



Forum

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Do We Really Need Dispute Boards?



By Levent Irmak

I wish to begin by mentioning briefly about the DRBF Annual Meeting & Conference organized by Region 1 which took place on October 1-3, 2010 in Charleston. The conference was well at-

tended by over one hundred delegates from around the United States. There were about fifteen delegates from outside the US, which gave the conference a bit of an international flavor.

On the last day of the Charleston Conference, I was a speaker in the panel titled “The Owners’ Perspective on DBs” and my presentation was about the Dispute Boards’ benefits to project owners. My intention was to give delegates a somewhat different perspective on the benefits of Dispute Boards: the “psychological aspect.”

During the conference I realized that Region 1 was truly working hard on promoting the use of Dispute Boards within the country, in a systematic and quite organized manner. Perhaps, by sharing my thoughts on this very subject, I can help and contribute to the efforts of my fellow colleagues who voluntarily

dedicate their time and energy in promoting Dispute Boards around the world.

Disputes are inevitable, and that is a fact. Another fact is that all disputes get resolved sooner or later, in one way or another, i.e. resolution by amicable settlement, by Dispute Boards, by arbitration or by courts, etc. Then, one may ask: why do we always talk about Dispute Boards while there are other methods to resolve disputes? Perhaps, the answer to this question is the key element in convincing potential users of Dispute Boards.

If we have to categorize dispute resolution mechanisms, without a doubt, the best resolution mechanism is the settlement between the parties on an amicable basis. However, the reality is that amicable settlement can not always be reached. Then, we resort to other methods to resolve our disputes. The most commonly used dispute resolution mechanisms used in construction projects worldwide are arbitration and litigation. Perhaps the UK and US may be excluded from this generalization, simply because the use of Dispute Boards in these countries are rather much more common than any other country in the world. Mediation is also another

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“...one may ask: why do we always talk about Dispute Boards while there are other methods to resolve disputes? Perhaps, the answer to this question is the key element in convincing potential users of Dispute Boards.”

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President's Page



Dear DRBF Members,

The Foundation is just coming off a very successful Annual Conference in Charleston, SC. The attendees were treated to discussions of the DRB specifications and process as they continue to evolve worldwide. Panelists discussed the Energy Industry with its opportunities and challenges and what the Foundation might expect to see in the future. We learned how the DRBF is attempting to develop and implement a marketing strategy to introduce the DRB process to new users, including negotiating to place dispute clauses in the construction contracts of large private companies. Everyone that went enjoyed an interesting evening and dinner at an 18th century plantation, Middleton Place, located just outside Charleston. The Al Mathews award was made to two individuals who have contributed to the success of the Foundation through their tireless efforts in its behalf. We learned about the success of the DRB process as practiced by the Florida Department of Transportation, and got the perspective concerning how various owners viewed the DRB process. The final presentations concerning three very large construction projects that are ongoing and using the Dispute Review Board process seemed to many to be the highlight of the conference.

One of our speakers was from Canada and believes that the time has come for more use of the DRB concept in that country. Region 1 includes Canada and is developing a marketing and outreach program to assist the US and Canadian efforts to enlist more users of the DRB process. DRB training is planned for the California, Florida and Colorado Departments of Transportation, and is available to individual companies. The Manual committee is constantly reviewing the manual to reflect changes as the DRB process matures. The main effort inherent in all of this is a continuing emphasis on education, training and increasing the user base. Region 1 will host the Annual Meeting of the DRBF in Seattle, Washington in September 2011.

Region 2, which presently includes everywhere but the United States and Canada, is expanding rapidly and may soon be split into further regions. Australia is scheduled to become Region 3 in 2012. Eastern Europe has a very active group based in Romania. There will be private training for departments of the Romanian Government in hopes that more use will be made of the DRB/DAB concept there. Region 2 has events planned for a regional conference in Vienna in April, the Region 2 Annual Conference in São Paulo, Brazil in May, Romania's regional conference in September and a European conference in Brussels during November. Plans for the São Paulo conference are taking shape and it should be both interesting and informative.

All in all this is an exciting time to be a member of the DRBF, and I'm looking forward to seeing all of you sometime during the coming year at one or more of the above conferences.

A handwritten signature in black ink that reads "John C. Norton". The signature is written in a cursive, flowing style.

John C. Norton
President
DRBF Executive Board of Directors

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Gwyn Owen, Director, Past President
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The Executive Committee meets monthly. Recent topics have included:

- Results of the updated DRB database project
- Efforts of the Region 1 Marketing and Outreach Committee
- Expansion of the Region 2 training program and new regional events
- 2011 budget planning

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

Executive Board of Directors Meeting Schedule:

December 17, 2010 by conference call
January 21, 2011 by conference call
February 18, 2011 by conference call

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Roger Brown, President
Doug Holen, President Elect
Kerry Lawrence, Past President
Deborah Mastin

Region 2 Board of Directors

Nicholas Gould, President
Richard Appuhn, President Elect
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James Perry

The Board of Regions 1 and 2 also meet on a monthly basis. Questions for the Executive or Regional Boards should be addressed to the Board Presidents, care of:
Dispute Resolution Board Foundation
19550 International Blvd. So., Suite 314, Seattle, WA 98188
Phone: 206-878-3336 Fax: 206-878-3338 Toll free (US only) 888-523-5208

To Admit or Not to Admit DRB Recommendations: That is the Question

By Kurt Dettman

In considering the drafting of DRB specifications, one of the topics that often comes up is whether DRB findings and recommendations should be admissible in legal proceedings that could follow the DRB process. This article will explore some of the pros and cons of admissibility vs. inadmissibility of DRB findings and recommendations in later legal proceedings.

The DRB Hearing Process and Recommendations

Most DRB specifications provide that the DRB will implement a relatively informal hearing process on any claims that it is asked to consider. The hearing process typically includes exchanging of position papers (with back-up) and holding a hearing where the parties present their respective positions. By design, the hearing does not have the trappings of an arbitration or litigation process such as keeping of a formal record, swearing of witnesses, marking of exhibits, and the like. Most notably, DRB specifications discourage the use of or participation by legal counsel; instead, claims are typically presented by the people who are actually building the project.

After the informal hearing process, the DRB issues detailed findings and recommendations (which I will refer to collectively as “Recommendations” in this article) on the issues in dispute.

The Recommendations usually focus on the circumstances and events on the project from a construction and engineering standpoint, with more emphasis on the technical specifications and plans than on the front end legal terms and conditions. Although “legal” issues may be raised, they often are not determinative of the outcome recommended by the DRB. (After all, most DRB members are selected for their technical expertise, not for their ability to wend their way through a thicket of legal issues).

If the DRB’s Recommendations are not accepted by the parties, the claim usually moves on to a legal proceeding, most often arbitration or litigation. Here, the lawyers take over and the proceedings switch to more of a legal track. Although there will still be appropriate respect paid to the events and circumstances of the project from a construction management and engineering standpoint, the legal proceedings are couched in terms of contractual rights, responsibilities and remedies, and the front end terms and conditions often become the focus of attention and emphasis. One party or the other (or perhaps both) may want to use (often selectively) parts of the DRB Recommendations to argue that the arbitrator or court should adopt the DRB’s Recommendations (or parts of them). This squarely confronts the issue of whether or not a party should be able to introduce into evidence, and whether an arbitrator or court should give persuasive or preclusive effect to the DRB Recommendations.

