



# Forum

VOLUME 14, ISSUE 2

MAY 2010

## Compatibility of Dispute Boards with Australia's Security of Payment Regime

There are several types of Dispute Boards:

- Dispute Review Boards: those derived from the United States model that provide non binding recommendations
- Dispute Adjudication Boards: those derived from the FIDIC model that provide an interim binding decision and may either be established at contract commencement ('standing Board') or only when a dispute arises ('ad hoc Board')
- Combined Dispute Boards: a hybrid of Dispute Review Boards and Dispute Adjudication Boards included in the ICC rules published in September 2004

This article concentrates on Dispute Adjudication Boards that are established and operate from about the time of contract commencement.

By Doug Jones and Graeme Peck

### Introduction

There appears to be an increasingly held view in certain areas that if there is a UK style statutory adjudication system in place, Dispute Boards are either incompatible with the regime and not able to be used or do not have any utility in the dispute management of significant construction contracts.

The Australian experience with the use of Dispute Boards against the background of a statutory adjudication regime modelled on that of the UK does not support this view. Instead, Australian practice demonstrates the ability of industry to overlook legal technicalities in favour of practical commercial considerations that take account of the real benefits available from a properly structured Dispute Board.

### *Australia's Security of Payment Regime*

In Australia, like many other jurisdictions, various pieces of legislation have been introduced in an effort to provide a measure of protection to contractors and subcontractors who have historically faced difficulties in obtaining payment from a party further up the contractual chain.<sup>1</sup> The introduction of statutory adjudication in most Australian states, through security of payment legislation, represents the latest legislative attempt of this kind.

Security of payment legislation was introduced in New South Wales in 1999, and Victoria, Queensland, Tasmania, the Australian Capital Territory and South Australia have since followed suit with legislation closely modelled on the NSW Act. Western Australia and the Northern

*(continued on page 14)*

<sup>1</sup> See, eg. *Contractors' Debts Act 1897* (NSW), *Workers' Liens Act 1893* (SA), *Contractors' and Workmans' Liens Act 1906* (Qld), *Subcontractors' Charges Act 1974* (Qld).

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## President's Page

I would like in this page to inform all DRBF members of the DRBF's current activities. The Foundation has been extremely busy on numerous matters ranging from developments, governance and contact with other entities involved or supporting the Dispute Board concept, this in addition to dealing with day to day duties.

The 10th DRBF International Conference and workshop will take place in Istanbul from the 12th to the 16th May 2010. The DRBF staff and all the members who have volunteered to run these major events are making the final arrangements. The registrations are proceeding as planned and once more we will see a gathering of people coming from all over the world, including the far away Australia, all aiming to share experiences, to exchange views, to identify best practices in the implementation of the DRB/DAB, and to "network." The Foundation is updating the DRBF introductory brochure; moreover the collection of basic data on DRBs has restarted in Region 1 and it will later be extended to Region 2. The collection of data had been suspended in 2004, mainly because of the excessive efforts needed to gather the information. The DRBF, in spite of the difficulties, has come once more to the conclusion that the factual data are essential to convince users, employers and contractors. All members are invited to support and contribute to this effort.

The DRBF *Practice & Procedures Manual* was published in January 2007, and the Board has decided to review and update the Manual; an ad-hoc committee has been formed with the programme to produce the up-dated Manual (with an expanded international chapter) within 18 months.

The web site will also be further improved in the coming months to make it even more interactive and user friendly; the web library will be expanded to offer more documentation to the interested parties and practitioners.

In addition to the above (the list is anyway not exhaustive) all the administrative and standard institutional activities are proceeding to maintain our Foundation on sound ground and under control.

The implementation of the DRBF Ten Year Plan is proceeding and the results are certainly positive. The guidelines documents which will regulate the relations between the DRBF and the various regions confirming the functions and the responsibilities are being finalized and are expected to be approved at the Executive Board meeting which will be held in Istanbul on May 14.

The ballot for the election of the Region 2 President Elect has just been concluded and the nomination will be announced in Istanbul. Now it is time to prepare for the election of President Elect for the DRBF Executive Board and for the Region 1 Board.

I wish also to mention an important duty your Boards have: the contacts and relations with the major entities dealing with promoting, financing, and contracting, such as the Multilateral Development Banks, FIDIC, ICC, AAA and several other organizations.

The DRBF logo calls for "Fostering Common Sense Dispute Resolution Worldwide." This does require continuous efforts by our Foundation. It is essential to maintain and possibly enhance our drive so we call for further members to volunteer to help the Foundation, please contact the undersigned or [info@drb.org](mailto:info@drb.org).

Last I cannot close this page without thanking all the contributors to the DRBF developments. At all our conferences we dutifully give credit to the many members who provide their efforts on a voluntary basis and also to the DRBF permanent full time staff and part time consultant. While there is no way I can list all the numerous volunteers, to whom goes my and, I am sure, yours heartfelt thanks, but I wish, at least, to record here and give formal credit to Stephen Fox and Ann McGough for their excellent work.

I am looking forward to meet many of you in Istanbul in May and or at the DRBF Annual Meeting and Region 1 Conference in Charleston in October 2010.

Sincerely,

Romano Allione  
President, DRBF Executive Board of Directors

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The members of the Executive Board of Directors are:

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James P. Donaldson, Treasurer  
Kerry C. Lawrence, Director and President, Region 1 Board  
Volker Jurowich, Director and President, Region 2 Board  
Peter M. Douglass, Director, Past President  
Harold V. McKittrick, PE, Director, Past President  
Gwyn Owen, Director, Past President  
Joe Sperry, PE, Founder, Honorary Director

The Executive Committee meets monthly. Recent topics have included:

- Redesign of DRBF general information brochure
- Revival of Manual Committee, to update *Practices & Procedures* Manual
- Development of regional conferences in Europe, Asia and the U.S.
- Nomination and election procedures for new Board of Directors positions

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:

May 14, 2010 in Istanbul, Turkey  
June 18, 2010 by conference call  
July 16, 2010 by conference call

### Region 1 Board of Directors

Kerry Lawrence, President  
Roger Brown, President Elect  
John C. Norton, Past President  
Douglas Holen  
Blasdel Reardon

