



# Forum

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## The Use of “Adjudication DRBs” Where Parties Are Subject to Adjudication or Arbitration Processes

By Kurt Dettman and Christopher Miers

### Introduction

Adjudication is a statutory process adopted in the United Kingdom by the Housing Grants Construction and Regeneration Act 1996 for obtaining a low cost, rapid decision in construction disputes. The use of adjudication has become well-established in the UK construction industry since the act was implemented in May 1998 and similar processes have now been introduced in other jurisdictions such as New Zealand and parts of Australia. In the UK it has had a profound effect in reducing the number of disputes that go to formal litigation or arbitration.

The adjudication process is available as an option for a party (usually the contractor) with a construction dispute to bring its claim to an “adjudicator” for a decision to be issued within 28 days after filing the claim. The parties are bound by that

decision unless/until it is overturned by a later process of litigation or arbitration. In the vast majority of disputes, the parties accept the adjudicator’s decision and do not pursue a later court or arbitral appeal, so the adjudication process results in what is tantamount to a binding decision. Adjudicator’s decisions have also met with full support from the judiciary in enforcement actions, and as such parties have very little scope for non-payment of any award made by the adjudicator.

In the United States (US) domestic construction market the closest cognate to the UK’s adjudication process is arbitration. In many respects, the arbitration process is like the adjudication process. There are, however, some differences: arbitrations (especially in large, complex disputes) usually are more formal; arbitrations usually take much longer and are

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**In the UK it (adjudication) has had a profound effect in reducing the number of disputes that go to formal litigation or arbitration.**

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## President's Page

As this is my first "President's Page" summary I initially wish to welcome you all to a new year at the DRBF. I also wish to thank Pete Douglass for all his sterling work at the helm during the last year – and leaving a healthy financial situation for us for the coming year. For the second time the DRBF has elected a non-US citizen as President, which shows the DRBF's commitment to stretching its influence beyond the shores of the US.

The DRBF has already been successful in assisting to integrate the Dispute Board system within those projects financed by the World Bank and the Multilateral Development Banks, and now is the time we need to further support our Country Representatives throughout the world to help them spread the word.

I must tell you that it's not just me standing on the soap box. I am assisted by Jim Brady who has become President Elect and by a very able Board of Directors, many of whom have been involved with DBs for over 30 years and the DRBF from its modest beginnings. However this year the Board is pleased to welcome a new member, young Doug Holen, who will I am sure make a valuable contribution. I am also assisted by a number of committees, a schedule of which appears on the opposite page. So if you need specific help on a particular topic then please contact the relevant committee chairman.

This coming year will be a year of change. It is the year when the Foundation makes a positive step forward to the birth of the new "10 Year Plan." Members will be able to vote on the mechanics of the plan during the coming months, but the plan will restructure the administration of the Foundation and enable it to more positively serve its members in differing parts of the globe. Clearly the needs of members in California will be different from those in Europe and Africa which is why some aspects of the plan were conceived. Hal McKittrick has been the father of this plan and it is to him we need to give both our thanks and support. He is assisted by "shadow committees" already instigated in Europe headed by Romano Allione and during the coming months also in the US.

We have just completed a very successful Annual Conference in San Diego in California attended by some 80 delegates representing 7 different countries. We were fortunate at the conference to be addressed by speakers representing owners and contractors who all seemed to support the concept of DBs and all showed a genuine need for the availability of trained and experienced DB members. This theme was also brought out strongly at the DRBF's International Conference in Romania earlier in the year.

Picking up on these requirements of DB users it is my intention during my year of office to instigate a mentoring system for potential DB members, to enable them to gain hands on experience before they get their first assignment. It's the chicken and egg theory – but in reality its sometimes difficult to get the chicken to lay the egg!! I am also going to start a "provisional" Presidents List of potential DB members. This is to enable me as President to make appointments of DBs whenever I am asked to do so. The Foundation already seems to be getting many enquires for the selection of DB members from both employers and DB users in various parts of the world and as such I have established a committee to look into the concept of having the DRBF to also become a Listing and Accreditation Authority. So watch this space for further information as the year goes along on both of these topics. All DRBF members will be receiving before too long some information on how to become president listed by the DRBF and if you are interested you will be asked to fill in a form to start the process of provisional listing.

Well, as I close out this first President's Page I wish to remind you all to make plans to go to Cape Town in sunny South Africa next May for the next International Conference. Details are on the web site – and from what I have heard so far from the organisers, it sounds like it will be the best yet!!

*Gwyn Owen*

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# Board of Directors

## DRBF Board of Directors Meetings

The DRBF Board of Directors met in person on October 5, 2007 in San Diego, CA. A complete review of the discussions and actions taken at Board meetings can be found on the DRBF web site. Following is a brief overview of the actions taken:

- New committees and committee chairs were established for 2008.
- The Board approved a motion to remove password restriction from Section 3 of the DRBF Manual, making it available to the general public.
- The Training Committee is planning new programs for 2008 will pursue hiring a part time person to support the training program.
- The Board agreed to pursue the establishment of a Member Listing which may have an accreditation component.

All DRBF members are encouraged to read the complete summary minutes and submit any comments or suggestions to Gwyn Owen, president of the Board.