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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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The Arguments for Admissibility

Those who favor admissibility advance the following arguments:

1. DRB Recommendations are usually non-binding. Thus, there is nothing other than persuasive authority that prevents a party from rejecting the DRB Recommendations. If, however, the party had to “live with” the Recommendations in a later legal proceeding, it will require the party to think long and hard about rejecting it, since an arbitrator or court might be inclined to adopt it as is. Thus, fear of the (potentially dire) consequences in downstream legal proceedings if DRB Recommendations are adopted by an arbitrator or court will motivate the “losing” party to accept the DRB Recommendations, or use them as the basis to negotiate to settle the claim.

2. DRB Recommendations are the product of a thorough vetting of the claim by neutral objective experts in the construction field who are familiar with the events and circumstances of the project - why should the parties have to “re-try” the claim again before an arbitrator or court when the parties have already invested the time and effort to fully explore all aspects of the claim? In effect, the DRB Recommendations could be considered a form of expert determination that the arbitrator or court should be able to rely on and not have to replicate through another round of evidence and experts presented by the parties. If the DRB Recommendations can be taken into account in the arbitration or litigation, it will have the added benefit of saving process time and money.

3. The value of the DRB process is to persuade the parties, through a thorough vetting of the parties’ positions before project-knowledgeable industry experts, to resolve the claims without resorting to

time-consuming, expensive arbitration or litigation. If parties are able to ignore the outcome of the DRB process, it will undermine the value of, and the parties’ commitment to, using the DRB process to settle their disputes. A lack of faith in the process may suggest to one of the parties that the other does not take the process seriously or is simply using it as a bargaining chip for negotiations.

4. If there is a concern about wholesale admissibility of the DRB Recommendations, the specification can be drafted to make only the Recommendations themselves admissible, not the entire record of the DRB process. Moreover, the parties can expressly reserve the right to argue why the arbitrator or court should not rely on the DRB Recommendations in whole or in part.

The Arguments Against Admissibility

Those who favor inadmissibility advance the following arguments:

1. DRB Recommendations are meant to be non-binding in order to let each party fully control its own destiny - in other words, the DRB is merely giving the parties recommendations that will help them, at the project level, decide to accept the Recommendations or negotiate some other mutually acceptable resolution. The mutual selection of neutral expert advisors and the presentation of the claim by project participants in a “get the facts out on the table” process should be adequate persuasive power to encourage the parties to accept the Recommendations or use them to negotiate a resolution. If they do not accept the Recommendations, then the parties can resort to a more “legal” proceeding with a full reservation of rights to assert claims in a new proceeding independent of the project level dispute resolution process. This is no different than

mediation, where the parties usually expressly agree that their presentations and the feedback from the mediators are inadmissible and that the “clock re-starts” if they go to arbitration or litigation.

2. The DRB process is deliberately informal and does not have what lawyers consider to be “process protections” such as formal discovery of documents and witnesses, a stenographic record, fact and expert witnesses under oath, the right to cross examine witnesses, etc. In contrast, arbitration and litigation incorporate these processes as the bedrock of the system. Moreover, the process in arbitration or litigation will be controlled and implemented by the parties’ lawyers, not the parties’ principals as it was in the DRB process. So, the net result of permitting DRB Recommendations to be admitted and potentially have preclusive effect is to take the outcome of an informal process without “process protections” and use it in as an offensive club or defensive shield in later arbitration or litigation.

3. If the DRB Recommendations are to be admitted and potentially have a preclusive effect in subsequent arbitration or litigation, then the natural tendency of parties (perhaps encouraged by their lawyers) will be to build into the DRB process more of the “process protections” that they would otherwise have in arbitration or litigation. The importation into the DRB process of more formal “legal” processes would then undermine the fundamental character of the DRB process as an informal, efficient project level dispute resolution process.

4. Even where parties reserve in the DRB specification the right to argue about admissibility or preclusive effect in subsequent arbitration or litigation, all the parties are doing is transferring the battle

into the arbitration or litigation process. Thus, not only are the parties fighting about the claim as presented in the arbitration or litigation (which may have different or additional issues in play), but they are now also arguing about what happened (or didn’t happen) before the DRB that makes the DRB Recommendations reliable (or not). Worse yet, they will be arguing about what the DRB did (or did not do) in its Recommendations as later interpreted by the parties. And as a further complication, DRB members typically cannot be called as witnesses, so the parties can have a field day debating about how the DRB Recommendations should be interpreted or implemented without the people who actually wrote them being at the table.

Conclusion

As with so many issues involving DRB practices, there is not a “right or wrong” answer here. However, drafters of DRB specifications should consider the arguments, pro and con, and make a thoughtful choice about whether the DRB Recommendations should be admissible in subsequent legal proceedings.

Kurt Dettman is the principal of Constructive Dispute Resolutions, an ADR practice specializing in all aspects of dispute avoidance and resolution in the construction industry. He has written extensively about DRBs and conducts training on DRB practice and administration. Kurt is on the DRBF President’s List and co-chairs the DRBF Transportation and Energy Committees. He can be reached at kdettman@c-adr.com.

Kurt wishes to thank Blase Reardon and Jim Groton for their valuable input on this article.

Region 1 President's Report

By Roger Brown

First I want to thank all of you for asking me to serve as your Region I President. Also thanks to those who attended a great conference in Charleston. We certainly learned what "*Southern Hospitality*" is all about, and we had a great turnout with excellent presentations. Hopefully we will see more of you at next year's conference being held in the great Pacific Northwest, Seattle Washington. The planning committee has already begun working on the program.

It appears that every incoming president must have a goal for their term and I selected mine several months ago: to ***increase the number of users of DRBs***. I feel the only way we can increase membership and the number of active Boards is to increase the number of users via a vigorous marketing effort. To that end I have instituted a marketing plan which has been submitted to the DRBF Executive Board. We are already proceeding with the plan at a pace commensurate with funding in place. The intent is that this plan will continue over time and the president elect, Doug Holen, is already involved assisting me with its implementation. Following is a summary:

MARKETING PLAN FOR REGION 1 - 2010 / 2011

Major Projects – Agencies – Organizations

We have selected the above three categories to focus on and "sell" the DRB concept to. Marketing committees have already been formed, based on project types, who will utilize information from any or all three categories when focusing on new users for DRBs.

Mega Projects

We have already developed a list of over 70 major projects totaling over \$70 billion that are either on the drawing boards or just beginning. These are projects, \$300 million to several billion, which are likely to be broken into smaller volume projects. The Boston Central Artery was an example of one mega project that resulted in over 45 Boards. The Seattle office staff will be the receiver from anyone hearing about a large project. They will do the initial research, finding who's in charge and identifying management companies, contractors, owner info etc., so the Marketing Committee will have all the information necessary to make initial contacts. DRBF members can also submit initial mega project information to me or Blase Reardon, Region 1 Director and marketing coordinator, so we can include it on our master list. This information will also be available through the DRBF website for members to review.