### Region 2 Board of Directors

Volker Jurowich, President  
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Richard Appuhn  
James Perry  
Paul Taggart

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

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# Outreach & Marketing Report: ENERGY BAR ASSOCIATION AND CPR CONFERENCE

*On behalf of the DRBF, Kurt Dettman recently participated in a presentation to the Energy Bar Association in Washington, D.C. and the annual conference of the Institute for Conflict Prevention and Resolution in New York City. The following is his report to the membership.*

## Energy Bar Association Presentation

On December 13, 2009, at the offices of Morgan Lewis in Washington, D.C., the ADR Section of the Energy Bar Association (EBA), chaired by Duncan Ross McKay of Northeast Utilities, presented a web cast entitled “**Riding the Wave: Exploring the use of ADR in the new wave of renewable, transmission and nuclear construction projects.**” The program began with a discussion by Steve Shapiro of Certus Strategies on how owners can navigate the turbulent waters of stakeholder and regulatory processes to plan, site and permit energy projects. Ingrid Myers of Morgan Lewis next discussed her transactional and arbitration experience with nuclear project owners. Kurt Dettman wrapped up the program by covering the potential use of DRBs in the Energy Industry.

The fact of the matter is that the energy industry, at least in the United States, has not used DRBs. There is some use of DBs in the international sector, and Kurt cited as examples:

- Kárahnjúkar Hydro Project, Iceland
- Ertan Hydro Plant, China
- Ghazi Barotha Hydro Project, Pakistan
- Owen Falls Extension Hydro Project, Uganda
- Nathpa Jhakri Hydro Project, India
- EPC Contract for Offshore Wind Farms

- ITER Experimental Fusion Reactor, France (DAB under FIDIC Conditions of Contract, to commence March 2010)

Ms. Myers, however, advised that most of her U.S. energy clients preferred to use arbitration and, most interestingly, preferred to reserve all claims to the end of the project and then arbitrate or negotiate an omnibus resolution of all project claims. This may seem peculiar to many of us with experience in the heavy civil sector, where there is a general consensus that resolving disputes in “real time,” while the project is under way, is always preferable to the end of the contract claim where memories have faded, people and documents have disappeared, claims have grown in size and complexity with the passage of time, and the only discussion is about money. This prompted Kurt and Duncan to write the article on page 6, urging in the energy industry to re-think its approach and explore the potential use of DRBs on energy projects.

## The CPR Conference

The Institute for Conflict Prevention and Resolution (CPR) is an organization that promotes and supports the use of alternative dispute resolution by large companies. Its members include companies such as Johnson & Johnson, IBM Corporation, ConocoPhillips, Shell Group, Northeast Utilities and a number of major national and international law firms. The

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The *Forum* is published quarterly by the Dispute Resolution Board Foundation (DRBF). Any opinions expressed are those of the authors and do not necessarily represent the opinions of the DRBF.

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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day and a half long annual conference had presentations that included topics such as “New Business Realities and the Role of ADR: The General Counsels Weigh In,” “Doing Business in Asia: ADR Advice From Experts,” “ADR and Healthcare—from Big Pharma to Patients’ Rights,” and “Dispute Prevention and De-escalation: How to Draft and Deploy ‘Real time’ Resolution Tools.”

A couple of threads were developed that will be of interest to DRBF members. First, the corporate General Counsels panel advised that they are using internal ADR systems to resolve disputes and claims, and therefore were relying less on outside counsel to fight things out in arbitration or litigation. They also advised that if they needed outside counsel, one of the important criteria was their approach to resolving issues and claims cost effectively. The bottom line was that, like most in these economically challenges times, these companies are looking to cut costs, including the use of outside legal gladiators.

The second thread was the introduction of dispute prevention, not just dispute resolution, as a goal of CPR and the practice of ADR. To date, it was noted, CPR (and for that matter, many ADR providers) have focused on dispute resolution—or how to resolve claims after the train wreck has already happened. A panel led by Jim Groton proposed that CPR (and other ADR providers) should focus more on dispute prevention, specifically, the use of third party neutrals to be available to help parties resolve conflicts, disputes, and claims in real time. One of the examples Jim cited was the use of DRBs in the construction industry. Interestingly, the theme of dispute prevention was also echoed by the corporate counsel panel that also focused on how to stay out of trouble, not just get out of

trouble when it’s too late.

For DRBF members interested in the topic of the use of third party neutrals to prevent, as well as resolve, disputes, Jim Groton has published an excellent article on the topic, entitled “The Standing Neutral: A ‘Real Time’ Resolution Procedure That Also Can Prevent Disputes”, CPR Alternatives, Vol. 27, No. 11 (December 2009).

*Kurt Dettman can be reached by email at [kdettman@c-adr.com](mailto:kdettman@c-adr.com).*

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## Outreach & Marketing Committee

As reported in the February ‘10 issue of the *Forum* newsletter, the DRBF’s Outreach and Marketing Committee is working to spread the message of the DRB process through a variety of avenues, including participation in industry events such as the ones reported here.

If you have information about **upcoming events** or are active in **organizations that would benefit from hearing the DRB message**, please contact Region 1 Director and Regional Representative Coordinator Blasdel Reardon by email at [reardon@bostonsolv.com](mailto:reardon@bostonsolv.com).

# The Use of DRBs in the Energy Industry

By Kurt Dettman and Duncan Ross  
MacKay

## Introduction

This article explores the potential use of Dispute Review Boards (DRBs) in the energy industry. To date, DRBs have not been used widely on energy development projects in the United States, such as the development and construction of new fossil fuel power plants, nuclear power plants, high voltage electric transmission lines, natural gas pipelines, and renewable energy sources such as wind farms. However, with new clean and renewable energy generation projects on the rise, new high voltage transmission lines being constructed for reliability and to interconnect with remote renewable generation sources, and the resurgence of complex nuclear power generation projects, the authors suggest that the energy industry in the United States consider using DRBs. DRBs provide a process for effectively managing, if not outright avoiding, potentially high cost, time consuming and distracting disputes and claims, better enabling energy project developers to keep their projects on schedule and on budget for the benefit of their customers and shareholders.

