	12
DRBF ANNUAL MEETING AND CONFERENCE REPORT FROM HOUSTON	14
DISPUTE BOARD WORKSHOP - BANGKOK	16
FIRST DRBF REGIONAL CONFERENCE IN BUCHAREST	18

# President's Page



The Foundation is moving forward to implement the revised structure outlined in the in the 10 Year Plan drafted in 2007. The revised Foundation bylaws have recently been approved by the members; the purposes and objectives remain substantially unchanged, and the organization structure has been modified according to the plan approved by the DRBF members.

As you know, the Region 1 includes US and Canada, Region 2 the rest of the world with the proviso to establish further regions when the conditions allow. Region 1 and Region 2 have both been fully operational since October 2008.

The DRBF Annual Meeting and Region 1 Conference was successfully held in Houston, Texas with good attendances at the workshops and conference. The Region 2 London conference was held in May 2009 and was also successful with close to 150 participants. A conference organized by the Romanian chapter was just held in Bucharest on October 30<sup>th</sup> and 31<sup>st</sup> 2009 with more than 100 delegates.

An Affiliation Agreement between the DRBF and Region 2 will be signed soon to define the permanent relationship between the DRBF and the Region.

Some very positive results of the revised organizational structure can be seen in the increased membership figures, the training programme, the contacts with various entities, and the sponsors of our events.

All the above activities have been made possible by the dedication of the organizing committees and by the DRBF support staff; I must commend all of the contributing persons for their efforts which resulted in successful events.

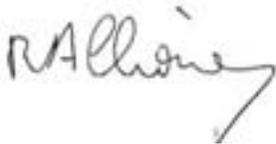
The DRBF will continue to move forward with the training of the participants to the process and increase the contacts with owner organizations, engineering companies and international financial institutions to further promote the proper use of the DRB/DAB process from the inception of the projects.

The Region 1 President Kerry Lawrence will, inter alia, maintain the push to have the DB concept imposed for the infrastructure works included in the "stimulus package" in USA and in "market outreach." The Immediate Past President, Jim Brady, will not only keep his duty as DRBF Board Member, but he will also lead the organizing committee for the 2010 Annual Meeting & Region 1 Conference which will take place in Charleston, S.C., USA October 1-3, 2010 (please lock in the date in your diary).

The International Conference , the primary Region 2 conference , will be held in Istanbul from May 14-16, 2010, and the organizing committee is well into the finalization of the programme and of the logistics. Istanbul is a wonderful city with culture and history popping up at any street corner. It will also be a good opportunity for many Region 1 members to visit the old continent and maintain contacts. The venues of future conferences in 2011 and 2012 are also being selected so as to allow the organizers and the members to make medium term plans.

You can see that the DRBF is alive and proactive, we shall not only maintain, but also increase the momentum particularly in training to keep contributing in preventing and resolving disputes, in few words to keep complying with the DRBF motto "Fostering Common Sense Dispute Resolution Worldwide."

Sincerely,



Romano Allione  
President, DRBF Executive Board of Directors

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Joe Sperry, PE, Founder, Honorary Director

The Executive Committee meets monthly. Recent topics have included:

- Finalization of the revised bylaws
  - Establishment of a budget and focus for the Outreach/Marketing Committee
  - Identification of locations for future conferences and workshops
  - Discussion of the formation of Region 3
- ...and more!

Summaries of the 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.drb.org](http://www.drb.org). Click on the **Member Login** button, and then click on **DRBF Board of Directors**.

## Executive Board of Directors Meeting Schedule:

December 18, 2009 by conference call  
January 15, 2010 by conference call

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Questions for the Executive or Regional Boards should be addressed to the Board Presidents, care of:

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Email: [info@drb.org](mailto:info@drb.org) Web: [www.drb.org](http://www.drb.org)

## Other News

### Chambers Recognizes Brazilian Law Firm At Awards for Excellence Ceremony in Miami

DRBF member Júlio César Bueno is pleased to report that his firm, Pinheiro Neto Advogados, received two distinguished awards from Chambers and Partners: “Latin American Law Firm of the Year 2009/2010” (the first time a Brazilian firm has won this award) and “Brazilian Law Firm of the Year 2009/2010.”

The Chambers Latin America Awards for Excellence were held at the Ritz Carlton in Miami, Florida on November 4, 2009. The awards recognize outstanding law firms and lawyers from across Latin America, as well as international firms operating in the region.

In giving the award, Chambers and Partners said Pinheiro Neto Advogados is “a firm that demonstrates outstanding capability across many areas of practice, a firm that offers the highest quality from all its lawyers from the most senior partners to the associates. It is a firm that can be relied on to engage actively and tirelessly on behalf of its clients and which has consistently shown itself to be of the highest caliber.”

Congratulations to Mr. Bueno and his colleagues at Pinheiro Neto Advogados. □

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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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### Forum Editorial Deadline

Our readers love to hear DRB success stories, challenges facing the process, and the latest industry news and events from around the globe. If you have new information about DRBs, DRBF members, or an article to share, please tell us! Contact Forum Editor Ann McGough by email at amcgough@drb.org.



*Deadline for the  
February issue is*

**January 1, 2010**

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Murray Armes

# Country Representative Reports

DRBF Country Representatives work throughout the year promoting the process in their regions. The following reports summarize work over the past year and touch on future prospects. Contact information for each representative is available on the DRBF website. For more information about the program or to express an interest in becoming a Country Representative, contact coordinator Paul Taggart at ptag1956@aol.com.

## Sri Lanka - Tilak Kolonne

The construction industry provides a significant contribution to the Sri Lankan economy. The industry absorbs large amount of local and foreign funds, provides significant employment opportunities and is involved in imports of construction materials and equipment. Most of the current construction projects going on in Sri Lanka are civil engineering and infrastructure development projects such as roads, water supply, drainage and power plants, funded by various agencies such as World Bank, ADB, JBIC, and JAICA. The proportion of building projects is relatively low when looking at the construction industry as a whole and the reason for is found in the current credit crunch experienced by many economies around the world. However, the number of housing projects including condominium developments is not that small particularly with the increasing demand for housing.

There are many contracting firms, consulting firms and other construction professionals who have been established and engaged in the industry. The government of Sri Lanka being the client for most of the infrastructure developments effectively controls the current scenario in the industry, however a handful of private clients are also emerging especially in the area of property development.