Agencies

Public agencies such as highway transportation departments, university systems, major cities and counties, airport authorities, energy groups, hospitals and others all are ripe for targeting. Once they become users they typically need immediate training and are a source of membership, both required for our major source of DRBF funding. The committee members, having experience in the types of projects the agencies represent, will know all of the various agencies that can be targeted for Boards. The Mega Project list will provide information for the first agencies to target as they will have the largest construction volume immediately available for DRBs. Recently a few more highway departments are beginning to use DRBs, such as Colorado, Ohio, and Wisconsin, and the timing is right to push the remaining 30 to 40 states that are not using them. Our old database contained a total of \$60 billion in project volume of which \$40 billion was in highway, obviously a huge market potential remaining. Only four states, Washington, California, Florida and Massachusetts, made up \$30 billion of the 40.

Organizations

Organizations are typically comprised of some common interest. Examples; AIA, the architects that work for the owners and are drafting specifications; ABA, the attorneys that also represent the owners and influence their selection of ADR methods and drafting of the General Provisions of contracts; AGC, the contractors and subcontractors who can benefit financially from DRBs at no cost (if the DRB spec is in the contract then the contractors

member and half of the chair is included in all bids as a scope of work, thus the owner is paying all costs for a DRB unless there is a dispute); COAA the Construction Owners Assoc. of America; SCUP the Society of College and University Planners are just a few. These large agencies typically have local chapters where the marketing committees (or other DRBF members) can join, speak etc. The DRBF has already requested some of these agencies to have panels discussing the DRB concept at their annual meetings.

Committees

Committees will be the heart and soul of our new marketing efforts. In the past we have relied on word of mouth, a few volunteers, full time marketing employee (which currently the DRBF still cannot afford), and Region Representatives. Most of us, including the Regional Reps, are not marketing people and thus find it difficult to make cold calls and know where to start. Having the above matrix of information available, with contact data, will greatly help the committee members make the first contact. In addition the committee members will be comprised of individuals whose background, experience and business contacts are with the market type. Since the market is the same as their primary career they will know the lingo, certainly some critical contacts personally, and thus already have their foot in the door. In addition the people they will be talking to will be much more apt to listen than someone from another industry. All committee members for each market type should come from the same background. Hopefully everyone on the committee would be available to travel and give a presentation when necessary. These committees would also be the ones who would contact and organize a presentation or be on a panel for the various organizations annual meetings and forums. Although the committee chair and perhaps at least one other will have DRB and DRBF experience there is no reason that new members could not be on the committee also. It would be an excellent time for a new member who wants to be involved with the DRBF and to have an opportunity to be on their first Board. The box lists project types for which committee chairs have already volunteered. If you are interested in joining the effort, please contact the Chairs directly. We already received five inquiries after the Charleston conference.

COMMITTEE CHAIRS

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Universities & Hospitals Douglas Holen dholen@comcast.net

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Energy Kurt Dettman kdettman@c-adr.com and Blase Reardon reardon@bostonsolv.com

Tunnels Rich Redmond richredmond@optonline.net

Canada (all projects) Gerald McEniry gmceniry@revay.com

If you live in or near a large metropolitan area the opportunities for DRBs are many. In the Seattle, WA metropolitan area currently there are over 30 DRBs representing highway, mass transit, sewer treatment, airport, hospital, university buildings, tunnels, schools and utilities. If you hear of major projects or public agencies in your area let us know and we will assist you in marketing in that area.

I look forward to working with all of you next year and ask for your support in expanding the DRB concept throughout our Region.

DRBF Region 1 President Roger Brown can be reached at roger@rbrowncg.com.

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. Members may request bulk quantity to use in promotional efforts. Contact the DRBF office at info@drb.org.

Website Design Update: Visit www.drb.org to view the DRBF’s new website design. Text changes are still underway, and we’d love to have your input! If you have ideas on how we can make the website more informative and user friendly, please contact Committee Chair Ann McGough at amcgough@drb.org.

Call for Papers: The DRBF is seeking papers or articles that may be of interest to DRBF members. 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.

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Contributors
to the DRBF**

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Impregilo
Salini
Sinohydro
Taisei

Gold

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**Do you know some-
one interested in
joining the DRBF?**

The DRBF attracts new members as the DRB process advances into new industries and regions throughout the world. Help us expand by sharing information with your colleagues. Complete membership information can be found on the DRBF web site (drb.org) or contact the main office for details.

WELCOME TO NEW DRBF MEMBERS
MEMBER ADDITIONS JULY THROUGH SEPTEMBER 2010

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Jeddah, SAUDI ARABIA

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LB Consensus LLC
Fort Lauderdale, FL USA

Ernest C. Brown
Ernest Brown & Company
San Francisco, CA USA

David R. Chapman, P.E.
Lachel & Associates Inc.
Morristown, NJ USA

Marcela Radovic Cordova
London, UK

Andrea Dalceggio
Milano, ITALY

Don W. Deere
Deere & Ault Consultants
Niwot, CO USA

Fred Dunham
Dunham Consulting Services
Elgin, IL USA

Robert Fenwick Elliott
Fenwick Elliott Grace
Adelaide, SA AUSTRALIA

Donald Eng
San Francisco Dept of Public
Works
Belmont, CA USA

Simon Fegen
Leach Consultancy Ltd.
Chippenhams, Wiltshire UK

Ugo Galli
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SpA
Belluno, ITALY

Tino Garcia
Ferreira Construction Company
Branchburg, NJ USA

Chowdhary S. Gondy
Virginia Dept. of
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South Riding, VA USA

Thomas J. Groark
Ferreira Construction Company
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Leo Grutters
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John Buck International a
Mubadala Co.
Dubai, UAE

Francis B. Gularte
Hayward Baker, Inc.
Ventura, CA USA

Tom Kilmartin
Frontier-Kemper Constructors,
Inc.
Evansville, IN USA

John Kinneen
AECOM
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John J. Macrae
High Point, NC USA

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Gregory S. Martin &
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Tarrytown, NY USA

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Jessica Romm
PWI
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commonly used method, but I consider mediation an intermediate method which aims at amicable resolution. Therefore, I wish to limit the extent of my discussion by focusing only on Dispute Boards and its benefits over arbitration and litigation.

We often talk about advantages of Dispute Boards over arbitration and litigation. The points many people focus on are: (1) timely resolution, and (2) less costly resolution. We also often talk about the dispute avoidance and prevention function of the Dispute Boards. Indeed, Dispute Boards provide the parties with the benefit of highly effective dispute resolution. Disputes are resolved comparatively in much less time with the involvement of DBs and the overall cost of resolution process is much lower than that of arbitration and litigation. The dispute avoidance function of DBs is something that deserves more attention than ever.

There are other benefits of DBs, which we often omit to pay enough attention. I call them “added benefits” and will attempt to elaborate on them in the following.

Based on my work experience over the years, I have come to realize that the destiny of a construction project depends on the people who are involved.

Let’s think of a typical construction project. The notice to proceed is given, and the contractor begins the work. The first few months are usually the best time period for the contractor and the employer. I call it the “Honeymoon Period.” People are excited about a new project, the stress level is not yet high and pressure has not yet set in among people. As the project progresses further, problems start to surface and the atmosphere starts to change. The Honeymoon continues only until the contractor files his first claim and the owner rejects it.