## Background On The Energy Industry

There has been a growing emphasis over the last several years on a new wave of energy development projects, whether to meet state Renewable Portfolio Standards (RPS) and Regional Greenhouse Gas Initiatives (RGGI), in anticipation of potential federal carbon legislation and a national RPS, or to take advantage of

federal stimulus funds made available for renewable and nuclear energy generation and transmission projects. In November 2009, the U.S. Energy Information Administration published its Annual Energy Outlook 2010 that, among other things, projected energy generation trends and needs through 2035. Here are a few observations from the report relating to the growth of renewable generation during this time frame:

- Of the estimated 250 gigawatts of new capacity added to the grid, renewables (including hydroelectric) will account for 93 gigawatts or about 38% of the generation mix.
- Non-hydroelectric renewable sources will meet 41% of the total electricity generation growth through 2035.
- Renewables will gain electricity market share to 17%; whereas all other generation sources will decline in market share.
- According to Renewable Energy Development, wind power has been growing at a rate of over 25% per year over the last 20 years.

ENERGY INFORMATION ADMINISTRATION / ANNUAL ENERGY OUTLOOK 2010

Additionally, many new renewable projects are located a substantial distance from load centers and require new, larger scale high voltage transmission lines to interconnect renewable generation with load centers often hundreds of miles away. This accounts in part for the tremendous growth in the number of announced transmission projects to

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interconnect with renewable generation sources throughout the United States.

After years of stagnation, new nuclear plants are once again moving from the drawing board to the Nuclear Regulatory Commission (NRC) for approval. As of March, 2010, the NRC has accepted and docketed applications for 17 new nuclear power plants (several with two units). See <http://www.nrc.gov/reactors/new-reactors/new-licensing-files/expected-new-rx-applications.pdf>. Following are a few additional observations from the Annual Energy Outlook 2010 relating to nuclear generation:

- Nuclear generating capacity will increase from 100.6 gigawatts in 2008 to 112.9 gigawatts in 2035 (of which increase, 8.4 gigawatts of capacity come from new plants).
- Electricity generated from nuclear power plants will grow from 806 billion KW Hrs to 898 billion KW Hrs in 2035.
- The NRC currently has 28 applications for new nuclear power reactors throughout the U.S.

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**Characteristics of Energy Projects**

Energy projects are becoming increasingly complex and challenging to build—the development and construction process for them is lengthy, they are costly, and they can be risky from both a technological and financing standpoint. For example, renewables projects, particularly large-scale and off-shore wind, nuclear power plants, and high voltage transmission projects often, if not almost always, encounter tremendous resistance from the communities in which they are to be sited. Additionally, environmental

and other interest groups concerned with the visual and physical impacts of such projects on environmentally sensitive areas and habitat and scenic vistas commonly make up part of the opposition to such development projects. These stakeholders often also influence the siting and permitting regulatory processes, generally resulting in an intense, lengthy, and costly undertaking for the developer. Developers of such projects cannot be faint of heart or short on either time or financing, and have to look for ways to navigate through this stakeholder minefield well before the project is designed and built. Employing various ADR techniques, such as facilitation, community-based conciliation or mediation, and early and effective stakeholder outreach can be key elements to the success of an energy project during its early stages. Often these processes result in commitments or limitations of operations that will become contractual requirements that will constrain the designer and builder during the design and construction phases.

Even after these new energy projects are sited and permitted, the projects themselves are complex to build, requiring a complicated contractual marriage among owners, engineers, construction managers, contractors/subcontractors, and suppliers. Every party enters into these contracts with the best of intentions for a smooth and harmonious relationship, but often disputes arise after the honeymoon has ended that can threaten to disrupt, if not outright dissolve, the union. Most importantly, the parties think constantly about who pays if the project is over budget or late--the owner? the contractor? the subcontractors? the suppliers? the customers?

Another factor that makes the energy industry somewhat unique is the degree to which energy companies are heavily

regulated, with their revenues and costs subject to scrutiny, after the fact, through the rate making process. Thus, energy companies not only must manage the bottom line on project costs, but also need to be able to justify those costs later in order to re-capture them in rates.

As with any complex, costly and lengthy project, disputes during the construction phase are commonplace. When disputes arise and the contractual and legal jousting begins, the combatants often cannot readily conceive of, let alone agree to, an alternative to traditional litigation to resolve their disputes. Thus, the question is whether adequate processes have been developed and put in place to manage effectively those disputes as they occur so that critical project relationships can be maintained, schedules met, and costs kept in check as the disputes play out. During the contracting phase of any development project, there is a need for focused and deliberate attention to how disputes during the project can be avoided, managed, and resolved. In many energy projects, the parties seem to rely exclusively on the adjudicatory process of either arbitration or litigation in the court system when disputes arise. Thus, despite the best planning, disputes, change order requests, and claims often pile up in a project's life-cycle and become one of the last boxes on the punch list to be checked before the project can be closed out and put into commercial operation.

Energy developers should consider incorporating other forms of ADR during the project's lifecycle to avoid the "bottlenecking" effect of adjudication at the conclusion of construction. Some energy project developers employ a stepped approach to dispute resolution that includes mandatory negotiation and

mediation before resorting to arbitration or litigation. This approach enhances the ability of developers to resolve disputes earlier in the process and enables the critical relationships to continue working toward the collective goal of timely and on-budget project completion. We suggest, though, that developers in this new wave of energy project development consider employing a standing neutral, such as a DRB, to more effectively and efficiently eliminate disputes and claims during the course of the project rather than waiting until the end of the project to "settle up."

### **The Advantages of Using DRBs for Energy Projects**

Power plant and transmission line projects share some common features with large civil construction projects, on which DRBs have been used successfully for years:

- Lengthy projects (permitting to commercial operation can take many years).
- Multiple parties (owner, designer, engineer, CM, GC, Subs, and Suppliers).
- Complex engineering and coordination challenges.
- Cost/schedule pressures to get to commercial operation.
- Involvement of outside stakeholders (funding entities, regulators, customers).