With the conclusion of the armed conflict that had lasted for about three decades, Sri Lanka is now seen as a safe and sound place for local and foreign investments and for tourism. The construction industry will benefit from such investments in the near future.

The construction industry in Sri Lanka mainly falls within the purview of four ministerial portfolios of the government of Sri Lanka. The employer and the contractor for a project normally enter into a contract,

which sets out their respective rights and obligations. In Sri Lanka, contract law is richly influenced by the English legal system and construction contracts are mostly in writing and properly documented especially for construction projects of high values.

When it comes to dispute resolution in the construction industry, arbitration and litigation were the only methods available until about 2002. Then, the government introduced a series of standard forms of contract, named Standard Bidding Documents (SBD) based on which the construction contracts can be drafted. There are four types of Standard Bidding Documents, each of which the government has recommended for contracts of different value or nature, as stated below:

- Standard Bidding Document for minor contracts – ICTAD/SBD/03 – Contracts up to Rupees 10 million
- Standard Bidding Document for procurement of works – ICTAD/SBD/01 – Contracts between Rupees 10 million and 150 million
- Standard Bidding Document for Major Contracts – ICTAD/SBD/02 – Contracts over Rupees 150 million
- Standard Bidding Document for Design and Build Contracts - ICTAD/SBD/04 – Design & Build Contracts  
(114 Sri Lankan Rupees = 1 US\$)

A significant common feature found within these documents as compared to the previous documents published is that there is a provision which makes adjudication compulsory before trying the disputes by arbitration. The arbitration proceedings are governed by a law which is the Arbitration Act No. 11 of 1995. A piece of law which is still under preparation is Construction Industry Act where adjudication is being recognized as a method of dispute resolution.

*(continued on page 22)*

# DRBF UK Meeting Report

By Murray Armes, UK Country Rep.

On Wednesday 9 September 2009, about 50 delegates assembled in London for the second DRBF UK Meeting. Last year the event was called the UK Member's Meeting but because a high proportion of delegates came from abroad it was decided to drop the reference to UK members this year. The other reason for doing so was because efforts had been made to invite some non members in the hope they found the meeting enjoyable and informative and would therefore join the DRBF. Only time will tell if we were successful in that.

This year most of the delegates were from the UK but we had delegates from four other countries: Sri Lanka, Italy, Spain and the Netherlands. A special thank you to them for travelling to the event.

The theme of the meeting was Dispute Avoidance. Rupert Choat of CMS Cameron McKenna started the meeting with a talk about what was and what was not a dispute, so that we would know what to avoid. In the UK there is a body of case law about what is and what is not a dispute. I am not sure if other countries define disputes in the same way, but Rupert left us in no doubt where we stood if we had one in the UK.

Murray Armes of Probyn Miers reviewed dispute avoidance techniques. He emphasized that disagreements can be constructive and may lead to innovation, but when a disagreement touches upon a parties' interests that is fertile ground for a dispute. He then went on to describe how dispute avoidance can be encouraged through both management and non escalation and some ideas about how dispute avoidance can be used proactively on any project.

Martin Barnes then gave a talk about how project management can be used to help avoid disputes. He also spent some time reviewing the methods being used on the 2012 Olympics project and in particular the use of the Independent Dispute Avoidance Panel.

Adrian Hughes QC provided a review of how the courts encouraged and supported the use of ADR, which in turn could lead to dispute avoidance. Peter Elliott gave an insight into how tender documents can be designed to help avoid disputes during the post contract stages of a project and also reviewed some court cases in connection with tender procedures and reminded us of some ways in which to avoid disputes over the ways projects are tendered.

The final talk was by Simon Delves of Shad-bolt Law, about how dispute boards can be used to promote dispute avoidance. Simon made what I think is a very valid point - whilst we train DB members to be adjudicators, we do not do much training in dispute avoidance. Perhaps that is something the DRBF could provide for its members.

The whole meeting was chaired by Tony Bingham of 3 Paper Buildings. Tony did a magnificent job in keeping the meeting roughly to time despite the best efforts of some of the speakers (including me!) to overrun. Tony chaired a lively debate at the end of the meeting and a new term "Disputamania" was developed for the trend that seems to support the way in which most disagreements in construction projects develop into disputes. Disputamania also has its followers, known as "Disputamaniacs" which probably applies to much of the dispute resolution industry, with the exception of most dispute board members of course!

The event was hosted by CMS Cameron McKenna and on behalf of the DRBF I thank the partners and staff for the excellent facilities and hospitality.

The feedback indicates that delegates enjoyed the event and thought it and the speakers were of high quality. There is certainly a demand for an annual event, however, these events do not organize themselves so if anyone has ideas for the next meeting, or better still would like to help, then do please get in touch with me at [marmes@probyn-miers.com](mailto:marmes@probyn-miers.com) - your help will be very welcome.

(continued from page 1)

**A Dispute Review Board Can Serve As the Initial Decision Maker**

Fortunately for the construction industry, there is a *well-established third-party neutral* available to serve as the Initial Decision Maker. The Dispute Review Board concept has been successfully used on thousands of construction projects since the early 1970’s, earning a reputation for assisting even the most difficult projects to completion without ensuing acrimony or lawsuits. Initially employed for heavy engineering construction projects such as tunnels, dams and highways, the DRB process has more recently been applied to “vertical” construction projects.

Many different types of buildings have had great success utilizing the DRB process. These include institutional projects

at colleges, universities and high schools, hospitals, prisons, justice centers and museums. Large assembly facilities have also benefitted from incorporation of a DRB, including stadiums, convention centers, airports and transportation terminals. DRB’s have also been employed for office buildings, parking structures and high-rise towers, and for historical renovation projects.

In fact, the more conflicts that a project is likely to have, the more beneficial the DRB process will be. Projects with built-in uncertainties that need to be resolved “on the fly” such as renovations and additions to existing structures, or buildings incorporating extensive utilities such as hospitals and research facilities will have significantly fewer claims upon completion if they include a DRB. Other buildings that benefit from *the confidence*



The **William H. Foege Building** is a 265K square foot, \$150M genome and bioengineering facility at the University of Washington, completed in 2006. Designed by CO Architects (then Anshen+Allen Los Angeles), built by Hoffman Construction, and funded in large part by a \$70M gift from the Bill and Melinda Gates Foundation, this construction project benefitted from the involvement of a capable Dispute Review Board. © Lara Swimmer Photography

-boosting presence of a DRB include fast-track projects, design/build partnerships, and buildings that utilize new materials or innovative design concepts.