Then what happens? A commonly known notion about the owners and the contractors starts to show itself. What is this notion?

Owners think the contractors always want to cheat them, whereas contractors think the

owners always take advantage of them by asking for more work for less or no money.

I think it is this notion – among other things – that affects people’s behaviors during the currency of a project, which in turn leads the way to disputes. This driving motive does of course occur in differing levels in each individual depending on each individual’s own experience, character, perception and interests.

What happens in a project where the contract calls for arbitration or a court for the resolution of disputes? When disputes arise, the parties usually do not prefer to go to arbitration or the courts in the mid-stage of the project, but rather wait until the end of the project, knowing that engaging in such an adversarial position will further exacerbate the situation. The corollary of this is that the contractor starts filing claims for minor issues, and in return, the employer rejects them all. The relations get strained between the contractor and the employer. The tension escalates and the situation gets even worse over the course of the project.

This is not a healthy situation for a project, and this situation leaves no opportunity to the parties for any amicable resolution. After all, would you not think that such situation would lead the parties to the same notion about each other? It is a situation back to square one.

The above situation would be totally different if a Dispute Board was in place. Disputes would be resolved shortly after they have arisen, leaving no reason for the parties to take adversarial position and untoward behavior against each other. This helps in maintaining a good relationship between the parties, thus contributing to a successful progress of the project. There is no need to mention that the overall cost of arbitration or litigation would be far beyond the cost of a DB.

For your convenience, I summarize my thoughts on benefits and advantages of Dispute Boards:

1. DBs provide *effective dispute resolution*, meaning timely and less costly resolution of disputes.
2. In the case of Standing Dispute Boards (as opposed to Ad-Hoc), DBs help in *avoidance* and *prevention* of disputes. Dispute avoidance means money saving, time saving and positive

focus on the project. This benefit can only be gained from a Dispute Board. Neither arbitration nor litigation can provide such benefit.

3. Resolving disputes at the jobsite level is better than resolving at higher management levels. DBs are involved in the jobsite level. Based on my experience, when a DB makes their site visits, the party reps usually consist of site management staff without the involvement of executive level management. When a referral is made to the DB, whether it is made by the contractor or by the employer, the position papers or other relevant documents are usually prepared by the site staff, without the involvement of corporate lawyers and outside counsels, except for issues involving pure legal matters or for highly complex issues. Unlike Dispute Boards, when a dispute goes to arbitration or litigation, it becomes a more important issue and draws the attention of executive level management, where lawyers get involved, outside consultants and counsels are hired. Simply the whole issue gets rather more intricate and more costly. For this reason, DB's involvement plays a great role not only in keeping the costs down, but also in preserving the relationship between the parties. Any attempt to resolve disputes beyond the job-site level will cost the parties more money, more time and stress.
4. From the owners' point of view, DBs help in respect of evaluating their engineers, designers or representatives, who are involved in preparation of contract documents. Imagine a dispute arising out of a design problem where the design was done on behalf of the employer by a designer/engineer, or a dispute arising out of an ambiguity in a contract clause setting out obligations of the parties. Normally, in such situations where designer/engineer or architect/engineer or ER whose professional work is questioned, the reasons given in a Dispute Board recommendation or decision can be a useful evidence for the employer to evaluate his designer/engineer/representative for their professional work. The employer may either pursue his loses against them or decide whether he would work with them again or not.
5. Unfavorable decisions or recommendations of DBs should be taken as "lessons learned." Those unfavorable recommendations or decisions should be used as a guideline by the owners, which can be quite helpful in drafting a new contract. Each lesson learned helps eliminate potential errors or problems in future contracts, and prevents the same errors and problems from reoccurring. This is also valid for the contractors. Therefore, Dispute Boards can be considered as neutral consultants, who provide guidance to the parties when the parties need clarification on disagreements. In respect of "lessons learned," this benefit can also be obtained when the disputes are resolved by arbitration or a court, but the cost and time required to get a resolution by arbitration or a court shall be considerably more than that of DBs. Furthermore, dispute resolution by DBs is more timely than others and this directly or indirectly helps the parties to focus on constructing the works and preserves the relationship.
6. DBs eliminate people-related controversies which may lead to major disputes if not handled and resolved in time. The provenance of disputes is the differences in opinions. Opinions are reflections of perceptions, notions, knowledge, character, interest and intention, all of which are part of human psychology. Individuals involved in the management of a project may be different from one to another. DB decisions or recommendations give the higher management an indication as to whether the project team is running the project properly. This works both ways, both for the contractor and the employer.
7. In the case of Dispute Boards, the parties set the rules of resolution mechanism themselves, e.g. procedural rules, etc. In arbitration and litigation, the rules are set by others (DB – In Control, Arbitration & Litigation – Out of Control).
8. DBs provide auto-control in claim submissions. Particularly if the dispute resolution provisions of a contract stipulate certain time limits to the parties to resolve their disputes (as in the case of FIDIC contract books), then this function of DBs becomes even more effective in preventing disputes arising out of potentially bogus claims. This means to the owner time and money savings while giving the owner's staff an opportunity to focus on other things. This is also valid when owners arbitrarily reject legitimate claims from the

contractors. An independent, impartial, knowledgeable and experienced DB will not allow such bogus claims or arbitrary rejections of legitimate claims and discourage such behavior. Knowing that disputes arising out of such bogus claims or arbitrary rejections shall not be tolerated by the DB, the parties will eventually act accordingly.

9. In situations where contracts do not provide for timely and fair dispute resolution mechanisms, then it is highly likely that potential bidders will consider adding additional risk factors into their proposals. This means higher bids, thus owners will have to pay more for the work. Bidders may think that the owner would delay the resolution of disputes and that they would not be able to recover their costs. Incorporating DB provisions in the contracts can eliminate this notion, thus resulting in lower bids.
10. Decision-makers in state or public organizations are usually under strict scrutiny as they are subject to relevant rules and regulations pertaining to their own administrative laws. Because of this, they may be reluctant to make decisions on settlement of disputes and to approve payments where the intention is to avoid or resolve a dispute. A well-reasoned decision or recommendation of a DB consisting of independent, impartial and experienced professionals provides for credible evidence to support the decisions of such public decision-makers. An owner with lesser authority to make decisions on financial matters – because of fear of being audited – may perhaps prefer to have a Dispute Board whose decisions are binding (e.g. Dispute Adjudication Board) whereas another owner with higher authority may prefer to have a DRB (Dispute Review Board) whose decisions are not binding.

Probably the above list can be expanded further. My intention was to put forth this list as a guideline to help my colleagues who have already started or will start promoting the use

of Dispute Boards. In promoting DBs, what might be a good idea is to prepare a “comparison chart,” having dispute resolution methods lined up on top and the benefits in the far-left column. For each corresponding benefit, a check-mark is put in the relevant box. I am sure the DB column will have the highest number of check-marks. When making a presentation to a potential user, a “one-sheet comparison chart” will make more impact than that of several pages of writing. As they say: “One picture is worth a million words.” If any of our colleagues happen to prepare such a chart, please do share it with us.

Before closing, the answer to the title question is:

“Yes, we really do need Dispute Boards.”