## Board of Directors 2007 Meeting Schedule:

**Executive Committee:** Nov. 29 and Dec. 14, 2007 and Jan. 25, 2008 by conference call  
**Board of Directors:** May 2, 2008 in Cape Town, South Africa

## DRBF Committees

### Executive Committee of the B.O.D.

Gwyn Owen

### Annual Meeting and Conference

Pete Douglass

### AI Mathews Award

Gwyn Owen

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### Institutional Funding and Grants

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### International and Membership

John Madden

### Newsletter

Ann McGough

### Nominations

Bob Rubin

### Professional Conduct

Bob Rubin

### Implementation Oversight of the 10 Year Plan

Harold V. McKittrick

### Website

Ann McGough

### World Bank Liaison

Gordon L. Jaynes

# THE DRBF'S 11th ANNUAL MEETING AND CONFERENCE

## *The Future of DRBs in Infrastructure*

By Harold McKittrick, P.E.,  
DRBF Past President

The 2007 DRBF Annual Conference was held on October 5<sup>th</sup> and 6<sup>th</sup> at the Hilton Hotel at Harbor Island San Diego and was attended by 86 delegates. It was a huge success by many measures. The customary DRBF Administration and Practice and Chairing workshops preceded it at the same venue on October 3<sup>rd</sup> and 4<sup>th</sup>. The latter was compressed into less time as a result of feedback from previous attendees, and the new format was well received. On Friday morning over 25 people had a guided tour of the USS Midway, an aircraft carrier that had served in major conflicts from the Korean War to Desert Storm. After the guided tour we were able to self guide through the ship to areas such as the Admiral's and Captain's quarters, the bridge, etc. One could easily have spent a full day on the vessel.

Prior to the Director's meeting on Friday evening, delegates were offered a workshop on Introduction to International Contracts using DABs. The workshop was the idea of outgoing President Pete Douglass who thought it appropriate in light of our growing international DRBF membership and the onset of Phase 2 of the DRBF Ten Year Plan that was later presented at the



*Russell Snyder addresses the conference attendees.*

conference. The workshop was attended by an overflow audience and well received. It was conducted by David Heslett of ECV and DRBF President Gwyn Owen, and centered on FIDIC contracts and the use of Dispute Adjudication Boards (DABs) under those contracts.

The theme of the conference was "The Future of DRBs in Infrastructure" and explored not only the future, but the geographical extent and varieties of

works that involve DRBs and DABs. The conference was keynoted by Robert Pieplow, Construction Division Chief of Caltrans, who discussed its huge program and its extensive use of DRBs including standing panels who serve multiple smaller contracts. Mr. Wells

discussed the upcoming use of a one person board in small Caltrans work. Gary Gallegos of the San Diego Association of Governments discussed construction programs and the use of DRBs in the San Diego area, and Harvey Elwin the use of DRBs in the San Francisco Public Utility Commission work, some of which will be mega projects.

A panel of Ken Lewaine of NYC's MTA, Craig McDaniel of WASHDOT and Henry Wells of Caltrans discussed the choice to use DRBs and the public owner's perspective. The owner's fiduciary responsibility to the public was emphasized and the fact that the use of

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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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DRBs on major projects was requested by the construction industry. Russell Snyder of AGC of California gave his perspective on construction disputes in San Francisco, and Ferdie Fourie of Kiewit gave the contractor's perspective in his well received presentation of Maximizing the Value of DRBs, all with the goal of settling disputes between the parties on site. William Dorey, President and CEO of Granite Const. Inc., spoke at lunch, after which Dr. Tom Stipanowich of the Strauss Institute at Pepperdine University led a panel of DRB members Jim Phillips, Kerry Lawrence and Steve Goldblatt in a discussion of mediation skills needed on a DRB.

Saturday evening, the Al Mathews Award Dinner featured brief remembrances of our recently deceased founder, Al Mathews, and Larry Delmore, our Executive Director who passed in January. The brief uplifting tributes were made by Bob Smith for Al Mathews and Bob Rubin for Larry Delmore. The highlight of the evening was the presentation of the 2007 Mathews Award to Bill Baker, Past President, Director and Secretary of the DRBF. The choice was a popular one and well deserved. Congratulations, Bill!

Sunday's presentations were varied and well received. Bill Baker, Jim Donaldson, newly elected director Doug Holen and Richard Hille, Executive

Director of the Gladstone Institute comprised a panel discussing the use of DRBs in the building industry. President Elect Jim Brady and Director John Madden gave insight on their perspective as an American serving on international DRBs. Gwyn Owen, Dick Appuhn and Director Romano Allione followed in a panel discussion on Dispute Boards worldwide. Finally, Gwyn Owen described his mentoring program, designed to prepare potential Dispute Board members who have not had DRB experience. That presentation merits close scrutiny by all DRBF members.

The conference presentations that were prepared on Microsoft PowerPoint have been posted on the DRBF web site for members. Simply login and click on the Library section. The conference was well received as witnessed by verbal comments and the written ratings of evaluation forms completed by attendees. The venue, meals and adherence to time were praised as well. The Dispute Resolution Board Foundation is particularly grateful to those who served on the planning committee. In addition to me, those were Bill Carlson, Jack Feller, Ann McGough and Steve Fox. □

For copies of all DRBF conference presentations, visit the library in the members section of the DRBF website:  
[www.drb.org](http://www.drb.org)



**Save the Date!**

**12th Annual Meeting and Conference  
October 4-5, 2008  
Washington, DC**

# Ethics in Today's World of DRBs: Challenges in Billing for DRB Activities



By Jim Phillips Ph. D.

The issue of a DRB member's billing for time spent on DRB activity can be one of the most controversial and emotional challenges for the DRB member. Typically, in the three party agreement between the owner, the contractor and each DRB member there are provisions for payment for Board activity at an agreed to hourly rate. The hourly rate is typically negotiated between each Board member and the party nominating the member, with approval by the other party, either the contractor or the owner.