The good news is that it is not necessary for the owner, contractor and architect to invent a new entity to serve as the new role of IDM, nor do the owner and contractor have to evolve new rules, guidelines, contracts and procedures. The DRB process is time-tested and ready to implement, with proven contracts, a long history of success, and a standing body of practitioners with construction knowledge and dispute resolution training.

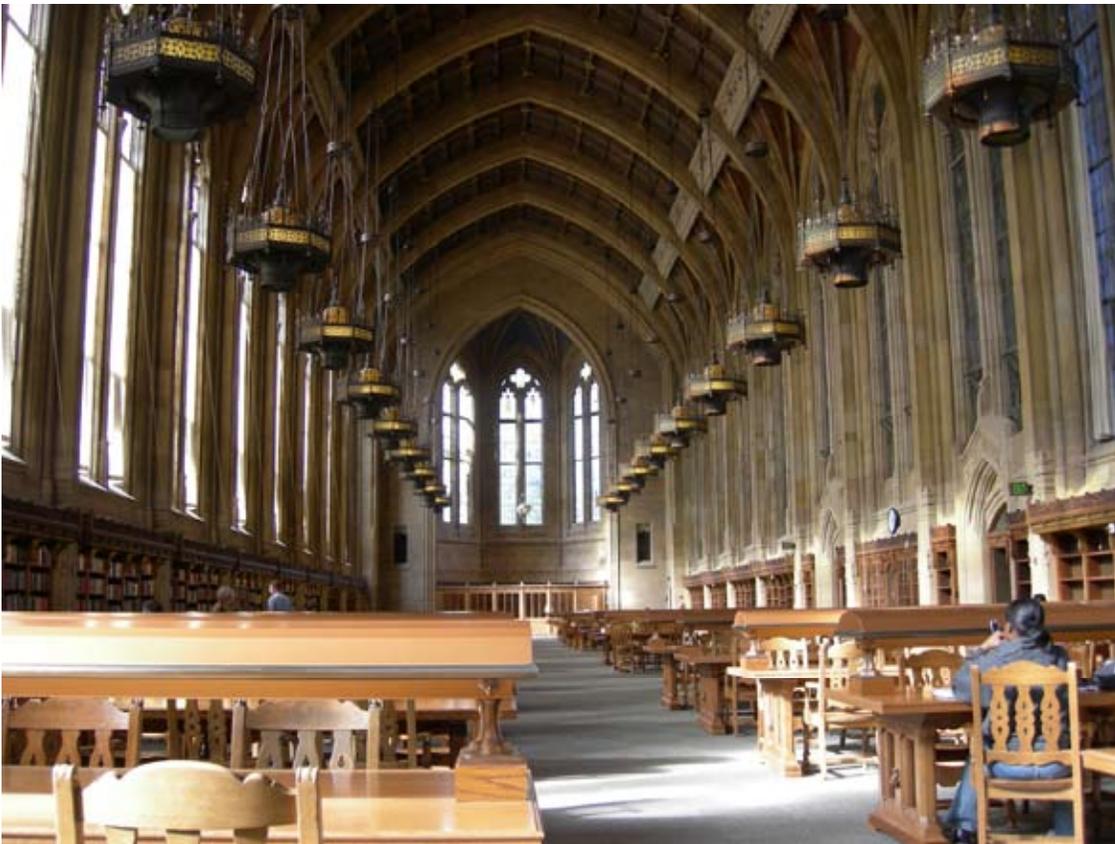
*Start by adding a clause to your contract to identify a Dispute Review Board as the Initial Decision Maker, in accordance*

*with the Dispute Review Board Foundation Manual (available at [www.drb.org](http://www.drb.org)).*

**A Dispute Review Board is Actually the *Ideal* Initial Decision Maker**

Use of a DRB ensures that the Initial Decision Maker will be neutral because the DRB members are typically selected by both the owner and the contractor, with the cost shared equally. DRB members are not only trained to serve as neutral parties, but many are also routinely entrusted to serve the construction industry as arbitrators and mediators.

The written recommendations of a typical DRB are not binding, allowing the owner and contractor to proceed to mediation, arbitration or even litigation if the DRB



The **Suzzallo Library** is a historic four-story Gothic structure built in 1926 on the University of Washington campus. A \$45M seismic retrofit designed by Cardwell/Thomas & Associates (with planning by Mahlum Architects) and built by Turner Construction was underway with new seismic bracing only 60% complete when the Seattle earthquake hit hard in 2000-02, shifting portions of the building. A Dispute Review Board was in place due to the complexity and unknown aspects of renovation work, contributing to the success of this project. Photo by Joe Mabel

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recommendation is not mutually acceptable. DRB recommendations are often admissible in any subsequent mediation, arbitration, or litigation, however, and these forums have traditionally placed great reliance on the findings of the DRB.

Additionally, a long history of use has shown that the recommendations from a DRB are usually found to be appropriate and acceptable by the parties, and rarely do these carefully considered and fair results lead to an additional dispute resolution process.

**A Dispute Review Board is Also the *Ideal Construction Partner***

Construction is an inherently complex and difficult enterprise, and it would be unusual to complete any large construction project without disputes arising between the parties. Dispute Resolution Boards provide the ideal process to settle these disputes *as they occur*, rather than allowing conflicts to simmer until the project has either ground to a halt or been completed.

Several remarkable *collateral benefits*

result from the use of a DRB. Defusing potential for the construction partners to become litigation opponents allows the contractor and owner to work more effectively as a team, with substantially less friction and discord. The need for a contractor's "litigation contingency" is removed, and insurance costs can often be reduced. With a trusted DRB resource regularly available to review *potential* issues, the parties tend to "bring problems to the table" rather than denying their existence or covering them over, allowing things to be resolved earlier and more easily. And with a successfully completed project behind them, the owner, contractor and architect tend to want to work together again, confident in their proven ability to manage difficult issues without resorting to battle.

**About the Author:** David Neagley, AIA is a forensic architect, contractor, mediator and arbitrator based in La Jolla, California, and started the Vertical Construction DRB Group. Presenting at the 2009 DRBF Conference in Houston, Texas, he documented over 140 "vertical" construction projects that have had success avoiding construction claims by incorporating the DRB process.