I wish you all the best and good luck with your efforts.

Levent Irmak is a Civil Engineer and Consultant and is the DRBF Country Representative for Turkey. He can be reached by email at leventi@tiac.net.

Forum Newsletter Editorial Deadline

Our readers love to hear DRB success stories, challenges facing the process, and the latest industry news and events. 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, 2011

Adjudication Under Romanian Law

By Solange Iana

Alternative dispute resolution (ADR) comprises dispute resolution processes and techniques that fall outside of the government judicial process.

Despite historic resistance to ADR, these procedures have gained widespread acceptance among both the general public and the legal profession. In fact, recently Romania adopted Law no.200/2010 regarding some measures for the acceleration of the process of solving disputes in law courts - the so called "the small reform". By this law, some courts are obliged to require the parties to resort to ADR of some type, usually mediation, before permitting the parties' cases to be tried. The rising popularity of ADR can be explained by the increasing caseload of traditional courts, the perception that ADR imposes fewer costs than litigation, a preference for confidentiality, and the desire of some parties to have greater control over the selection of the individual or individuals who will decide their dispute.

It is an unquestionable reality that some litigants really want to reach agreement through collaborative processes and don't necessarily need a coercive power of the state to enforce a resolution. Perhaps more importantly, many people want to use a professional when they become involved in a dispute, particularly if the dispute involves various specific technical aspects.

Not only individuals or business entities make use of the alternative dispute resolution procedures to solve conflicts and/or potential conflicts between them. Also governmental agencies and other state bodies over the world apply for these methods in consideration of their obvious advantages.

One of the classical examples is that of complex civil engineering contracts, involving multifaceted construction scenarios supported by various international financing instruments.

The main progress up to date in the process of the resolution of disputes under international civil engineering contracts has been the introduction of the Dispute Review or Adjudication Board, or, in the case of smaller contracts, the use of a single adjudicator or expert decision-maker, to resolve disputes before, and / or instead of arbitration.

The fact that the World Bank included this system into its Standard Bidding Documents-Procurement of Works and FIDIC introduced a similar system into its Conditions of Contract for Design/Build and Turnkey (the "Orange Book") and issued a Supplement to its Conditions of Contract for Works of Civil Engineering Construction, Fourth Edition, 1987 (the "Red Book") providing, among other things, for a dispute adjudication board procedure encouraged public entities to adopt this adequate alternative of dispute resolution.

The use of dispute review or adjudication board procedures, as well as any other ADR, generally depends on the agreement by the parties to use these processes, either before or after a dispute has arisen.

In Romania, the legal base for the parties to agree upon a dispute resolution clause in a contract is the Civil Code.

The article 969 of the Romanian Civil Code provides that:

"Legally concluded agreements have the power of law between the contracting parties. They may be revoked by mutual consent or due to causes authorized by law".

Article 970 of the Romanian Civil Code provides that:

"Contracts must be fulfilled in good faith. They are mandatory not only in respect of what is expressly mentioned therein but also in respect of all consequences of equity, custom or law as they may relate to such obligations."

It follows from Articles 969 and 970 of the Romanian Civil Code that a dispute resolution clause inserted into a contract creates legally binding obligations which not only must be performed but must be performed in good faith by the parties.

Obligation is used in reference to anything that an individual or an entity is required to do because of a promise, vow, oath, contract, or law. It refers to a legal or moral duty that an individual can be forced to perform or penalized for neglecting to perform.

An express contractual obligation arises as a result of an enforceable promise, agreement, or contract spelled out in direct and actual terms. This obligation can incur a penalty for its un-fulfillment.

Therefore, once included into a contract, a provision related to the adjudication of a dispute by the DAB has an imperative nature and would not be interpreted as voluntary. The parties will have the obligation to act in good faith whenever performing duties or exercising rights under their contract.

Under Romanian Law breach of contract arises when an agreement is not honored by one or both of the contracting parties, either by non-performance of the contractual provisions therein or by one interfering with the other party's performance.

One party's failure to follow the contractual provision in respect of the dispute adjudication mechanism is a breach of contract which will engender the applicability of legal sanctions.

Moreover, the Decree No.31/1954 regarding the juridical regime of individuals and legal entities stipulates, under Article 3 thereof, that the law protects civil legal rights provided that they are exercised in accordance with their economic and social purpose.

In this respect no one could refuse to perform the obligation undertaken under a contract. The exercise of a civil legal right without observing the principles upon which the right should be exercised is an abuse of right.

Likewise, the exercise of a right in bad faith; and/or exceeding its limits as provided by the contract and acting contrary to good faith principles enshrined in Romanian law (Article 970 of the Civil Code), is an abuse of right.

Despite the fact that Romanian Civil Code does not provide a definition of the "good faith", it is unanimously accepted that "acting in good faith" when performing a contractual obligation means that a party shall exercise its rights without harming the other party's rights. Therefore, the exercise of the contractual rights beyond the limits of the parties' common intention might be construed as an abuse of right.

According to Romanian Law the sanction for an abuse of right may be either passive or active. The passive way of sanctioning an abuse of right consists of the refusal to enforce any claim or legal action taken by a person who is abusively exercising a right or the rejection of any defense based upon a right abusively exercised.

As a conclusion, under Romanian Law, a contractual clause regarding the adjudication of a dispute by the DAB has a binding nature for the parties (irrespective of their legal status) and should be fully and promptly performed by them.

Solange Iana is an Attorney at Law with Leaua & Asociatii in Romania. She can be reached by email at solange.iana@leaua.ro.

Reinventing the Wheel and Making it Square, or Using Good, Common Sense?

By Alina Valentina Oprea

Dispute Resolution Board Foundation (DRBF), Dispute Board Federation (DBF), *Federation Internationale des Ingenieurs Conseils* (FIDIC), and other professional organizations and individuals are promoting worldwide the benefits of using Dispute Boards for preventing and solving disputes. They know, and make huge efforts to share their experience with the parties to the construction contracts, so that all could benefit from the advantages brought by Dispute Boards. Conferences, workshops, meetings, newsletters... by all means, these people want to make others aware of methods to prevent and solve disputes with no conflict.

Wisdom won and internationally used contract conditions and the laws in different countries have made alternative dispute resolution methods the officially recommended (imposed, in some cases) method to solve the disputes. Good judgement leads in most cases in the civilized world.

Human nature and strong personalities of different individuals in some countries make people ask themselves: “What if we would try something different to resolve disputes...? Something like... law courts...?”

“What if we would try another shape of the wheel...? Let’s try it square...!” without considering the efforts and experience achieved by so many people and generations to get and keep the wheel round...

Some authorities, here and there in the world, said “Let’s try it by court law and see what happens.” This may be okay for private money, if the owner takes this risk on his/her own money.

But what about public money? Do the authorities have the right to risk the public’s money, money collected from individuals

and from firms and companies, by trying to solve the big number of disputes within the construction contracts by methods other than the ones specially created and used for these disputes as win-win solutions, such as Dispute Boards? A win for the parties, a win for the projects, a win for the regions and countries. Law courts – the method some of them have chosen to solve the difficult, technical disputes within the construction contracts – are already extremely overloaded and will be forced to give decisions in years instead of days (28 days, as per U.K. regulations, 84 days, as per FIDIC rules of adjudication, etc.). This does not even take into consideration the lack of technical specialization in such courts.