Depending on the method of selection of the entire Board, the third Board member, who often becomes the Chair, either may agree to a different rate or agree to a rate consistent with the other members of the Board. Irrespective of what method is employed to arrive at each member's rate, all Board members typically bill the project by the hour for their time spent on DRB activity.

The question posed in the August, 2007 DRBF *Forum* was how should a Board member respond to a challenge by a project official when that the Board member's invoice, as submitted, will not be paid. The question posed goes on to state that this official has also edited the member's invoice and has returned it marked up and significantly reduced.

On their face, the Fundamental Canons of the DRBF Code of Ethics do not speak to this issue. Canon Two does recite that the "[c]onduct of Board members should be above reproach."

I would argue that this would include truthfulness and accuracy in billing. Beyond Canon Two, the Code emphasizes neutrality, impartiality and confidentiality. This issue raises several questions that may not have easy answers, but how a matter like this is resolved, could have a significant impact on the level of trust between the DRB and the parties.

In essence this question casts the integrity of the DRB member into question, as one implication is that there is time billed for which was not, in fact, worked, or that the Board member has billed the project for an item that was not agreed to by the parties. Left unaddressed, this issue could contaminate this Board member's effectiveness on the project. It might also affect the integrity of the entire DRB process on this project.

Section 2, Appendix 2B, Three-Party Agreement of the DRBF Manual contains a model Three-Party Agreement. Under Section VII Payment, there is a discussion of how Board members are paid. Section A provides that payments to Board members "...shall constitute full compensation for work performed, travel time and services rendered, and for all materials, supplies and incidentals necessary to serve on the DRB."

Moreover, under paragraph C of Section VII Payment of the Proposed Three-Party Agreement of the DRBF Manual as referred to above, provides that the Board member will be reimbursed for "actual direct, non-salary expenses, .....subject to limitations imposed by the contract." This suggests

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that the parties may have agreed to certain limitations in the agreement as to payment for certain expenses.

An easy answer to the question posed is that the project official might be deleting an item not covered as compensable in the Three-Party Agreement. If that is the case, this might be an easy issue to clear up with an email or telephone call. Accordingly, if this disputed invoice was an oversight or a misunderstanding as to what expenses were compensable, the Board member should be guided by the Three-Party Agreement.

I would add here that matters like this are better resolved quickly, rather than be allowed to remain unresolved. In my experience the longer an issue like this goes unresolved, the more chance there is for misunderstanding, resentment and mistrust. The DRB member might consider being proactive to be consistent with Canon Two's requirement of a member staying "above reproach."

However, if this disputed invoice arises from a challenge from the project official related to work potentially not performed, or the time it took the Board member to accomplish the activity, the stakes are raised dramatically. Again, it may be possible for the Board member to proactively head off this type of an issue.

Paragraph E(3) of Section VII Payment provides that the invoices of Board members should be "[a]ccompanied by a description of activities performed daily during that period." If the DRB member describes in accurate detail the activity performed, in my opinion, the less likely it is that the project official will not understand the amount invoiced. Keeping accurate records of time charged to a project and expense receipts are crucial for anyone serving on a DRB and can go

a long way toward preventing a situation raised by this question.

Moreover, fully discussing billing documentation and requirements with the owner and the contractor at the outset of the DRB process can also minimize confusion and misunderstanding about acceptable billing procedures. For example, I know that some colleagues advise the parties up front that whenever they visit the project site for any reason, they bill for a full day because of lost opportunity costs and because it is impossible to predict how long a regular meeting, project tour or formal and informal hearing might last. If all parties concur, this should take this practice off the table during the life of the DRB.

Beyond those issues, it is important to point out that the same task can take different individuals different periods to complete. While it might take me five minutes to fully read and understand a five page letter or other document, it might take my fellow DRB member an hour. Different professional education and backgrounds, different skills and abilities and different professional experience all factor in to how any of us accomplish any task. If a DRB member is constantly concerned about the time being expended to perform his/her responsibilities, poor performance may be the outcome. Again, discussing these types of issues at the outset of the DRB might go a long way toward heading off questions about billing.

Another practice of which I am aware is that DRB members will discuss together the time they are spending to do certain tasks such as drafting a recommendation, reviewing contract drawings and documents and other activities that are more personal as opposed to attending meeting, hearings and touring the project.

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These discussions can often ensure a reasonable “consensus billing” practice. While some may not feel comfortable with discussing their billing, others may welcome feedback as to whether they are being reasonable in their billing practices.

In the question posed, the project official had taken the step of editing the DRB member’s invoice and reducing the amount of time for which the member would be paid. This indicates to me a breakdown of communication and/or an absence of trust. A more appropriate response might have been to give the DRB member the courtesy of a telephone call or an email before unilaterally disapproving the invoice. By not doing so, the Board member is put in the awkward position of being presumed guilty and having to prove innocence. With Canon Two’s standard of staying above “reproach,” the DRB member in this situation may want to take the initiative and inquire as to the reason for the editing of the time charged on the invoice. I also would recommend getting the other parties, especially the owner, involved in the discussion. This will prevent the conversation from becoming exclusively personal to that member, and can mitigate

potentially inappropriate and emotional comments. Involving the other DRB members might also be considered.

The DRB member put in this position should also consider the potential damage to the DRB process if he/she were to take an inflexible position and unconditionally insist that the time deleted be restored. If this situation were to raise ongoing issues of trust and credibility, the member’s effectiveness might be compromised. Finding reasonable solutions without abandoning the DRB’s authority and neutrality may be difficult, but is certainly possible.