***Get Involved!***

There are many ways to become involved in the DRBF. Join a committee or become active in local efforts through a regional chapter or by contacting your US Regional or Country Representative.

Complete contact information for all committees, chapters, and representatives is available on the DRBF web site:

**[www.drb.org](http://www.drb.org)**

# WELCOME TO NEW DRBF MEMBERS

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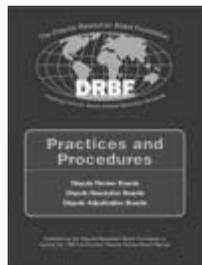
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***DRBF Practices and Procedures***  
**Dispute Review Boards**  
**Dispute Resolution Boards**  
**Dispute Adjudication Boards**

The Dispute Resolution Board Foundation publishes the *DRBF Practices and Procedures* Manual, making it available for download free of charge on the web site. Bound copies are available for purchase online. Copies are \$40 for DRBF members and \$60 for non-members. Visit the Manual section of the DRBF web site ([drb.org](http://drb.org)) to learn more.

***Have an idea or question for the Manual Committee?***

The DRBF Practices and Procedures Manual is an authoritative and up-to-date explanation of the dispute board process. Because the process is continuously developing, the format has been tailored to allow it to be updated as necessary. Help the Manual expand by sharing your ideas and input with the Manual Committee: [info@drb.org](mailto:info@drb.org).

# Ethics in Today's World of DRBs: Board Member's Insistence on Fairness Revisited



By Jim Phillips Ph. D.

It was so good to see many of you in Houston at the Annual Meeting and Conference. I saw old friends and made many new ones. Many of you gave me very positive feedback about

this column and the issues I write about. Its always rewarding to hear that members of the Foundation are not only thinking about ethical issues as a priority, but are agreeing with the majority of my opinions, as we all work to provide quality service to the construction industry in our respective roles as problem solvers and dispute resolution professionals.

As I indicated in my remarks in Houston, I see ethical practice in DRBs as practice that puts the relationships between the contracting parties, as well as between Board members, as the first priority. If we as members of this Foundation can view our work as trusted professionals who are invited to participate in a project to provide an extremely valuable service, which requires our total commitment to the interests of the parties, the contract between them and the work of the project, many of the ethical challenges discussed here will most likely never arise.

It is not by accident that the Foundation's Code of Ethics is short and concise. While many professions have extremely long and complicated codes of ethics, the legal and medical professions come to mind, our Code is extremely succinct. As I said in Houston, the five DRBF Canons basically ask us to put the project's relationships between the owners, contractors and subcontractors, both contractual and interpersonal, first. As I will discuss later in this column, I think that by so doing, the Code also asks us to put the relationships between Board

members above our own individual professional and financial interests as well.

The Code asks us to be impartial and to disclose any financial or contractual interests that may affect our impartiality. It asks us to avoid any appearance of impartiality, which might give any party pause as to our neutrality. Finally, it asks us to conduct ourselves, the meetings and the hearings during the life of the project in a fashion that respects the contractual relationships between the parties. I think this means being responsive in a timely fashion to the parties' requests for hearings, reconsideration or clarification, conducting meetings in a manner that is least disruptive to the ongoing work and conducting hearings in a manner that allows all parties full and comprehensive opportunities to present their positions and arguments to each other and to us as Board members.

At the risk of Ralph Ellis accusing me, as he did in Houston, of "preaching a sermon," I am confident that most Foundation members understand all of this and are ordering their activity accordingly. However, one member in Houston admitted to me that it takes only one bad example of unethical behavior to cause criticism to be lodged against the DRB process and its professionals.

As I mentioned above, the relationships between DRB members is also worthy of examination. I will devote a future column to a discussion of how maintaining good Board member relationships can inform ethical practice and decision making as it relates to the operations of the DRB on a project. The question I posed in the last issue of the Forum speaks to this to some extent. In that scenario, two DRB members were faced with the following dilemma: the third Board member

insisted on writing minority recommendations to the parties based on fairness considerations outside the four corners of the contract documents.

Canon 5 of the DRBF code of Ethics provides that the Board's reports and recommendations shall be based solely on the provisions of the contract documents and the facts of the dispute. Typically, this limits the board's authority to bases its recommendations on what the contract allows in terms of how certain contract and performance issues might be resolved. If a Board member continuously refuses to comply with the contract language, serious repercussions can ensue.

Section 3.7.2 of the Foundation's Practices and Procedures speaks to this issue as well. That section provides that "[i]t is essential that all recommendations be based solely on the provisions of the contract, the facts of the dispute and [, if appropriate,] applicable laws and regulations. Any recommendation that is not consistent with contract language, facts, and circumstances of the dispute will likely undermine the credibility of the DRB."

Section 3.8 also provides relevant language to be considered. This section discusses the issue of Board member resignation in certain circumstances. "If the DRB concludes that one of the members is an obstacle to the dispute resolution process, the member in question should resign for the benefit of the project." This issue of resignation is a very important issue. In our scenario, if the two DRB members are convinced that the third member is not going to discontinue writing recommendations based on fairness principles, that member may be deemed to be an obstacle to the process.

The three members of this DRB, at the least, should have a candid conversation about their ongoing ability to perform their contractual obligations and attempt to resolve this issue together. If the third member can be persuaded that continuing to base recommendations on fairness principles is

undermining the DRB process, he or she may either decide to resign, or decide to discontinue this practice and return to the four corners of the contract. In any event, resignation from the DRB should be carefully considered from all viewpoints before that option is exercised because of the disruption to the process and the potential damage to many of the project relationships.

I encourage any of you to write to me with your thoughts about this, especially if you have personal experience in this very tough situation.

## **NEXT ETHICS CHALLENGE**

Assume that you are a DRB member on a project that has been under construction for two years. During one of the regular onsite DRB meetings, the contractor attempts to present a dispute for the DRB to hear and issue a recommendation. At first the owner objects, claiming that he has had no notice of the dispute, and therefore has had no opportunity to prepare a position in response, but then decides to move forward, saying "having another hearing is just going to be a waste of time for everyone."