Who will win from replacing Dispute Boards and arbitration with law courts in the construction contracts, as authorities from some countries, here and there, try to do or even have already done?

Law courts will be even more over loaded. The conflicts will be escalated, in the absence of a Dispute Board which can prevent them, and will be solved in a way that is full of conflict, in long lasting and painful court trials.

Contractors will lose confidence in quickly receiving their entitlements, and, in this way, will have to work in a more risky environment. Prices will increase to cover the higher risks, or the contracts will be awarded for incredibly low prices and either the contractors will become bankrupt, in the absence of not receiving their entitlements quickly, or will try, by all means, to recover their losses and receive their entitlements – unorthodox and non-transparent methods included.

Who will win...?

- **Projects**, to be continued and finalized, if still possible, by weakened contractors in bad relations with unfair employers?

- **Employers** themselves, getting bad, never ending projects?
- **Beneficiaries** of these (public) projects, delayed or forever unfinished?
- Or **obscure people or entities**, taking advantages from all these delays and messy relationship and projects, or just being satisfied that they can so easily spoil the good standing methods and institutions and the beneficial efforts of so many people to establish a good, fast and fair environment for the construction industry?

Do you recognize some of these, in your countries or projects, in the tendencies and actions of authorities...? I am sure that each of you knows of a situation that matches the description above.

I can tell you about Romania, where we have road, railways and other projects - some of them valued at hundreds of millions of Euro, and financed by public money (Romanian or European). There have been (or still are) employers using good conditions of contracts (like FIDIC ones, that foresee alternative dispute resolution methods). These employers can make bad decisions and in this way spoil the contracts by including abusive conditions, making the contracts unbalanced and replacing the adjudication, arbitration and other alternative methods of preventing and solving the disputes from the contracts with the courts of justice exclusively...! Disastrous decisions for the projects, for all the parties and for the employers themselves, for the contractors, for the projects beneficiaries and for the citizens.

I am happy to report that the Road Authority in Romania changed its mind and reversed the bad, unbalanced contracts already published for the next tenders of hundreds of millions of Euro into more balanced contracts, with DABs and arbitration in place to prevent and resolve disputes. The Roads Authority is benefiting from good advice from true professionals who mobilized around the cause and from people convinced

of the advantages of balanced contracts and of maintaining Dispute Adjudication Boards and arbitration within the contracts.

The victory is one for rationality and good, common sense. The same victory is needed for the Railway Authority and for other authorities in Romania which intend to or already spoiled the balanced contract conditions and removed the ADR methods, replacing them exclusively with law courts. This, in a country which already adopted, by law, different kinds of alternative dispute resolution methods in all the domains in order to make the life of its citizens and of the law courts themselves easier and in less conflict.

Professionals, people from inside and from outside these authorities, now is the time to speak up! Make the decision makers aware of the advantages of having balanced contracts and fast, less expensive methods of preventing and solving disputes without conflict. You, or people like you, already succeeded in convincing the Road Authority to make the right decision!

The danger of making wrong decisions is big when people in charge are being replaced so often with new ones, not (yet!) aware of the good way of doing things and trying, almost all of them, to change the rules – irrespective of being good or bad.

Professionals, please keep staying alert and vigilant to preserve what is good and to make decision makers aware when things go wrong. You are more powerful than you might think, and the good always win, sooner or later.

Alina Oprea is a member of the DRBF Region 2 Board of Directors and serves as DRBF Country Representative for Romania. She can be reached by email at alina.oprea.v@gmail.com.

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www.drb.org

Interested in becoming a Country Representative?
Contact Coordinator Paul Taggart at ptag1956@aol.com

Ethics in Today's World of DRBs:

Owner argues dispute has previously been heard and there should be no "second bite"



By Jim Phillips Ph. D.

From all reports, the Annual Meeting and Conference in Charleston, S.C. a few weeks ago was a huge success and everyone seemed to have a great

time both at the sessions and touring Charleston and the surrounding area. Thanks again to Jim Brady for his efforts to ensure attendees and guests had a pleasurable experience over the weekend.

I thought the discussion of the importance of ethical conduct by DRB members was especially important as many of you joined into the discussion of both the importance of ethical practice generally as it relates to the Foundation's standing in the industry, as well as of the hypothetical question we posed for discussion.

The question posed in the last issue of the *Forum* related to an owner, during the course of the contractor's presentation of his/her position on a dispute during a Formal Hearing, arguing that the contractor should not be able to present this dispute again because it had in essence been heard before at a previous formal hearing.

If you recall, the original question recited a situation where the owner had complained that the contractor was attempting to present a dispute at a hearing that was new or different from that which had been agreed to by both parties was properly before the DRB. That

Procedures, agreed to by both parties, provided that only those disputes that had been briefed by both parties were eligible to be heard by the Board at a formal hearing. My discussion of this issue concluded that neither party should be allowed to "sneak" a new issue into a hearing that had not been agreed to be heard or briefed by both parties. To do so would allow one party to orchestrate a "hearing by ambush" which the DRB should never allow.

We further assumed in the previous question that the DRB decided to postpone the hearing on the new issue to a later hearing in order to give the parties the opportunity to brief the dispute.

Now back to the current question. We are now in the formal hearing of the dispute, previously delayed, and now the owner is arguing that this dispute has already been heard by the DRB in that previous hearing. I think it would be safe to assume that the contractor would be arguing that he/ she has yet to be able to present this dispute to the DRB.

This question, it seems to me, is a case of the owner attempting to have it both ways. By that I mean he originally complained that the contractor was attempting a "sneak attack" and now he claims that the dispute has already been heard. Of course we are assuming that this dispute is very similar or related to one that had previously been presented at a previous formal hearing.

This is a classic example of what can happen if the parties do not **agree in writing** before a formal hearing is convened as to the nature and scope of the dispute that the DRB will be hearing. The Foundation's *Practice & Procedures Manual* in Section 3.6.1, Hearings Preparation, provides that soon after the hearing date is set, "...the parties should strive to jointly agree on the exact wording of a statement of the dispute." The Manual further provides that the parties should define it as best they can, but that it is up to the DRB to define the dispute according to the Board's analysis.

In some cases, the DRB may want to hear arguments from the parties as why the dispute should be defined a certain way or in a certain scope. This way, both parties have the opportunity to be heard on how they view the dispute and why it should be framed a certain way. This practice would be in keeping with Canon 5 of the Code of Ethics which provides that the DRB "shall impartially" consider all disputes referred to it. In my opinion the definition of the dispute prior to the hearing, as the parties agree, or as the DRB defines it, is fundamental to the fairness of the hearing and the impartiality of the Board.

As I discussed in the previous *Forum*, in some cases as parties go back to revisit the facts of the project's construction to prepare a position paper and oral argument for a formal hearing, one dispute uncovers either a different but related issue, or the accumulation of several distinct disputes, which can change the scope of the dispute that has been agreed to be heard. Another method for dealing with this phenomenon would be for the party in that situation to request a telephone conference with the DRB chair and the other party to get clarification and agreement before going forward to the hearing.