With these factors in mind, what are the advantages of using a DRB as a way to prevent and resolve disputes?

- DRB members are respected industry professionals and knowledgeable about the type of project being built.

**DRBF Country Representatives**

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- DRB members are neutral and objective, and are charged with making recommendations based on the facts and the contract documents.
- The DRB process starts at the beginning of the project and is in place throughout the lifecycle of the project, so it is available as and when needed.
- As a result of its involvement in the project the DRB becomes familiar with the players, the issues and the project's history.
- The periodic DRB meetings require open communication among all project participants that helps avoid issues becoming disputes or claims.
- The DRB meetings promote the periodic involvement of all key project stakeholders, including senior decision makers.
- The hearing process is contemporaneous with the dispute and is thorough, but focused—it is, therefore, much less expensive than arbitration or litigation.
- The relatively informal hearing process on claims permits the parties themselves (as opposed to their lawyers) an opportunity to present their sides of the dispute.
- The findings and recommendations are detailed so that the parties have the benefit of the DRB's evaluation of the dispute in all of its aspects (both factual and legal).
- The findings and recommendations are non-binding, leaving ultimate control of the outcome to the parties.
- The DRB findings and recommendations give the parties a basis on which to assess risk exposure and make better informed business judgments that can be used to justify decisions later to regulators and rate commissions.

**Conclusion**

The successful use of DRBs to prevent and resolve disputes is well-established on complex heavy civil and building projects. The coming multi-billion dollar wave of renewables projects, new nuclear projects and large high voltage transmission projects in the energy industry share many of the same characteristics as these projects—costly, lengthy, complex, high risk and a veritable breeding ground for disputes. As the Energy Industry considers how to effectively, efficiently and timely manage and resolve disputes on these projects, owners should consider transplanting the success of DRBs to the energy projects of the future. □

**About the Authors:**

**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, with an emphasis on megaprojects. He has written extensively about DRBs and conducts trainings on DRB practice and administration. He can be reached by email at [kdetman@c-adr.com](mailto:kdetman@c-adr.com).

**Duncan Ross MacKay** is Deputy General Counsel for Northeast Utilities (NU). NU operates New England's largest energy delivery system with operations in Connecticut, New Hampshire and Western Massachusetts covering 11,345 square miles. Member companies in NU's transmission business include Connecticut Light and Power (CL&P), Public Service of New Hampshire (PSNH), and Western Massachusetts Electric Company. He is responsible for the team of lawyers at NU who evaluate and resolve claims involving NU projects and can be reached by email at [mackadr@nu.com](mailto:mackadr@nu.com).

## Other News

### Arbitration Training Seminar

Philippine Dispute Resolution Center, Inc. (PDRCI) has been a partner of DRBF Philippines in promoting DABs and DBs in the Philippines. PDRCI will be conducting a seminar on Arbitration on the 26th to 29th of May, "The Law and Practice of Commercial Arbitration" at the Linden Suites in Pasig City.

The 4-day seminar aims to teach law practitioners and other professionals the law and practice of commercial arbitration. The seminar will discuss the applicable laws governing commercial arbitration and will guide the participants in a step-by-step fashion through the entire arbitration process, starting from the drafting of the arbitration agreement, preparation of the arbitration claims and defenses and selection and appointment of the arbitrators, to the conduct of the arbitration hearings and the recognition, enforcement and challenge of arbitral awards.

The seminar will also discuss in depth the relevant laws on arbitration, including the ADR Act of 2004, the Arbitration Law and the UNCITRAL Model Law on International Commercial Arbitration. It will also cover recent developments in commercial arbitration, including the Special ADR Rules of Court and the Implementing Rules and Regulations of the ADR Act (DOJ Department Circular No. 98), which took effect in October 2009 and December 2009, respectively.

At the end of the seminar, the participants are expected to have acquired a working knowledge of the arbitration

process both from the perspective of an arbitrator as well as of a lawyer representing parties in arbitration proceedings.

More information and registration forms are available at the organization's website, [www.pdrcl.org](http://www.pdrcl.org).

### NCDRC Upcoming Events

The DRBF is a member of the National Construction Dispute Resolution Committee (NCDRC) of the American Arbitration Association (AAA).

DRBF members may be interested in the following NCDRC meeting dates for 2010. If a DRBF member has an idea for the NCDRC, please contact Region 1 Board President Kerry Lawrence.

#### 2010 Mid-Year Meeting

**Thursday, June 3, 2010**

**9:30AM to 3PM**

**Washington, DC.**

**Seyfarth Shaw LLP**

**975 F Street, NW Washington, DC**

#### 2010 Annual Meeting

**Thursday, December 9, 2010**

**9:30AM to 3PM**

**Washington, DC, Site: TBD**

#### 2011 Mid-Year Meeting

**Thursday, June 2, 2011**

**9:30AM to 3PM**

**Washington, DC, Site: TBD**

## **DRBF Event Calendar**

The Dispute Resolution Board Foundation 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 Responsibilities 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 & Chairing Workshop  
June 4, 2010  
Seattle, WA USA**

**2nd Bucharest DRBF Regional Conference  
“Understanding Dispute Boards: A training workshop and conference  
introducing and examining the effective use of Dispute Boards  
in FIDIC Contracts”  
June 9-11, 2010  
Bucharest, Romania**

**International FIDIC Contracts Training Course  
“The Responsibilities and Duties of Dispute  
Adjudicators and Parties to Disputes”  
June 14-15, 2010  
Vienna, Austria**

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

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

# Ethics in Today's World of DRBs:

## Contractor Requests DRB Resignations After Several DRB Hearings and Recommendations



By Jim Phillips Ph. D.

The question I posed in the February issue of the *Forum* was how should the DRB respond to a request from the contractor to the Chair that the Board resign because,

after several Recommendations from the DRB that neither party accepted, the contractor has decided that the DRB process is “a waste of time.” The question also assumes that the owner is in favor of keeping the DRB process in place during the project.