This question arose from a real world event and I do know the parties and the DRB member worked through it to a satisfactory outcome for all. Discussing billing practices and the satisfactory amount of detail of the activity on the invoice at the beginning of the project can help avoid such situations. A DRB member’s proactive initiative can also minimize these types of issues. Preventing protracted disputes regarding Board members’ billing practices can go a long way toward developing and maintaining trust and good working relationships on the project, two cornerstones of the DRB process.

*(continued)*

## **Ethics in Today’s World of DRBs**

The problems presented in this column are part of an ongoing series designed to engage a discussion among the DRBF membership about some of the challenges that occur during the DRB process. A committee of experienced DRB practitioners led by Committee Chair Jim Phillips will review and share ideas and opinions about the ethical dilemmas presented here.

Please send your thoughts on this issue, or problems you have faced with a DRB, to the DRBF:

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**Next Challenge: Formal Hearing**

Assume that you sit on a DRB for a project that is drawing near the completion date. The contractor has brought a few disputes to the DRB for Formal Hearing as the project has drawn to a close. The contract documents are ambiguous as to the prerequisites for bringing disputes to the Board. One section of the contract states disputes can be referred to the DRB by either party at any time, while another section specifies certain notice requirements must be satisfied by the contractor to the owner before a dispute may be referred to the DRB by the contractor.

Assume that during a break in a regularly scheduled meeting on the project site, the contractor’s representative tells one DRB member that the contractor intends to cobble together a string of disputes, some that have been submitted to the owner and some that have not, and present one mega dispute for a Formal Hearing.

**What would you do if you were that DRB member?**

**In Memoriam**



**Albert A. Mathews** passed away peacefully on August 17, 2007. He was born in Pentwater, Michigan on June 15, 1915. He graduated from Michigan Tech., and had his own engineering company. He specialized in heavy construction projects in the U.S. and abroad, including China, Central and South America, Australia and New Zealand. He was also a DRB consultant and a founder of the Dispute Resolution Board Foundation.

Mr. Mathews is survived by his wife, Lei, daughters, Barbara Pachano (CA) and Sandra Burnside (CA), grandchildren and great grandchildren, brothers, Roger (MI) and Donald (CA), sisters Pauline Harrison (CA) and Norine Sanders (NM), step children, William D. Young (CA), Elizabeth Reis (WA), and Carlos P. Young (HI). Al wished to exit his life as he lived it, simply and quietly. There were no memorial services.

*(continued from page 1)*

more expensive as they often replicate US litigation practices; arbitrations often are conducted after the project is over; and arbitration decisions are, in essence, final and binding when rendered because there is no realistic ability to appeal to court.

In this article, the authors discuss the concept of an “Adjudication DRB” as an alternative to the UK adjudication process and the US arbitration process. They propose that if the parties to a project are already subject to UK adjudication or US-style arbitration process, it may produce a better result if an “Adjudication DRB” is used in lieu of an adjudication/arbitration process.

### **The Adjudication Process**

Within the UK adjudication process, the adjudicator can be a single person selected by agreement between the parties before the start of the project, although more commonly he is selected after the dispute occurs by a “nominating body” which typically will be one of the main professional institutions. The typical adjudicator is either an experienced construction professional with some legal training or a lawyer with construction expertise.

The party initiating the adjudication must submit its claim document to the adjudicator within 7 days of electing to refer the dispute to adjudication, and the adjudicator must issue a decision within a further 28 days (unless a longer period is agreed). Most adjudications follow a standard procedure of requiring a defense submission seven days after receiving the claim. This very limited time available can place the defending party at a disadvantage, but it is premised on the assumption that the issues in dispute should

already be known about by both parties and therefore in the claim document there should be nothing new to take the defending party by surprise.

Once the defense is served the adjudicator may decide to call a meeting, visit the site, request additional information, documents or submissions, or take whatever other steps he/she considers are appropriate within the available timetable. The adjudicator may act inquisitorially, although in practice the adjudicator normally relies on the parties to submit the evidence on which they wish to rely. The adjudicator may also bring in an additional expert to advise him/her, provided that the parties have the opportunity to read and comment on that expert’s advice before the adjudicator comes to a decision. Once the adjudicator makes a decision, the parties are obliged to follow that decision, with very limited grounds for non-compliance.

The strength of the adjudication process is that it provides a rapid and cost effective mechanism for deciding a dispute, which can be undertaken during a project without major distraction from the overall project objectives. It provides a decision from an expert neutral third party on the disputed issue, which generally tends to end the matter. Its initial objective, which was to ensure that roughly the right amount of money was in the right hands as rapidly as reasonably possible, has been achieved and the process has transformed dispute resolution for the construction industry in the UK.

The downside of the adjudication process is that due to its speed it does not allow for a detailed analysis of issues. If therefore it is mis-used for a complex dispute the parties either need to agree a longer timetable for the adjudicator to give his/her decision, or to accept that the

adjudicator is not likely to have the time to delve into the complexities of the dispute and is likely to make his/her decision based on only the major parts of the argument.

Like all legal procedures, there are occasional adjudicator's decisions that appear to a party to be wrongly decided. In such cases the dissatisfied party can resort to litigation or arbitration (depending on the requirements of the contract) but normally must comply in the interim with the decision of the adjudicator.

### **The Arbitration Process**

As most readers are aware, arbitration is a well-established dispute resolution mechanism in the construction industry. Since readers are likely to be familiar with the arbitration process the authors do not discuss here the details of the process.