### **What should the Board do?**

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#### **Ethics Commentary or Question?**

***Please contact:***

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# DRBF Annual Meeting & Conference

## Report from Houston

By Doug Holen, Chair, DRBF Annual Meeting & Conference Committee

The DRBF Annual Meeting and Conference was held on October 3<sup>rd</sup> and 4<sup>th</sup> at the Woodlands Conference Center just north of Houston, Texas.

Conference attendees were greeted by Romano Allione, Executive Board President and Kerry Lawrence, Region One Board President and thereafter treated to various “How To’s” including: How to Meet the Need for Speed with a Quick Draw DRB” presented by Rick Reed, Director of Coats Rose of San Antonio, “How to Write a DRB Opinion” presented on Sunday by Dr. Ralph Ellis, Associate Professor at the University of Florida, and “How to Screw up a Perfectly Good DRB.” The last “How To” was presented by Deborah Mastin, Counsel for the Miami Airport, and drew rave reviews from the conference attendees.

The group also heard from Texas State Senator Tommy Williams who provided an insight into the workings of the Texas Legislature and Texas politics which helped Lynn McDonald put the recent failure to enact DRB legislation in that state into perspective. The group also heard from Curtis Martin who described mediation and arbitration Texas style.

At lunch on Saturday, Wayne Crew, the Director of the Construction Industry Institute located at the University of Texas in Austin, gave attendees an insight into the operation of the Institute and the research it is performing for the benefit of the construction industry.

On Saturday afternoon, Dennis Largent from the Colorado Department of Transportation (CDOT) and Tim Maloney, Edward Kraemer and Sons Construction, provided an overview of the events leading up to the adoption of a DRB process by CDOT. Dennis outlined how CDOT developed its contract provisions and briefly discussed the success of the program to date.

Roger Brown then shared the results of his study of the differences between highway, tunnel and vertical construction DRB’s with the group and solicited comments from a panel that included tunnel, highway and vertical DRB practitioners as well as two representatives from the vertical construction industry, Tom Peterson VP and General Manager of Hoffman Northwest and Tom Gerlach Jr., Senior VP. Turner Construction.

David Neagley was given the assignment of making the final presentation before the close of the Saturday session. He performed admirably, capturing the attention of the audience despite the approaching cocktail hour, introducing a unique approach to marketing the DRB process. David presented an extensive compilation of photographs of completed vertical construction projects that had utilized DRB’s. David gave credit to the design and construction teams and provided the names of the DRB panel members involved.

On Saturday evening, conference attendees and their guests were treated to a Texas style BBQ served indoors (it rains in Texas) while Jim Brady presented the Al Matthews Award to two very worthy

recipients, Jack Feller and Dick Appuhn. Our thanks to all who participated in planning and participating in the conference and a special thanks to our sponsors, without whose support, the conference would not have been a success. See you next year in Charleston. □

After Dr. Ralph Ellis finished the presentation on “How to Write a DRB Opinion” on Sunday morning, James Phillips, Adjunct Professor of Law at the University of Richmond, led a discussion of Ethics in the World of DRB’s.

The highlight of Sunday morning’s session was the presentation by Jorge Quijano, the Executive Vice President for Engineering and Program Expansion of the Panama Canal Authority. Mr. Quijano provided an overview of the construction program at the Canal including the projects required for the construction of a new fourth lock. Conference attendees were given an insight into the Authority’s planning, acquisition and program management strategies and given an update on the progress of the Work. Mr. Quijano’s informative and entertaining presentation can be found on the DRB Foundation website and is certainly worth viewing.

The conference closed with an interesting and informative presentation contrasting Disputes Review Boards in the United States and Canada, Disputes Adjudication Boards in the United Kingdom and Disputes Adjudication Boards under the FIDIC Conditions of Contract provided by Kathy Barnes and Joe Guarino from Watt, Tieder, Hoffar & Fitzgerald, LLP.

The conference had been preceded by Administration & Practice Training and Chair Training Workshops on Thursday and Friday and by a companion event, a CLE hosted by the Andrews Kurtz law firm in downtown Houston, on Friday. Many of the conference attendees participated in these events as well.

## **DRBF Event Calendar**

The Dispute Resolution Board Foundation is hosts meetings and conferences throughout the year, as well as training workshops. Some workshops are private, in-house training for agencies using Dispute Boards, and others are stand alone or held in conjunction with a conference. New events are added as the dates are confirmed; visit the DRBF website for the most recent schedule.

**Training Workshop:  
The Allocation of Risk and  
The Duties and Resonsibilities of the  
Dispute Adjudication Board Under  
FIDIC Contract Conditions**

**May 12-13, 2010  
Istanbul, Turkey**

**10th Annual International  
Conference:**

**Construction Disputes  
at the Crossroads  
May 14-16, 2010  
Istanbul, Turkey**

**Northwest Regional Conference  
TBD  
Seattle, WA USA**

**14th Annual Meeting and  
Region 1 Conference  
October 1-3, 2010  
Charleston, SC USA**

**Visit [www.drb.org](http://www.drb.org) for details!**

# Dispute Board Workshop-Bangkok

## The Event

The first Dispute Board Workshop to be held in Bangkok, Thailand took place on 19 and 20 June 2009. The event was jointly organised by The Dispute Resolution Board Foundation [DRBF], The International Chamber of Commerce Thailand [ICCT] and the International Commerce in Paris, France [ICC].

The trainers for the workshop were John Papworth, a Chartered Arbitrator and practicing Dispute Board Member, who represented the DRBF and Calliope Sudborough, a qualified lawyer and the ICC Deputy Manager for ADR, Expertise, Dispute Boards and DOCDEX, who represented the ICC.

The two day event consisted of presentations by the trainers, case studies and practical demonstrations; the presentations included an introduction on the history, usage and various stages of a Dispute Board's activities from the appointment of the Board through to the referral of a dispute to the Board and the publication of the Board's decision; ethics, member selection and other relevant topics concerning the usage of Dispute Boards were also covered in these presentations. The case studies provided a valuable insight into the practical considerations when a Board is appointed and performing its duties and the workshops were both educational and, at times, amusing.

A total of twenty one participants took part in the workshop which was held at the Sheraton Grande Hotel in Bangkok. The participants consisted of developers, oil companies, owners of construction companies, quantity surveyors, contract administrators, arbitrators and, of course,

lawyers. The participants mostly came from Thailand but the several participants travelled from Sri Lanka, Singapore and Japan to attend the event.