This issue is a tough one primarily because it is not addressed directly by the language of the DRBF's Code of Ethics. The first point that should be made is that immediately after receiving the contractor's request, the Chair should so advise her/his fellow Board members in order that all members can discuss a course of action prior to the next regularly scheduled DRB meeting. Obviously the Board should take the request seriously rather than just the contractor's dissatisfaction with the DRB's Recommendations that neither she nor the owner has accepted.

Assuming that the contractor's request is not based upon alleged misconduct by the DRB or a member, such as a failure to disclose a conflict of interest or an *ex parte* communication, the DRB might want to review its activity on the project to determine if it can identify any other reason for the contractor's request. For example, maybe the Board did not provide adequate attention in its Recommendations to the contractor's positions, or failed to fully explain the logic of its rationale that provided the bases for its Recommendations. Often a party may perceive that the DRB has not fully given the attention to its positions in the hearing process, either by giving ample and equal time for

each to make their presentations, or in some other way, indicated that the playing field is not level. Perceptions of unfairness often begin with very small or minor actions by a Board that are interpreted the wrong way, which begins a growing perception that the DRB is not treating each party equally, which calls the entire process into question. Canon 4 of the Code of Ethics commands that the DRB conduct meetings in an “impartial manner.” Sometimes, by cutting off testimony, or failing to fully consider a document presented in the hearing, either party may believe that the DRB is not fully engaged in the process, which can lead to perceptions of bias or unfairness in the process.

Even if the Board in this question can identify an action that prompted the contractor's request for the Board's resignation, it may be the contractor's frustration has been percolating for such a long time that any attempts to correct the appearance of unfairness will fall on deaf ears. However, the Board should be prepared to address these concerns at the next regularly scheduled meeting. Better yet, the Board should, in discussing the request at the meeting, inquire as to the basis for the contractor's request for its resignation to determine if there are misperceptions about a previous activity that might be corrected or fully aired and perhaps resolved.

It should be noted that the Foundation's Practices and Procedures manual does address the issue of resignation in Section 3.8. This section initially states that most Third Party Agreements provide that a member, or the entire DRB, may be terminated with the agreement of both contracting parties. In our case, the owner has expressed his interest in having the DRB continue, so our issue is more complex.

This section also states that one of the parties may have become reluctant to refer disputes to the DRB because "...they have lost faith in the DRB's impartiality." This recalls my comments earlier about the Canon 4 requirement for the Board to remain impartial. Section 3.8 goes on to state that "... [i]f the Chair senses that this is a possibility, he or she should investigate the situation and do everything possible to address it, including discussion and correspondence with both parties to understand their concerns and points of view."

Section 3.8 also provides for a framework for the DRB to make a decision regarding resignation. If the DRB decides that one member is an "obstacle" to the dispute resolution process, then that member in question should resign. Again, in our question under discussion, the owner has indicated a desire that the DRB continue, so the owner in our example would have to agree after a full discussion of the facts and circumstances. If the owner continues not to agree to a resignation, then according to this section, the DRB must carefully consider the best course for the benefit of the project.

Section 3.8 also provides that if none of the Board has violated any principles of impartiality, and if one or both of the parties no longer trust the DRB to be impartial, the DRB has lost much of its value and "... replacement of the entire DRB with new Board members should be considered." This section goes on to state that the entire Board should offer its resignation and it is then up to the parties to accept it. It goes on to provide "...[i]n the event that the parties disagree as to whether the DRB should be replaced, then the resignation is deemed not to be accepted."

This language suggests that if one party wants to keep the DRB, as in our case, the resignation should not be accepted. Obviously, this is a very complex question with many ramifications for the project. In our case, the contractor said that she thought the DRB process was a waste of time and money. This might suggest that the contractor is not happy with the Board's

Recommendations, rather than a belief that the DRB is no longer being impartial. Section 3.8 suggests that resignation for this reason is not a good idea because the parties could then have the belief that they might "shop" for favorable Board members.

The issue of the DRB resignation, as I have suggested here, is a complex and difficult one, on which there is precious little guidance in the Canons of Ethics. If the DRB's resignation is accepted by both parties, the effective date should be scheduled so that a new Board is in place simultaneous with the previous DRB's termination. In any event, a resignation by the full DRB, in my opinion, should only occur when all parties and the DEB agree that it has lost its effectiveness as impartial decision makers. The important thing is to have an open and honest discussion about a Board resignation so that the parties can continue to have confidence in the process, no matter who the individual Board members are.

Finally, the specific contract DRB Specification should be looked to prior to the time that any resignation is executed. Some specifications and third party agreements may not require both parties to accept a member or the entire DRB's resignation. Obviously, each case should be analyzed on a case by case according to the specific contract language. I will appreciate any of the readers' comments on this important topic.

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### **NEXT ETHICS CHALLENGE**

Assume you are the Chair of a DRB that has been operating on a project for quite some time. You are chairing a formal hearing of a dispute brought to the Board by the contractor for a Recommendation. The Rules of Procedure by which the hearings are conducted, and to which both parties have agreed, provide that no dispute can be heard without first being briefed in position papers and responded to by the other party. Assume that in the middle of the hearing, the owner alleges that there is a dispute being introduced for the first time at the hearing for which there has been no briefing in the position papers.

**What should you do?**

---

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

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

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(continued from page 1)

Territory have also introduced similar-legislation<sup>2</sup>, although theirs are not as closely modelled on the NSW Act as the Acts of the other states and territories are.

In contrast to earlier legislation which focussed primarily on insolvency risk, but did little to streamline enforcement, the current legislation focuses on trying to ease the contractor's difficulty in getting paid by providing a quick enforcement process in the form of a statutory progress payment regime, backed by adjudication.<sup>3</sup> It addresses the insolvency risk more indirectly, in that by use of the legislation a contractor can (hopefully) prevent a situation where it has not been paid for months or years by the time the owner becomes insolvent.

Importantly, parties cannot use the contract to exclude the operation of the Act.<sup>4</sup> Though because the matter being adjudicated upon is the contractor's right to progress payments, not final liabilities, any injustice that may be done in the adjudication can theoretically be corrected in the determination of those final liabilities

in arbitration or litigation. Arguably all that really happens is that payment risk gets transferred to the upstream party until such time as the courts or arbitrators render a final determination.