There are certain features of arbitration, however, that sometimes may make it a less than ideal way to resolve construction disputes. Typically the arbitrator or arbitration panel is selected well after a dispute has arisen or a formal claim has been made—indeed, the arbitration often occurs long after the project is over. Although construction arbitrators tend to be subject matter experts in construction issues and applicable legal principles, they are required by this late selection to learn about complex issues on disputes that often have been years in the making. Moreover, often these arbitration processes can involve cumbersome information exchanges, voluminous submissions, and lengthy hearings that sometimes stretch over years.

After the sometimes lengthy and

expensive arbitration process, the arbitrator issues complex findings that represent the arbitrator's best effort to understand, assimilate and reconcile conflicting positions on the facts, the costs, the delays, expert opinions, and legal liabilities. The process is therefore well suited to a very detailed analysis of issues where there is no urgency for resolution, but when compared to adjudication the arbitration process can appear slow and expensive.

### **The Adjudication DRB Concept**

The "traditional" DRB process differs from the adjudication/arbitration process in the following respects:

- The DRB is in place for the duration of the project.
- The parties may bring their claims to the DRB in what is (at least in comparison to adjudication) a lengthier process.
- The DRB's findings and recommendations are usually non-binding.

The DRB process offers several advantages as compared to the adjudication or arbitration process. One of the advantages of a standing DRB is that it is thoroughly versed in the life cycle and history of the project. Through periodic site visits during the course of project the DRB becomes familiar with the nature of the project, important events and circumstances, the project participants, and the issues that may eventually become disputes or claims. When claims are presented to the DRB, it can use its historical knowledge of the project to better understand, discern and analyze the merits and amounts of such claims. In addition, the DRB should be able to reduce and/or shorten the process because the

*(continued on page 12)*

*(continued from page 11)*

parties will not have to “educate” the DRB in the way a “cold” adjudicator/arbitrator needs to be educated. be perceived to be more efficient and impartial than that of single member, but at the same time is much more expensive. For smaller contracts economic factors may well prevail.

Another way in which a “standing” DRB can work better than a “one-off” adjudicator/arbitrator is that the DRB can be aware of and encourage the parties to resolve disputes before they become claims elevated to the DRB. Often, by raising issues and questions during its periodic site visits, and thus obliging the parties to focus on and discuss difficult issues before they escalate into disagreement, the DRB may be able to head off disputes. Thus, the DRB not only provides a dispute resolution mechanism, it can also provide a dispute avoidance mechanism. This additional ameliorative role of a DRB is not one that a traditional adjudicator/arbitrator can play when brought in after the claim has already matured.

As noted above, arbitrator decisions are very difficult to appeal. As the adage goes, “arbitrators’ decisions can be wrong on the facts, wrong on the law, but still not be overturned”. Assuming that this is the outcome that the parties selecting arbitration may receive, a knowledgeable, expert DRB should be able to give a more satisfactory result. The DRB’s knowledge of the project and the facts and circumstances underlying the claim should put it in a better position to give the parties a decision that is “right on the facts and right on the law.”

The authors also propose that introducing the merits of the adjudication process into the traditional DRB process

can give further advantages. The current FIDIC “Red Book” and “Yellow Book” international construction contracts have incorporated a form of combined DRB and Adjudication, through the use of a Dispute Adjudication Board (DAB) either appointed at the start of the project (Red Book) or after the dispute has arisen (Yellow Book). The FIDIC timetable is longer (84 days) for the making of a decision, and can make use of a three-person panel or a single person adjudicator. Both the ICC Dispute Board Rules and the UK Institute of Civil Engineers (ICE) Dispute Resolution Board Procedures similarly introduce dispute boards composed of one or three members, who issue a binding decision within 90 days or 84 respectively.

One concern that readers may have is the additional cost of supporting a standing DRB. The authors submit that the cost savings associated with a reduced and more efficient process implemented by a knowledgeable DRB will more than make up for the carrying costs of the DRB. Moreover, arguably the parties for their money are getting a better quality result on average because the DRB is applying its expertise combined with an in-depth knowledge of the project.

### **Conclusion**

The adjudication and arbitration processes are well-established in the construction industry. These processes, however, have their limitations in terms of timeliness and cost—and ultimately the parties’ satisfaction with and acceptance of the outcome.

The authors propose that for most projects on which the parties are already subject to a binding dispute resolution process, the preferred dispute resolution mechanism would be to combine

the concept of a standing DRB with the concept of the UK adjudication/US arbitration processes. The use of “Adjudication DRBs” presents an opportunity to combine the best features of a DRB with the best features of the adjudication/arbitration processes. □

**About the Authors:**



**Kurt L. Dettman** is the principal of Constructive Dispute Resolutions, a consulting firm specializing in alternative dispute resolution in the construction industry. He can be reached at [kdettman@c-adr.com](mailto:kdettman@c-adr.com) and [www.c-adr.com](http://www.c-adr.com).



**Christopher Miers** is an adjudicator, mediator, chartered arbitrator, chartered architect and DRB member based in London, UK. He can be reached by email at [cmiers@probyn-miers.com](mailto:cmiers@probyn-miers.com).

## Other News

### New Dispute Board Book Now Available

Publisher Thomas Telford Ltd has recently released a new title, “Dispute Boards: Procedures and Practice.” Written by DRBF members Gwyn Owen and Brian Totterdill, the book outlines the various contract procedures which require or permit the use of Dispute Boards. It gives a detailed explanation of interpretation and application of each requirement, both practical and legal/contractual, referring to the international Conditions of Contract published by FIDIC as well as to other published procedures.

The book also deals with the functions, practicalities and procedures of DBs from their inception. The book outlines the requirements and outputs of DBs and describes in detail their day to day activities- and the pitfalls which Board members may fall into.