The organisers of the event were able to keep the fees for the event to a minimum as a result of sponsorship from Thaivivat Insurance PCL and Siam Cement Trading Company (SCT). Only positive feedback was received from the participants on the event all of whom received a certificate of attendance issued jointly by the DRBF and ICCT.

## Dispute Boards in Thailand

Regrettably Thailand does not have extensive experience with Dispute Boards and to the best knowledge of the writer no Dispute Boards have been appointed in Thailand to date; however, there is obvious interest in Dispute Boards at grass roots level as evidenced by the success of the workshop despite the ongoing economic crisis and Swine Flu which no doubt prevented potential participants from attending the workshop.

Thailand, like many other countries, is trying to stimulate its economy with major infrastructure projects; the extension of the mass transit systems in Bangkok in one of the stimulus packages being put into effect by the Thai government. Much of the financing for these projects will come from major lenders such as The World Bank, The Asian Development Bank and The Japan International Cooperation Agency [JICA] who now require the use of Dispute Boards in the contracts they finance and potentially, unless otherwise agreed between the lenders and the Thai government, there is considerable scope for the use of Dispute Boards in Thailand in the near future.



Participants at the Dispute Board Workshop - Bangkok

The DRBF will be making approaches to the Thai government, lenders and contractors to offer its assistance both in an educative role and a practical role to ensure, where appropriate, Dispute Boards are used in a proper manner for the mutual benefit of the Thai government, the lenders and the contractors that are engaged to carry out the works.

For more information, contact Victor Smith LLM, Chartered Arbitrator and Thailand DRBF Country Representative at [vsmith@charndell.com](mailto:vsmith@charndell.com) or [www.charndell.com](http://www.charndell.com).

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Dr. Patricia Galloway and Dr. Kris Nielsen are members of the DRBF and serve on panels on the AAA and the ICDR.

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# First DRBF Regional Conference - Bucharest

By Alina Oprea, DRBF Country Representative for Romania

My dream came true: a DRBF conference again in Bucharest! The 2007 Annual International Conference of DRBF, which took place in Bucharest, created unforgettable memories. The interest in the dispute prevention and settlement is so big in Romania and the surrounding region that we had to have another DRBF conference here. But another one after only 2 years...? This had never happened before! The DRBF Annual Meeting is held in the US, and the International Conference moves to different countries each year... How to handle this?! Let's invent another kind of conference, we said: a regional one!



In addition, since the 2007 conference, **DRBF EurAsia** was formed for people in Europe and Asia – we are now 47 members strong, eager to spread the word about the benefits of using dispute boards.

We chose subjects of the greatest interest in the region for the two days event held 30-31 October 2009, a day each of training and conference: Dispute Prevention Techniques, Dispute Board Hearing – A Simulation, Balanced Contracts, Roles of the actors in dispute prevention: Engineer, Employer, Contractor, Using Dispute Boards – Why? Best Use/ Wrong Use of Dispute Boards, Presentations to Dispute Boards: How to do it; What to avoid; Lessons to be Learned, and Experience of Various Countries in Using Dispute Boards; Successful Use of Dispute Boards.

I am grateful to all who contributed to the success of the conference: Volker Jurowich, the President of DRBF Region 2, co-initiator of the regional conference idea; Jim Brady, the President of the DRBF; Romano Allione, incoming present President of DRBF; and Ann McGough, who, despite of being a mother of 4, or even because of this, is a very active and organized person, ensuring the logistics and other details – without her dedication and efforts our hopes and desires would not have come true into this conference. Committee members and session chairs who helped organize the conference include Volker Jurowich, Ann McGough, Bogdan Oprea, Murray Armes, Krzysztof Woznicki, Steven Fox, Dick Appuhn, Gwyn Owen, Jim Brady, Edward Corbett, Brian Totterdill, and Nicholas Gould. I am also grateful to the many talented speakers who generously shared their experiences (in the order of their appearance): Bogdan Oprea, Murray Armes, Florin Niculescu, Pierre Genton, Chris Miers, John Papworth, Malcolm Kelly, Enrico Vink, Krzysztof Woznicki, Marcello Viglino, Radu Baruta, Mircea Tenovici, Giovanni Di Folco, Oana Soimulescu, David Brown, Romano Allione, Nicolae Micu, and Vekoslav Korosek.

We also appreciate the support of FIDIC, and corporate sponsors Shadbolt Law, Soimulescu & Dragan-Costin and Techno Engineering and Associates. Last, but not at all the least, thanks to the 122 participants from 21 countries themselves – unexpectedly by many, and only hoped by me, a big number, without whom all our efforts wouldn't be worth much.

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The event itself and the subjects presented and discussed were very attractive for many people, who learned more about dispute boards, from the beginner users and practitioners, as well as the experienced ones. All of them were very satisfied about the opportunity to meet so many people involved in the area of disputes.

Delegates enjoyed Romanian food at the gala dinner and many had, with more or less surprise, “*a certain regard*” to the Romanian folklore entertainment, which reminded many that traditional music is very similar in many countries and regions in the world, underscoring the fact that we are not so different from others and we have a common heritage which deserves to be discovered and preserved.

Take a look at some of the participants’ comments we received about the First Ever DRBF Regional Conference, Bucharest, 30-31 October 2009:

“I have highly appreciated the presentations, the specific information and the interesting discussions we had...”

“DRBF should become a promoter/lobbyist toward funding agencies, politicians and other decision makers to make know DB principles. Thank you.”

“Very good.”

“First of all I would like to thank you for the opportunity to attend this event. I have learned many things and the only suggestion I have is that the subjects discussed at the workshop should have been submitted early to the participants for a deeper analysis of it.”

“Great content”

“It was extremely interesting and perfectly organized! We are definitely coming to Turkey...”

The result is that the participants want a similar event again in Romania, in the region and in the world.

“A surprisingly big success!” said the DRBF leaders, who agreed to organize this first ever regional DRBF Conference, but did not expect or hope such a big interest in it and such good achievement...

See you next time, at another exciting event!