Under the NSW Act, if a construction contract makes provision for progress payments, the legislation effectively turns the contractor's contractual entitlement into a statutory one.<sup>5</sup> If the contract does not make such provision, then certain default provisions take effect so that the contractor is entitled to monthly progress payments.<sup>6</sup> Armed with this statutory entitlement to progress payments, the contractor may make a "payment claim" setting out an amount it claims to be due.<sup>7</sup> The owner must respond with a "payment schedule," setting out the amount the owner believes to be due and giving reasons for any difference from the payment claim.<sup>8</sup>

Where the amount shown in the schedule is less than the amount claimed (or if the owner fails to pay), the contractor may choose to apply for adjudication of the matter.<sup>9</sup> The adjudication application must be made to an authorised nominating authority chosen by the contractor<sup>10</sup>,

<sup>2</sup> *Building and Construction Industry Security of Payment Act 1999* (NSW) ("NSW Act"); *Building and Construction Industry Security of Payment Act 2002* (Vic) ("Victorian Act"); *Building and Construction Industry Payments Act 2004* (Qld) ("Queensland Act"); *Building and Construction Industry Security of Payment Act 2009* (Tas) ("Tasmanian Act"); *Building and Construction Industry (Security of Payment) Act 2009* (ACT) ("ACT Act") (this Act does not commence until 1 July 2010); *Building and Construction Industry Security of Payment Act 2009* (SA) ("SA Act") (as at February 2010, this Act had no commencement date); *Construction Contracts Act 2004* (WA) ("WA Act") and *Construction Contracts (Security of Payment) Act 2004* (NT) ("NT Act") respectively.

<sup>3</sup> For simplicity of expression this section refers to the operation of the legislation in the context of a contractor and an owner. It should, however, be noted that the Acts apply equally to owner/contractor and contractor/subcontractor contracts.

<sup>4</sup> This provision is common to the security of payment legislation in all states and territories: NSW Act s 34, Victorian Act s 48, Queensland Act s 99, WA Act s 53, NT Act s 10, ACT Act s 42, SA Act s 33, Tasmanian Act s 11.

<sup>5</sup> NSW Act s 11(1) (a).

<sup>6</sup> NSW Act s 11(1) (b).

<sup>7</sup> NSW Act s 13.

<sup>8</sup> NSW Act s 14.

<sup>9</sup> NSW Act s 17(1).

<sup>10</sup> NSW Act s 17(3) (b). With the exception of the WA Act and NT Act, which allow parties to select a adjudicator by agreement, this provision is common to the security of payment legislation in all other states and territories: WA Act s 26(1)(c), NT Act s 28(1)(c), Victoria Act s 18(3)(b), Queensland Act s 21(3)(b), ACT Act s 19, SA Act s 17(3)(b), Tasmanian Act s 21(1).

which then refers the application to an eligible adjudicator.<sup>11</sup> While procedure is largely at the discretion of the adjudicator,<sup>12</sup> a determination must be made within 10 business days of the adjudicator's appointment, unless the parties agree otherwise.<sup>13</sup>

If the owner does not pay the amount due under the adjudicator's determination, the contractor may give notice of an intention to suspend work, and may also obtain an "adjudication certificate" which can be filed in court as a judgment for a debt.

***Is There a Place for Dispute Boards in a Security of Payment Regime?***

A Dispute Board is a panel of (typically) three experts, existing from the outset of the project, which meets together at regular intervals throughout the course of the project so as to develop a familiarity with it, and which hears and resolves disputes both quickly and cheaply as they arise on site. The key difference to note between a Dispute Board and statutory adjudication under the security of payment regime, for the purposes of this discussion, is that a Dispute Board is contractually based and the panel of experts are usually chosen by the parties, while the adjudicator under the statutory regime is chosen by an authorised nominating authority. Both processes, however, are intended to be binding on the parties in the interim.

How then do these two dispute resolution processes operate when it comes to a payment dispute?

The first matter that must be considered is whether a Dispute Board can act as the adjudicator under the security of payment regime. The legislation requires that an adjudication application be made to an authorised nominating authority, which refers the dispute to an eligible adjudicator. This leaves no room for the parties to select their own adjudicator. It is therefore not possible for a Dispute Board, the members of which have been selected by the parties, to make a determination under the Act.<sup>14</sup>

Given a Dispute Board cannot act as an adjudicator under the Act, the second question is whether an interim binding determination on a payment dispute by a Dispute Board can replace adjudication pursuant to the Act. The Act explicitly states that parties cannot exclude its operation through contractual provisions. Thus a purportedly binding decision on a payment dispute by a Dispute Board cannot stand because the contractor retains the right to have that same payment dispute decided by an adjudicator under the statutory adjudication regime.

Does this make Dispute Boards redundant as far as payment disputes are concerned? In theory, yes. There seems to be little utility in establishing a Dispute Board if its decisions on payment disputes are effectively voidable upon application for adjudication.

In practice, however, experience is showing that where the parties have chosen to establish a Dispute Board they are preferring to allow the Dispute Board to make final and binding decisions on all

<sup>11</sup> NSW Act s 17(6).

<sup>12</sup> See NSW Act s 21.

<sup>13</sup> NSW Act s 21(3).

<sup>14</sup> Note that this differs from the position under the United Kingdom statutory adjudication regime, which does not stipulate how the adjudicator is to be selected, thereby leaving it open for the parties to appoint the Dispute Board as the adjudicator where the UK statutory scheme applies: *Housing Grants, Construction and Regeneration Act 1996* 108.

disputes under the contract, despite the apparent incompatibility with security of payment legislation. Since 2003, approximately AU\$5 billion actual construction turnover has been completed or is well underway with contracts utilising various forms of Dispute Boards. The type of contract has ranged across the full spectrum of Construct Only, Design & Construct, Early Contractor Involvement, Design, Construct & Maintain, Design, Construct, Operate & Maintain, and Hybrid Alliances. There have been three known disputes formally referred to Dispute Boards since 2003. None have gone beyond the Dispute Board and there has been no suggestion that the parties involved in these contracts considered an adjudication application.