In the current question where the owner is claiming that the contractor has already presented a dispute, it will be up to the DRB to decide whether, in fact, the dispute has already been heard and decided, or whether this dispute is properly before it for a Recommendation. It is clear, however, that the owner should not be able to prevent a contractor from bringing a dispute to the DRB for a hearing.

NEXT ETHICS CHALLENGE

Assume you are a DRB member on a project that is over 50% complete and that there have been no informal or formal hearings held thus far. Assume that the parties seem to be communicating at a high level; the correspondence indicates a good partnering program, productive weekly meetings and problem solving on all sides to resolve issues which arise that might turn into disputes. Assume you are at a regular project meeting and that both parties request that the DRB disband and resign because "we do not have any problems and do not need the DRB."

What should the DRB do?

**Ethics
Commentary
or Question?**

Please contact:

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Dispute Resolution Board Foundation 11th Annual International Conference

Real Time Dispute Resolution in Infrastructure Contracts *Latest Developments and the Advantages of Dispute Boards* May 14-15, 2011 Renaissance Hotel, São Paulo, Brazil

The Dispute Resolution Board Foundation's 11th Annual International Conference offers the latest information and ideas about the growing use of the Dispute Board process around the world. Optional training workshops are offered on Thursday and Friday prior to the conference for beginner and advanced practitioners.

Agenda

Day 1 Revisiting the Fundamentals of Dispute Boards for New Markets - *Round table discussion of the fundamentals of successful Dispute Boards within the context of the Latin American construction market.*

The Use of Dispute Boards in Brazil: Experiences and Perspectives – *DRBF Country Representative for Brazil, Gilberto José Vaz, will moderate a discussion of the current use of Dispute Boards in the country as well as future prospects for the process. Discussion will include developments in alternative dispute resolution within Brazil and lessons learned to date.*

Dispute Boards in Latin America – *A discussion of experiences throughout Latin American countries, including accomplishments, challenges, and future potential. Moderated by Romano Allione, Immediate Past President of the DRBF Executive Board of Directors.*

Latest Developments on Resolving Controversies in Construction Projects in the World – *Trends and issues regarding the methods of dispute resolution in construction projects around the world, and insight on how local perspective affects the process.*

Day 2 Rules for Dispute Boards: Model Clauses and Institutional Procedures – *An overview of the developments of Dispute Boards in terms of institutional rules and model clauses, analyzing the advantages and problems of adopting them. Perspective from the DRBF, ICC, FIDIC, and local organizations.*

Dispute Boards and Legal Systems – *Analysis of this fundamental issue regarding the perspective of Dispute Boards in civil law countries in comparison to common law countries. The dilemma of “recommendation vs. decision” under the light of legal systems. The use of DBs in public contracts in both systems. What are the challenges and possible solutions?*

Conference and training workshop are open to employers, contractors, consulting engineering firms, law firms and 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. For those traveling from outside Brazil, the DRBF will arrange optional tours to some of Brazil's most popular destinations, such as Rio de Janeiro, historic cities of Minas Gerais, the Amazon and the beaches in the Northeast.

Visit the Meetings & Conferences page of the DRBF website for updated information regarding conferences and training workshops.

DRBF 2011 Event Calendar

March 24

Introduction to Dispute Boards for Government Officials
Bucharest, Romania

April 8-9

DRBF Conference for Dispute Board Users in Central Europe
Vienna, Austria

May 12-13

Training Workshops:
Introduction to FIDIC and Dispute Boards in International Construction Contracts
Dealing with Conflict as a Dispute Board for Advanced Practitioners
Renaissance São Paulo Hotel
São Paulo, Brazil

May 14-15

11th Annual DRBF International Conference
Renaissance São Paulo Hotel
São Paulo, Brazil

May 20

Northwest Regional Conference
Seattle, Washington

September, *date to be announced*

4th UK Member's Meeting
London, UK

September, *date to be announced*

3rd DRBF Bucharest Regional Conference
Bucharest, Romania

September 22

Training Workshop
Seattle, Washington

September 23-24

15th Annual Meeting & Region 1 Conference
Seattle, Washington

November, *date to be announced*

DRBF European Conference
Brussels, Belgium

DRBF 14th Annual Meeting & Conference: A Report from Charleston

By Jim Brady

This year's conference was held in the most beautiful city in the US. True it is hot here in the summer but Fall brings a lessening in the temperature - and hurricane season. The week prior to the conference we had heavy rains, but the hurricanes, as directed, went elsewhere and we had perfect weather for the conference.

Before the Annual Meeting & Conference was a day for DRB training, aimed at two different groups. One for newcomers, those not familiar with the DB process, potential practitioners or those who should have basic knowledge of the process. Instructors were Doug Holen and Steve Goldblatt covered lots of content. The second was the DRB Update workshop, designed to keep members attuned to the DB principles, case histories and ethics, taught by Roger Brown. There was a tremendous amount of exchange between the participants relating their experiences and approaches to problems often faced by DBs. Roger kept the session interesting, moving from topic to topic inviting participation from all. Roger's guidance and total interaction made it a very worthwhile session. This refresher course is one the DRBF should offer at every opportunity, an opportunity to sit with other practitioners discussing view points, problems and ethics in the real world. Each member comes away with a refined set of 'best practices.'

The Welcome Reception was held in the Fancies Marion's lobby. This is the grand old hotel of Charleston, extensively remodeled to recapture its early opulence. One thing not commonly known is that after the World War II General Dwight Eisenhower maintained a floor in the Hotel Pierre in NYC that overlooked the southeast corner of Central Park. Similarly, General Mark Clark lived in the top floor of the Francis Marion overlooking the old Citadel parade grounds. It was great to see so many old friends arrive early and so many of the training participants stay after class and mingle. It was very well attended and I saw lots of networking in progress. It was a great kick off for the event.

We planned this to be an informative and innovative conference. Because Charleston is an interesting city, we decided the 3, half-day format would be best. The sessions each had a theme, with afternoons left for exploring and several special events thrown in for good measure. Read more about the tours on our event website: www.drbfcharleston.org.

After introductions from incoming President Jack Norton, I had the privilege of introducing our kick-off speaker and friend, Mayor Joe Riley. Charleston has over 3 million visitors a year, and Joe is asked to speak frequently. His staff wanted him to do the standard three minute 'Welcome' speech. Joe said 'no' and we all benefited from his deep insights to the city's history, preservation and continued development. Maybe 'insights' is not the proper word, as to me it evokes 'observations.' Mayor Riley, during his 34 years as mayor, has not been an observer, he is the inspiration and driving force. It was a true compliment for him to share so much time with us.