Alina Oprea  
Conference Committee Chair  
DRBF Country Representative for Romania  
DRBF EurAsia Founder  
alina.oprea.v@gmail.com

## Dispute Boards Overview Presented at SCL Gulf Meeting in Doha

In October, DRBF Country Representative for Qatar, Wayne Clark, presented a talk on Dispute Boards to the Society of Construction Law (Gulf) in Doha. The event was well attended with over 100 guests. Two other papers were delivered on the Qatari Court process and the newly established Qatar Arbitration Centre. Feedback from the organizers and attendees was positive, and the local press covered the talk which brought further exposure to the topic. As a follow up, Mr. Clark will be contacting a range of local employers about incorporating DBs into their contracts.

A copy of the paper that was presented in Doha can be found in the **Library** of the DRBF website. Simply visit [www.drb.org](http://www.drb.org) and login to the member’s section, then click on the “Library” link found in the upper toolbar.

Wayne Clark is the DRBF Country Representative for Qatar. He can be reached at [wayneclark64@hotmail.com](mailto:wayneclark64@hotmail.com).



# Dispute Resolution Board Foundation 10th Annual International Conference

## “Construction Disputes at the Crossroads”

May 14-16, 2010

Marmara Taksim Hotel

Istanbul, Turkey

The Dispute Resolution Board Foundation's 10th Annual International Conference offers the latest information and ideas about the growing use of the Dispute Board process around the world. Sessions end in early afternoon each day to allow delegates to participate in group tours of this remarkable city. The optional Gala Dinner on Saturday evening is always a highlight of the International Conference.

### Conference Agenda

#### Day 1 Keynote Address

**Overview of Dispute Resolution in Turkey** - Moderator and four speakers representing Turkish contractors, employers, engineers, and construction lawyers. Round table discussion will be led by the moderator, directing questions to speakers concerning the following subjects before taking questions from the audience: (1) Traditional Methods in Resolving Disputes in Turkey & Problems Encountered; (2) Can the DB Concept Work in Turkey? If So, What Are the Future Expectations?

**Trends in Construction Dispute Resolution in the Region** - Moderator and four speakers from countries in the region. A second round table discussion on the following subjects: (1) Can a DB Member of Common Law Background be Effective in a Civil Law Country? Does the Answer Change if the Civil Law Country is One Where Sharia Law Exists?; (2) What are the Problems of Foreigners Seeking to Avoid Disputes in the Country of the Project? How Does the DB Concept Fit in the Region?

#### Day 2 Problems in Administering Resolution of Disputes

- The day's chairperson will preside over three tutor-led breakout sessions on the following topics: (1) Main Obstacles in Resolving Disagreements (considering typical actions which escalate normal disagreements into formal disputes); (2) Challenges of Operating Clause 20 of FIDIC Conditions; (3) Pathological DBs (considering actions which frustrate the effective use of DBs).

#### Day 3 Cost Control in Use of DBs

– Breakout session structure addressing the following issues: (1) Effective Use of the DB Process; (2) Document Control (use of party agreement on facts, use of common documents bundle); (3) Fair Hearing.

## **Training Workshop**

# **“The Allocation of Risk and The Duties and Responsibilities of the Dispute Adjudication Board Under FIDIC Contract Conditions”**

**May 12-13, 2010**

**Marmara Taksim Hotel  
Istanbul, Turkey**

The DRBF will present a two-day workshop in conjunction with its 10th Annual International Conference. This year’s workshop will address basic concepts of risk allocation in all standard FIDIC Conditions of Contracts as well as the handling of claims by the parties and the employer’s engineer/representative. Due to the ever increasing use of the Design-Build contracts by employer organizations both in the region and internationally, there will be emphasis on the use of the FIDIC forms for Plant and Design-Build and EPC Turnkey Contracts. The workshop will also examine the duties and responsibilities of the parties, the engineer/employer’s representative and the Dispute Adjudication Board to resolve the disputes that commonly arise under FIDIC forms of contract.

The first day will concentrate the delegate attention to (1) the common risk areas in traditional construction contracts with an emphasis on design and variation risks; (2) the operation of the claim and dispute resolution provisions of the contract and (3) the roles of the engineer and employer’s representative under the Design-Build and EPC forms.

On the second day, the workshop will turn attention to (4) the establishment of the Dispute Adjudication Board; (5) the adjudication process starting with informal advice and then procedures for obtaining DAB decisions and finally (6) the effects of DAB decisions under FIDIC standard contract forms.

This training event is co-sponsored by the DRBF and FIDIC and will be fully CPD and CLE accredited.

Conference and training workshop are open to all construction industry and dispute resolution professionals interested in learning more about the Dispute Board process with an emphasis on best practices and practical experience.

**Visit the Meetings & Conferences page of the DRBF website  
for updated information and registration details.**

## Country Representative Reports

*(continued from page 5)*

The government's financial regulations require all construction contracts (other than special projects) to which the government is a party to be based on the said SBD documents. This in turn makes adjudication compulsory as a method of dispute resolution for all such construction projects. In addition funding agencies encourage parties to incorporate an adjudication clause in to the contracts which they fund. Apart from that the modern trend is that the private parties do incorporate an adjudication clause in to their contracts. Thus it is quite evident that there is a growing demand for adjudication over arbitration or litigation than ever before.

However, amidst these circumstances it is regrettable to mention that the facilities and resources available for the development of adjudication and other alternative dispute resolution methods are very limited and more correctly not adequate at all. Only a handful of persons are adjudicators and most of them are not really trained for the job. Most of the dispute adjudication boards found in Sri Lanka are ad hoc, however, there are some instances where full-term adjudication boards are in operation. For example, one of the major on-going highway construction projects in Sri Lanka is Southern Transport Development Project, with three separate contracts and a full-term Dispute Adjudication Board (DAB) appointed in each contract. I am a member (Adjudicator) of the DAB of Contract (Package) 2. The project is jointly funded by ADB and JBIC.

There is no formal programme or course of study for the purpose of training construction adjudicators in Sri Lanka. Therefore, as an overseas trained adjudicator I am of the view that the practice in Sri Lanka has serious defects which needs to be rectified. The uplifting of the standards of adjudication and other alternate dispute resolution methods has become extremely important. I believe the target has to be achieved in an expeditious manner in view of the present and future developments and for the betterment of the construction industry in Sri Lanka.