This apparent preference for Dispute Boards can be attributed to certain benefits offered by Dispute Boards over statutory adjudication. In particular:

- Dispute Board panel members are generally chosen by the parties for their expertise and reputation, thereby automatically earning them the respect of the parties, while adjudicators under the statutory scheme are often unknown to the parties.
- The Dispute Board is involved in the project from the outset, whereas adjudicators will generally have no prior knowledge of the project and certainly have no prior involvement in the project or with any party. In addition, adjudicators are expressly limited to deciding a claim on information derived from the claim and response.
- Dispute Boards encourage early identification of potential issues and a procedure for the reporting and discussion of such issues at routine

Dispute Board meetings. At these meetings the Dispute Board encourages a collaborative approach to issue resolution on a "best for project" basis. This also promotes the maintenance of project relationships.

### *Conclusion*

Australian experience strongly supports the argument that properly structured Dispute Boards, while technically inconsistent with the security of payment regime and apparently redundant in terms of payment disputes, can operate very successfully in a legal environment which incorporates a statutory adjudication system similar to that first developed in the United Kingdom. The statutory adjudication course remains open to any contract party but, from a common sense point of view, why would one choose a security of payment action when the contract provides an alternate that is substantially preferable on virtually every basis one can contemplate? It seems that practical commercial considerations are winning out over legal technicalities with parties favouring Dispute Boards over statutory adjudication. □

Author's Note: The authors gratefully acknowledge the assistance provided in the preparation of this article by Jennifer Ingram, Legal Assistant, Clayton Utz.

**About the Authors:**



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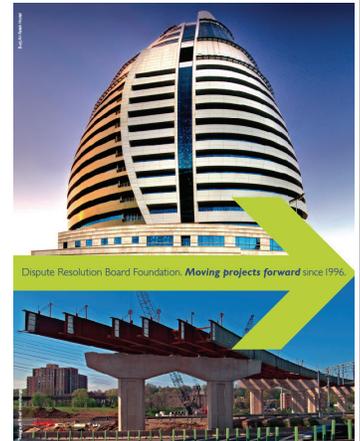


Graeme Peck is a consulting construction engineer and co-founder of the well known Australian construction consultancy Evans & Peck, from which he retired in 2001. He was President of the Dispute Resolution Board Australasia (DRBA) from 2005 – 2009 inclusive and has been Australia and New Zealand Country representative for the international DRBF since 2005. He can be reached by email at [gmp@gmpeck.com.au](mailto:gmp@gmpeck.com.au).

## DRBF Promotional Tools

### New Brochures Available

The DRBF recently developed a new general information brochure to help spread information about the DRB/DB process, and the Foundation in general. The brochure features a fresh look with beautiful photos from projects with DBs. Copies will be available to view at all upcoming conferences and workshops. Members may request bulk quantity to use in promotional efforts. Contact the DRBF office for details.



### Website Updates Underway

The DRBF will be updating the Foundation's website to reflect design changes consistent with the fresh look of the new brochures, as well as add updated content and user friendly tools. If you have ideas for the website update, please contact Committee Chair Ann McGough.

### Call for Papers

If you have papers or articles that may be of interest to DRBF members, consider submitting them to the Website Coordinator Ann McGough. All submissions will be subject to peer review and must have any necessary approvals for distribution to our membership.

Contact Ann McGough at [amcgough@drb.org](mailto:amcgough@drb.org)

## **WELCOME TO NEW DRBF MEMBERS**

### **MEMBER ADDITIONS FEBRUARY THROUGH APRIL 2010**

G Hemantha Mohanlal Aponso  
Colombo, Moratuca SRI LANKA

Narendra Kumar Baral  
Kallimandu, NEPAL

Philip Bonanno  
East Falmouth, MA USA

Mireille Bouzols-Breton  
Bois le Roi, FRANCE

Antonio Bove  
Caserta, ITALY

Francis Brennan  
Capital Project Management Inc.  
Fairfield, NJ USA

Guiseppe Broccoli  
Montanari, Brescia e Associati  
Milan, ITALY

John P. Christensen P.E.  
Christensen Associates Inc.  
San Rafael, CA USA

Steven Davis  
Steven Davis Consultants  
Torrance, CA USA

Dr. E.M.G. De Zylva  
Colombo, SRI LANKA

Martin DeMatteo  
M. DeMatteo Construction Co.  
Milton, MA USA

D.M.D.S. Dissanayaka  
Cost Management Services Pvt Ltd  
Kurunegala, SRI LANKA

Stewart Duthie  
Voluntari, Jud Lifov ROMANIA

Chandana Pradeep Kumara Geeganage  
Salasi Lanka Pvt Ltd  
Kadawatha, SRI LANKA

Mahadeva Gopinath  
Melrose Arch, SOUTH AFRICA

M.S.R.S. Gunarathna  
Oriental Consultants Company Ltd  
Panadura, SRI LANKA

H.A. Pradeep Ranjan Hangawatta  
VFORM Consultants Pvt. Ltd.  
Kotugoda, SRI LANKA

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Board  
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Roger Wills  
Bath, UK

## 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](mailto:amcgough@drb.org).



*Deadline for the  
August issue is*

**July 1, 2010**



# **DRBF Upcoming Conferences and Workshops**

## **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.

A two-day workshop, “The Allocation of Risk and The Duties and Responsibilities of the Dispute Adjudication Board Under FIDIC Conditions of Contract,” will precede the conference on May 12-13.

The Dispute Resolution Board Foundation would like to thank the following companies and organizations for their support:

**Affiliating Organizations:**

Adjudication Society  
European International Contractors  
International Federation of Consulting Engineers (FIDIC)  
International Chamber of Commerce  
Istanbul Technical University-TechnoBee

**Sponsors:**

Astaldi  
CMC di Ravenna  
Fenwick Elliott  
Impregilo  
Leach Group  
Navigant Consulting  
Salini Costruttori  
Taisei Corporation

## **2nd Bucharest DRBF Regional Conference**

### **Understanding Dispute Boards: *A workshop and conference introducing and examining the effective use of Dispute Boards in FIDIC contracts***

**June 9, 2010 - Workshop**

**June 10-11, 2010 - Conference**

**Novotel Bucharest City Centre  
Bucharest, Romania**

Dispute Board users and practitioners will gather to discuss best practices, ethics, challenges and solutions in the implementation of successful Dispute Board programs. On Wednesday, the DRBF offers a workshop with lecture and interactive sessions introducing FIDIC Contracts, explaining their use in the region, as well as exploring adjudication principles and dispute resolution under FIDIC, ICC and other rules. The workshop will also cover best practices in the administration and practice of DABs.