The book also examines the various alternative forms of Dispute Boards and procedures which are currently in use. The duties and responsibilities of individual Dispute Board members are defined together with ideal and best practice guides. The authors explain the specific requirements for the outputs of Dispute Boards including site visit reports, decisions and recommendations which Boards are required to produce from time to time and provides pro forma examples of the required outputs. The appendix includes standard forms of procedures and extracts from relevant contracts.

The book is £55. For more information, visit [www.thomastelford.com](http://www.thomastelford.com). □

**Electronic Versions  
of the Forum Available  
to All Members**

Did you know you can now receive the Forum by email? If you prefer this method, let the DRBF know today. You’ll save time, paper and production costs. Back issues of the Forum are also available on the DRBF web site, [www.drb.org](http://www.drb.org).

If you have news about DRBs, DRBF members, or an article to share, please tell us!



*Deadline for the  
next issue is*  
**January 1, 2008**

# WELCOME TO NEW DRBF MEMBERS

MEMBER ADDITIONS AUGUST 2007 THROUGH OCTOBER 2007

Salim Amod  
Development & Engineering  
Consultants (Pty) Ltd  
Johannesburg, SOUTH AFRICA

Pirooz Borojerdi  
Tally Engineering, Inc.  
Pembroke Pines, FL USA

Jeffrey Callahan  
Anchorage, AK USA

Robert Andrew Cochrane  
Unicorn Consulting  
London, UK

Ricardo Estripeaut  
Creative Engineering Group  
Cooper City, FL USA

Michael Frick  
INPROCON International Project  
Consultants GmbH  
Vaterstetten, GERMANY

Doug Friday  
Odan Mor Pty Ltd  
Perth, WA AUSTRALIA

Randall F. Hafer  
Kilpatrick Stockton LLP  
Atlanta, GA USA

Ken Harp  
Progressive Technical Services  
Doctors Inlet, FL USA

Ibrahim M. Jardaneh  
City of Orlando  
Orlando, FL USA

Michael E. La Vigne  
San Francisco, CA USA

Ian McIntyre  
Evans & Peck  
Chatswood, NSW AUSTRALIA

James R. McLellan  
Stanley Consultants, Inc.  
Jupiter, FL USA

L.E. Moahloli  
Imbani Projects  
Johannesburg, SOUTH AFRICA

Robert T. Murphy, P.E.  
Robert T. Murphy, P.E., PLLC  
Hallandale Beach, FL USA

Giovanni Battista Rigoni  
S.E.Co.L.S.p.A.  
Rome, ITALY

Maximiliano Rodriguez  
Rodriguez-Fernandez Law Firm  
Bogota D.C., COLOMBIA

David Shields  
National Projects and Construction  
Abu Dhabi, UAE

Steven R. Striffler  
Attorney at law  
Boston, MA USA

Enrique Tamayo  
Tamayo Engineering, LLC  
Miami, FL USA

John B. Wilson  
St. Augustine, FL USA □

# Spotlight on the DRBF's Northeast Representatives

By Blase Reardon

The six New England states comprise fertile, but differing opportunities for DRBs. And because the late Larry Delmore was a Bostonian, I had the opportunity to see him often and to benefit even more from his wisdom and leads for our efforts on behalf of the DRBF and its mission. Since Larry's sudden death, I have had the opportunity to work more with DRBF members Kurt Dettman and to a lesser extent Eric Kerness. At our meeting in San Diego, I was fortunate to have Kurt formally recognized as co-regional representative for the DRBF's New England efforts. The synergy between us for the past year has helped to find leads and contacts and organize and follow-up on our joint efforts. The following is a summary of our accomplishments for the past year and a look ahead at our joint efforts for 2008.

1. One DRB, begun in 2005, ended successfully early in 2007 with the completion of a \$218 million 18 mile underground transmission project (known as the "NSTAR 345 Kv Reliability Project") in metropolitan Boston.
2. Within Massachusetts, and especially Boston, our DRB missionary work has focused on a myriad of huge vertical construction projects ranging from \$130mil to \$800mil APIECE. Kurt and I have been ferreting out the good prospects (vs. some surprising "no interest whatsoever" attitudes) for DRBs as part of an overall dispute avoidance project approach. Most of these "DRB candidates" are just breaking ground or in the final permitting/financing stage so our efforts on these will continue into/throughout 2008. For this reason we were gratified to see the interest in "DRBs for building construction" at the San Diego conference.
3. Within Massachusetts, Kurt has been trying to interest MassHighway in a pilot

DRB effort on a bridge in Fall River.

To date, most DRB use in our highway construction projects has been confined to the successful, but much maligned (in my opinion) Big Dig. Elsewhere, an enormous statewide public school funding program is just beginning. We are deliberating whether to approach individual school districts or the Mass School Building Authority directly.

4. Turning to Connecticut, through a contact at the CT Contractor's Assn., we will monitor DRB opportunities there as the "nutmeg state" emerges from a governmental overhaul especially within its Transportation and Public Works departments.
5. As for Vermont, thanks to Eric Kerness who is meeting soon with the Department of Transportation we hope to have a full presentation of the use/benefits of DRB's to that state's public construction entity.
6. Small as it is, Rhode Island poses some interesting opportunities for DRBs. Kurt has contacted the RI Contractors Assn., and thanks to a lead from Joe Keating (Calif.) we are following developments on the Narragansett Bay Commission project.
7. As for New Hampshire and Maine, we have not yet identified points of contact or project opportunities in these states for DRBs, but they will remain on our radar screen.