### Switzerland – Pierre Genton

In addition to active participation at the DRBF workshop in London in May 2009, activities have been concentrated this year on meeting potential new members for the Foundation and on lecturing about the DB process at various conferences, including the DRBF Regional Conference in Bucharest and the ICC/FIDIC Conference in Istanbul. For over eight years part of my lecturing at the Masters Business Law (faculty of Law of Geneva/Lausanne) has been devoted to DBs. I am preparing a conference to be held on 21/22 January 2010 in Switzerland "Key Concerns of the Construction Industry and Tentative Responses," and one of the modules is "Key concerns in amicable and semi-amicable procedures." The Dispute Board approach will be tackled in this module by users and lawyers who have used DBs.

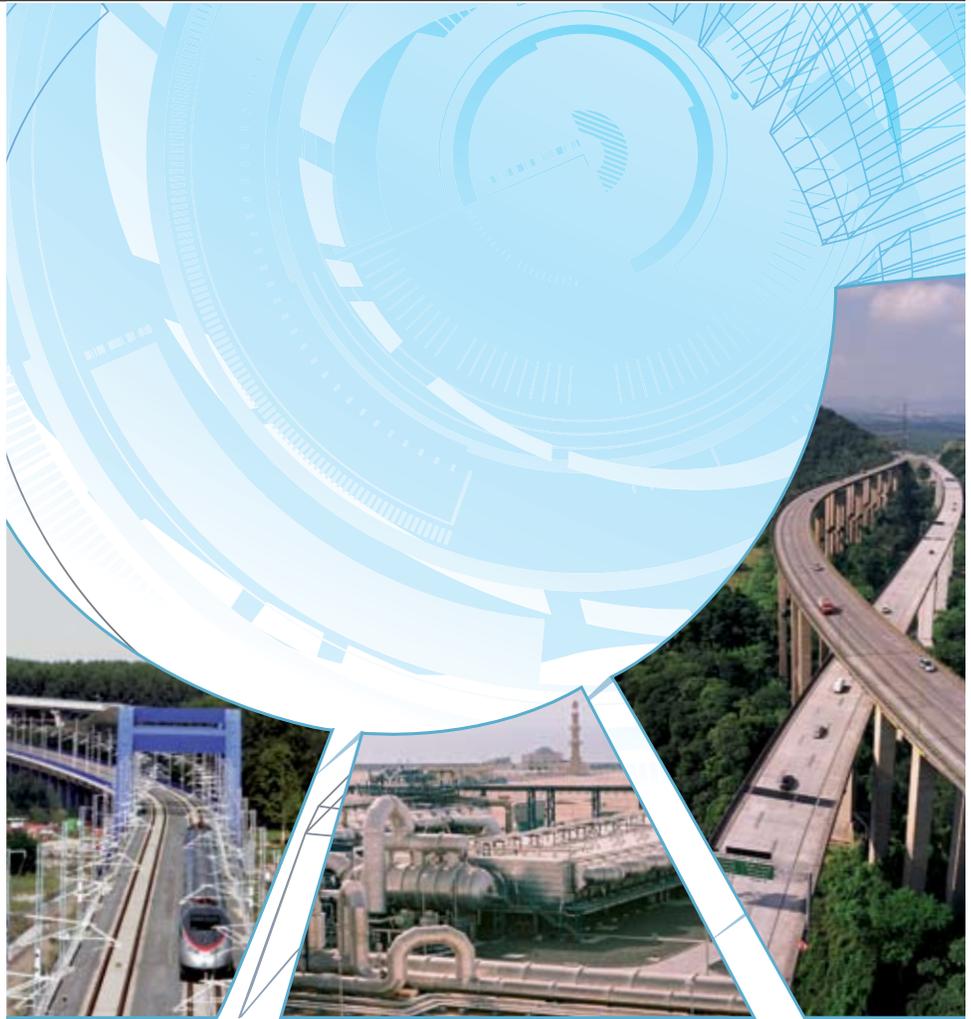
### Brazil - Gilberto José Vaz

There have been many opportunities to speak about the DRB process in Brazil; notably a Congress held in August 2008 with a panel called "Another path on the resolution of conflicts in the construction and infrastructure fields: Dispute Resolution Boards," promoted by the Brazilian Institute of Engineering (Instituto de Engenharia) and the International Conference of Arbitration, Infra-Structure and Construction, promoted by the Chamber of Arbitration CAMARB, with a panel discussing the use of Dispute Resolution Boards in October 2008. Most recently, I spoke on this theme in October 2009 in the Getúlio Vargas Foundation (FGV) in Rio de Janeiro, discussing the use of dispute boards in contracts involving the Public Administration and at an event about engineering contracts held in Belo Horizonte in November.

Looking ahead, the main activity will be in developing plans to host the 2011 DRBF International Conference in Brazil.

### Mexico – Herfried Wöss

The door has been opened for Dispute Boards through the reforms of the public acquisition and works laws as of May 2009 for all federal public works and PPPs contracts. The contracting community is



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*(Mexico, cont.)*

currently waiting for the necessary “general rules” in order to have Dispute Boards operating in Mexico.

In June I organized a two day conference on “Infrastructure Projects and Dispute Settlement” and speak frequently on dispute boards at meetings and conferences, such as the ICC Conference on World Bank financed projects held recently in Mexico City.

The Special Edition Latin America of

**Transnational Dispute Management** will contain an analysis for the new framework for arbitration and alternative dispute settlement (including dispute boards).

**Editor’s Note:** There will be more Country Representative Reports published in the February 2010 issue of the *Forum*. Contact information for all representatives can be found on the DRBF website. □



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### FOUNDATION FORUM

## *Jack Feller and Dick Appuhn Receive Al Mathews Award*

Each year, the Dispute Resolution Board Foundation bestows the **Al Mathews Award** to one or more members who have given exemplary service in advancing the use of Dispute Resolution Board concepts, and the DRBF. On October 3, 2009, DRBF members **Jack Feller** and **Richard (Dick) Appuhn** were recognized for their many contributions. The awards were given during a banquet held in conjunction with the DRBF 13th Annual Meeting and Conference in Houston, Texas. Congratulations gentlemen!



#### Past Winners of the Al Mathews Award include:

- 2001 Al Mathews
- 2002 Robert Matyas, Robert Smith, and Joe Sperry
- 2003 Jimmy Lairscey
- 2004 Jim Donaldson, Pete Douglass, Carlos Ospina, and Steve Fox
- 2005 Gordon L. Jaynes
- 2006 John Nichols and Peter H.J. Chapman
- 2007 William B. Baker
- 2008 Romano Allione and Harold V. McKittrick