On Thursday and Friday, the Regional Conference will bring together experienced owners and practitioners to discuss dispute resolution in Romania and surrounding countries, and current practice using various Dispute Board styles and best practice in the implementation of a program, including costs, site visits, informal advice and more. The presentations and panel discussions will also address the role of the Dispute Board, referrals, position papers, hearings and decisions, and offer an interactive exercise in solving problems at a hearing. The event includes an optional gala dinner Thursday evening for delegates, speakers and guests featuring international and Romanian cuisine.

The workshop and conference will be run by a faculty of speakers and tutors including: Nabil Abbas, Radu Baruta, Boiana Berchi, David Brown, Edward Corbett, Cremona Cotovelea, James Dow, Nicholas Gould, Leo Grutters, Sorin Ionescu, Marius Lăncrăjan, Alina Oprea, Bogdan Oprea, Oana Soimulescu, Adriana Spassova, Georgiana Tecuci, Zoltán Záhonyi, and more.

**Sponsors:** Astaldi, Clyde & Co. LLP and Fenwick Elliott

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, as well as a focus on issues specific to Romania and the surrounding region.

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

# **Northwest Regional Conference & Training Workshop June 4, 2010 Radisson Gateway Hotel Seattle, Washington, US**

Join the DRBF in Seattle, Washington for the Northwest Regional Conference, an annual event of DRB users and practitioners in the Pacific Northwest who gather to discuss best practices, ethics, challenges and solutions. The morning kicks off with the popular DRBF Chairing Workshop. After lunch, the afternoon conference will offer interactive discussions on practical issues and challenges facing the DRB community.

## **Event Summary**

### **Morning Session: Dispute Review Board Chairing Workshop**

The workshop is an intensive, half-day program designed to address the issues involved in chairing DRBs and is for practitioners who are interested in or are currently serving as DRB Chairs. It includes case study, lecture, demonstrations, exercises, discussion of chairing issues and the exchange of experiences and suggestions for improving the DRB process for owners, contractors and DRB members. It is recommended, but not necessary, that participants have taken the Dispute Review Board Administration and Practice Workshop prior to attending this one.

### **Afternoon Session: User's Forum**

The User's Forum will begin with a focus on how the parties should prepare for presentations to a DRB for both advisory and formal hearings. Discussions will center on organization of documents, position papers, issue narratives, schedule presentations, contract and contemporaneous documents and quantum calculations. The second half will be a series of advisory opinions where participants will act as Boards making recommendations on several "actual" advisory hearing issues.

**Fees:** Morning Workshop \$250, Afternoon User's Forum \$150

**Book both and save!** Only \$350 for Conference and Workshop Package

Training Workshop and User's Forum are open to all construction industry professionals interested in learning more about current DRB methods with an emphasis on success stories and lessons learned. The workshop may qualify participants for credits from AAA and the Washington Bar Association towards their continuing professional development programs. Please contact the organizations individually for details. Space is limited, so register today!

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



## CALL FOR NOMINATIONS FOR THE AL MATHEWS AWARD

The Dispute Resolution Board Foundation presents the prestigious Al Mathews Award each year to one or more DRBF members who have given exemplary service in advancing the use of the Dispute Resolution Board concepts and the DRBF.

Nominations are solicited from the membership and by the president of the Executive Board of Directors. A framed proclamation and trophy will be presented to the recipient at the Dispute Resolution Board Foundation Annual Meeting and Region 1 Conference October 2, 2010 in Charleston, SC, USA.

**SEND YOUR NOMINATION, INCLUDING AN EXPLANATION OF WHY THE NOMINEE IS DESERVING OF THE AWARD, TO:**

**Award Nominations/DRBF**

**19550 International Blvd. So Suite 314**

**Seattle, WA 98188 USA**

**Or e-mail to [home@drb.org](mailto:home@drb.org) Re: Al Mathews Award Nomination**

**Entries should be postmarked no later than July 15, 2010**

**THE DISTINGUISHED LIST OF PAST WINNERS INCLUDES:**

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Robert Smith  
Joe Sperry  
Jimmy Lairscey  
Carlos Ospina  
Pete Douglass  
Jim Donaldson  
Steve Fox  
Gordon L. Jaynes  
John Nichols  
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Romano Allione  
Harold V. McKittrick  
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## FOUNDATION FORUM

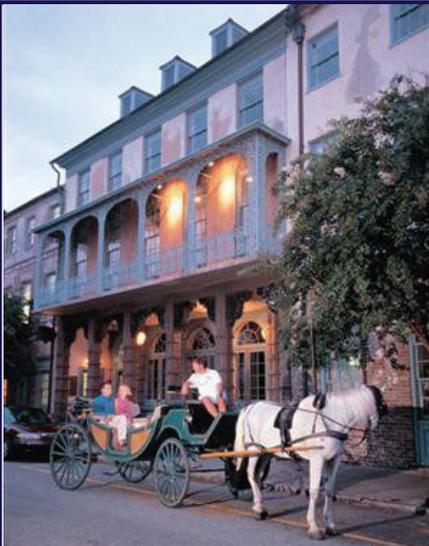


Photo from Charleston CVB

# Save the Date!

**Dispute Resolution Board Foundation  
14th Annual Meeting and  
Region 1 Conference  
October 1-3, 2010  
Francis Marion Hotel  
Charleston, South Carolina USA**

*Charleston offers a dynamic blend of American history, cultural arts, natural beauty, distinctive food, historic architecture and gardens, and Southern charm. The DRBF will offer group tours to enhance your visit.*

*Start your planning today!*



Photo by Jonathan Lamb