Lastly, because of the presence here of a very influential member of the National Association of Surety Bond Producers, we have been developing relationships which may lead to a full DRBF presentation at a national forum. We would welcome any assistance/support from other DRBF members throughout the U.S. because the surety industry has a keen financial incentive in seeing construction claims and disputes reduced through any procedure such as DRBs. □



# 8th Annual International Conference

## May 2-4, 2008

### Cape Town International Convention Centre

### Cape Town, South Africa

The Dispute Resolution Board Foundation will hold its 8<sup>th</sup> Annual International Conference May 2 - 4, 2008 in Cape Town, South Africa. The distinguished panel of speakers includes government officials in Africa, representatives from Multilateral Development Banks (MDB), owner representatives, contractors, engineers and Dispute Board practitioners. The conference will be conducted in English with simultaneous translation into French. Delegates will be encouraged to take an active part in the discussions and will be able to network and make new contacts. Afternoons are free for networking or touring the region, and on Saturday evening there will be a Gala Dinner at the Spier Wine Estate in Stellenbosch.

#### Workshops

An intensive two-day training workshop has been scheduled in conjunction with the conference. On May 5 and 6, join experienced Dispute Board trainers to explore the subject "*Successful Use of Dispute Boards Under FIDIC MBD Harmonized Conditions for Construction.*"

#### Registration and Reservations

Conference registration fees are €300 for DRBF members (€155 for African state residents), €350 for non-members (€175 for African state residents). To register, send in a completed registration form which can be obtained from the DRBF office or downloaded at [www.drbf.org](http://www.drbf.org).

#### Official Conference Travel Resources

The International Conference planning committee has negotiated special rates with several travel resources to assist delegates with transportation, accommodations, and tours in the region.

**Airline:** Soho Travel of London, England has negotiated preferential fares with South African Airways for attendees booking their reservations through Soho Travel. South African Airways flies to South Africa from North and South America, the United Kingdom and Continental Europe, the Middle and Far East, and Australia and New Zealand. The airline is a member of Star Alliance and can offer convenient connections from all over the world. Soho Travel can also assist conference delegates with intra-South Africa and other intra-Africa arrangements if desired. Contact Account Executive Colin Whitbread at Soho Travel by phone +44 207 631 0100, fax +44 207 436 3831 or email [sales@sohotravel.co.uk](mailto:sales@sohotravel.co.uk), and be sure to mention you are attending the DRBF International Conference.

**Tour Operator:** The Travel Link will arrange half-day tours in the Cape Town area on Friday and Saturday afternoons. Descriptions of the tours are available on the DRBF web site, and includes such popular attractions as the Cape Peninsula, Table Mountain, the winelands, Robben Island, and more. Travel Link will have a travel desk at the at the conference to assist with travel and tour arrangements, and can also arrange hotel transfer service from the Cape Town Airport. The Travel Link can also assist delegates in arranging private tours in Southern Africa. Contact the company by phone +27 (11) 327 3282, fax +27 (11) 327 3400 or email [lorenn@worldspan.co.za](mailto:lorenn@worldspan.co.za), or visit their website [www.fellentours.co.za](http://www.fellentours.co.za).

**Hotel:** The host hotel for the conference and workshops is the Southern Sun Waterfront. Delegates are encouraged to make reservations early to take advantage of group rates: single rooms are R1 175.00 and doubles are R1 330.00, including breakfast. A reservation form is available on the DRBF website, or contact the hotel by phone +27 21 409 4000 fax +27 21 409 4777 or email [waterfront@southernsun.com](mailto:waterfront@southernsun.com).

**Visit [www.drbf.org](http://www.drbf.org) to download conference and hotel registration forms and complete conference details.**

## **Dispute Resolution in Africa Conference Programme**

### **Friday, May 2 - Introduction**

8:00am-1:00pm      Registration and Welcome  
Keynote Address  
Dispute Avoidance: What does the DB Process Offer?  
Port of Ehoala Project in Madagascar  
DB's for International Chamber of Commerce  
Lenders' Experience with FIDIC and MDB Harmonized Editions  
Dispute Resolution for MDB's, IBRD Speaker  
MDB Harmonized Edition for AfDB Financed Projects  
Open Floor Discussion for First Day Sessions

### **Saturday, May 3 - Practical Experience in Africa**

8:00am-12:45pm      Practical Experience in Francophone Africa: speakers from Société d'Avocats, Salque Associes, and a prominent contractor/engineer  
Practical Experience in Southern and Anglophone Africa: speakers from South Africa, the Presidency Affairs PIU in Sudan, and a prominent contractor/engineer  
Open Floor Discussion  
Evening              Gala Dinner – Moyo located at the Spier Wine Estate in Stellenbosch

### **Sunday, May 4 - Practical Applications in the Dispute Resolution Process**

8:50am-12:50pm      Delegates will be invited to divide themselves into four breakout session groups, exploring each topic for 25 minutes each and then following with summaries from each session moderator and open floor discussion.  
Session A: Constituting a DB under MDB/FIDIC  
Session B: Organizing Periodic Site Visits  
Session C: Referrals and Advisory Role of DB  
Session D: The Costs of Dispute Boards

### **Monday, May 5 and Tuesday, May 6 - Optional Training Workshops**

#### ***Successful Use of Dispute Boards Under FIDIC MBD Harmonized Conditions for Construction***

This training workshop will feature a plenary session focused on Clause 20 and five problematical areas of international civil works contracts. The following session will include 15 hours of interactive training in small groups working on dispute scenarios involving the five frequently problematical areas:

- Contract risks involving care of works, insurance, possession of site, taking over and defects liability
- Contract risks involving design, ground conditions and climatic conditions
- Programming delays, extensions of time, and use of critical path delay analysis
- Variation orders, instructions and pricing
- Cost fluctuations and price variation using a contract formula based on published indices