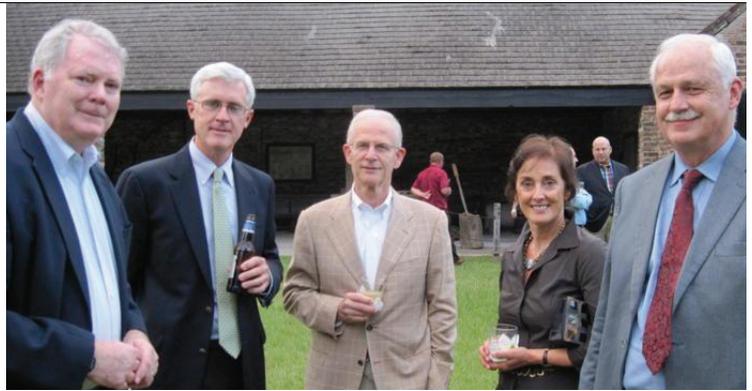
Each day's session had a general theme. The first day was lead by Bill Baker and concentrated on DRBF members involved with the ins and outs of the process. It included an in-depth look at current DRB specifications, pointing out some things to look for and look out for, with discussion led by Steve Goldblatt. The next session was led by three of the most dedicated DRBF members, Bill Edgerton, Joe Sperry and Pete Douglass. They, along with Bill Baker, are in the process of revising the DRBF Manual. I've sat in on one of their work meetings, and it is awesome to see how dedicated and determined they are to refining and improving an already excellent document. The session gave insight into the processes that go into shaping the DB procedures, and more importantly the thoughts behind the processes.

The third morning's session reflected on one of the DRBF's continuing areas of heightened awareness, ethics. Jim Phillips very ably led the group. Whether with the pros and cons of the arguments presented in a dispute or just the presenting of a Board member's disclosure statements, gray areas need to be avoided at all costs. Any hint of a non ethical practice or a bias severely damages the DB process. Jim writes an informative column in each issue of the Forum. Everyone took something away from this session.

Our lunch speaker, Dean Andy Abrams, was a delight. I confess I had concerns about the dean of a law school in front of our group, but once we met all fears subsided. His '*Irreverent Look at Charleston*' was a hoot, with insider information that was historical, and even better yet, true. It took a little of the halo off the 'Holy City' but made it a far more interesting place. Can you believe we had pirates, red light districts, speakeasies and questionable politics?

Saturday's general theme was about the future of the Foundation, "*The Road Ahead, New Markets and Expanding Markets.*" This was spearheaded by Blase Reardon who was assisted by several, in particular Kurt Dettman.

The first session was ‘*Current Status of the US Energy Industry*’ by Dr. Lester Lave. This is a major concern to all Americans, and it was good to get insights from one who knows the industry. To at least reduce somewhat our dependency on foreign oil, the US will have to develop our natural gas potential, purify our burning of coal, revive our nuclear industry, and conserve energy with pump storage. These are all multi-billion dollar industries requiring heavy construction contracts, a DRBF area for sure. Next followed “*Energy Industry Opportunities and Challenges*” moderated by Kurt Dettman. A very distinguished group of panelists closely associated with the industry explored the needs for dispute resolution in these areas.



Conference Chair Jim Brady (far left) finally relaxes with fellow delegates at the stable yard reception at Middleton Place.

Day two’s final session was “*Spreading the Message,*” a topic close to Blase Reardon’s heart as well as many others. Examples were given on how the DRBF is approaching new markets both domestically and internationally. The report of the Marketing/Outreach Committee detailed efforts to date and where they are headed next. As a formal effort of the DRBF this is a relatively new undertaking. Tremendous strides have been achieved under guidance of Blase Reardon and his team in less than an year. Our new Region 1 President, Roger Brown, also has outreach at the top of his agenda, and at lunch he defined his direction and elaborated on how to achieve the DRBF’s goals.

Sunday’s general theme was “*Where Does the Foundation Find Itself Today?*” This was led by our incoming DRBF Executive Board President Jack Norton. What have we achieved in our 13 years since our founding? Well for starters, we are 700 members strong with members in 50 countries. We have two full fledged regions with an emerging Region 3 in Australia. In total there are DBs on approximately \$200 billion dollars of construction work around the world.

Dr. Ralph Ellis’ presentation “*Success of DRBs in Florida*” was outstanding. The conclusions supported with charts and graphs were overwhelmingly conclusive. His study, along with others such as Jim Haggins’ Washington Metro’s Case History, should convince an owner. The next session, “*Owner’s Perspective on DRBs,*” was chaired by Doug Holen and had a most outstanding panel of owner representatives: Larry Drolet, Ken Lewaine, Eric Smith, Stephen Spohrer and Levent Irmak. This panel represented a vast range from first time owners to the largest construction projects in the US, to underground, to universities, to vertical construction and to international construction.

There were two very interesting sessions on major world class projects. Levent Irmak presented a look at the Marmary Project, a tunnel project in the Bosphorus, and its challenges such as multiple TBMs, sunken tube tunnel placed against swift currents, and archeology finds so numerous it set excavation back three years. Steve Spohrer presented the John J. Audubon Bridge, the longest stayed cable bridge spanning the Mississippi River. An excellent presentation! The major difficulties, the efforts required to move past them, and how Mother Nature may not always be on your team.

The final session was by Ken Lewaine on the MTACC’s \$25 billion dollar transit project in NYC. The program involves construction of a major section on the Second Avenue Subway from 96th to 63rd Streets, and multiple construction contracts for new stations at 96th Street, 86th Street, 72nd Street and a reconfiguration of the existing 63rd Street Station. Another major component is the East Side Access, which will allow the Long Island Railroad to access Grand Central Terminal and the East Side of midtown Manhattan. This involves carving twin 1,200 foot long 4 train stations in the rock deeply below the existing Grand Central Terminal without disturbing any existing train traffic. Easy? Just ask the contractor. A third major project is the extension of the 7 Line Subway, from GCT past Times Square under the port authority bus terminal, down 11th Avenue with a new station near the Javits Center. A project ahead of schedule in NYC. Wow! Twenty-five billion is a lot of money even for NYC. All the major underground individual contracts have DRBs, and DRBF members fill most of the slots. Ken’s presentation was outstanding.

The conference officially closed with a farewell luncheon. There were no speakers but some very heartfelt ‘Thank-You’s’ to all those who contributed and all who attended. All three days were of the highest standards. The high quality of the final day’s program and the wrap-up luncheon appear to be very good ideas. From a quick count at the sessions and lunch it appeared there was about 80% retention of attendees. A record!



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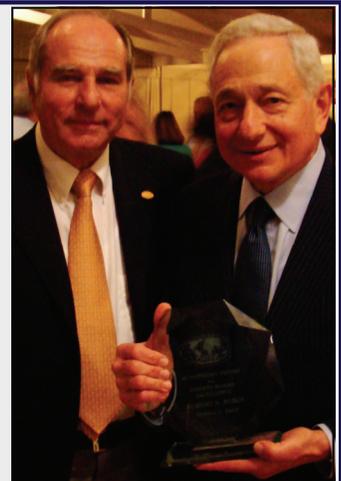
Gwyn Owen and Bob Rubin Receive 2010 Al Mathews Award

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 2, 2010, DRBF members **Gwyn Owen** and **Robert Rubin** were recognized for their many contributions to the Foundation and to the process. The awards were given during a banquet held in conjunction with the DRBF 14th Annual Meeting and Conference in Charleston, South Carolina. Unfortunately, Gwyn Owen was unable to attend, but DRBF Past President Romano Allione hand delivered the award to him recently. 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**
- 2009 Richard Appuhn and Jack Feller**



DRBF Past President Romano Allione (left) congratulates Bob Rubin.