**Space is limited!  
Secure your space by registering early.**

# DRBF Ten Year Plan

The DRBF Ten Year Plan that appeared in the August 2007 issue of the Forum was presented to the DRBF membership at the International Conference in Bucharest and more recently at the DRBF Annual Conference in San Diego. We are now in Phase 1 of that plan under a more streamlined DRBF management structure. The plan calls for establishment of the first two world Regions in the second phase before the DRBF consists of as many as seven to eight world regions at the realization of the Ten Year Plan. The plan calls for realization of Phase 2 within a two year period:

## PHASE 2 – ESTABLISH THE FIRST REGIONS

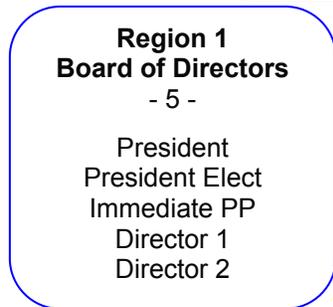
The first regions will be established under Phase 2 (North America, Europe and possibly Australia and New Zealand).

The first Regional Board will consist of North America, the second the rest of the world, with the possible exception of Australia and New Zealand that will comprise the third board. **It must be emphasized that the composition of Region 2 is temporary. As other regions have the necessary assets, they will leave Region 2 and become additional DRBF regions.** The support teams for each board will range from the Executive Board’s full time employees and established office to minimal services initially required by regional boards. Those could consist of time sharing rental of office space; minimal secretarial and clerical support supplied by hourly providers, consultants and accountants; and photocopying and office supply services. The region budget should include funds to support the regional president’s travel to the Executive Board of Director’s meetings.

## DRBF BOARD COMPOSITION

The Executive Board of Directors will be elected by the entire DRBF membership and consist of the President, President-Elect, Immediate Past President, Secretary and the Presidents of the existing regions (elected by members only of their regions). The Executive Director and a Vice President of Finance (a position to be created at fulfillment of Phase 3) will be ex officio and non voting members. (Until the Vice President of Finance position is created, an elected and voting Treasurer will occupy the position.) Each regional board, to be elected by regional members only, will consist of the President, President-Elect, Immediate Past President and two directors. After Phase 2, other regions will be established in Phase 3.

### DRBF Organization Structure Phase 2



**PHASE 3 – ESTABLISH REGIONS WORLD WIDE**

The Master Plan to be achieved at full maturity in Year 2016 is shown in the illustration at right. It represents a natural growth from Phase 2 as conditions warrant. At the end of 2006, the DRBF membership was 632 and was located in North America (437); Europe (118); Asia (25); Middle East (6); Africa (9); Latin America (7); and Australia and New Zealand (30). Clearly North America and Europe can sustain regions by 2008. Because of its remoteness and consequential independence Australia and New Zealand probably should be made a region in the near future as well. At this time the others are far from a reality but the regionalization plan should promote their development quicker than the DRBF’s present structure.

**NEXT STEPS**

The next important step in the Ten Year Plan is a vote on acceptance of the Ten Year Plan by the DRBF membership on December 15, 2007. Members will be able to vote electronically or by mail. The rest of the immediate implementation schedule is:

1. **Vote on 10 Year Plan (including By Law Changes) by Membership – Dec. 15, 2007.**
2. **Dec. 16, 2007 – If Ten year Plan approved, President appoints nominating committee for Executive Board and a “shadow” committee for the North American Board.**
3. **Call for nominations to Executive Board, North American Board and European Board in Feb. 2008 Issue of Forum.**
4. **Executive Board Nominating, “shadow” North American Board and “shadow” European Board Committees advise DRBF BOD of their slate of 2008 Nominees – BOD In Person Directors Meeting – April – May, 2008.**
5. **Elections for Executive Board, North American Board and European Board – July 1, 2008.**
6. **Election results reported by teller to Pres. DRBF – July 8, 2008.**
7. **Executive Board, North American Board and European Boards organize July 9 – Sept. 30, 2008. Draft business plans, first annual operating budgets and calendars. Each budget is to include revenue sources and region operating expenses.**
8. **Oct. 4, 2008 – Newly constituted Executive, North American and European Boards installed at 2008 Annual Meeting.**

**About the Author:** Harold V. McKittrick is a past president of the DRBF and currently serves as a member of the Board of Directors. He can be reached at hmckittr@cox.net.

**DRBF Organization Structure Phase 2**





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## FOUNDATION FORUM

Dispute Resolution Board Foundation  
19550 International Blvd. So., Suite 314  
Seattle, WA 98188

### FOUNDATION FORUM

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## William B. Baker Honored with AI Mathews Award at the DRBF's 11th Annual Meeting and Conference

Each year, the Dispute Resolution Board Foundation bestows the **AI 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 6, 2006 the organization recognized William B. (Bill) Baker with the award during a banquet held in conjunction with the DRBF Annual Meeting and Conference. Mr. Baker was recognized for his many efforts, including promoting, arranging, preparing and conducting several DRBF workshops for Caltrans in 2007 and 2008; and extensive work over a two year period on the committee responsible for the revised DRBF Practices and Procedures Manual issued in January 2007. In addition, he has served in several leadership roles on the DRBF Board of Directors, including Secretary since 2006 and President in 2000-2001. "Bill has been a steadfast supporter of the DRBF and promoter of the DRB process throughout California and North America for many years," said DRBF Immediate Past President Pete Douglass. Congratulations Bill!

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

- 2001 **AI 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**