

# Report on the DRBF10<sup>th</sup> Annual International Conference Istanbul 14-16 May 2010

## - Construction Disputes at the Crossroads

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The aim of the Dispute Resolution Board Foundation (DRBF) (650 members worldwide) is "fostering commonsense dispute resolution worldwide" by promoting the use of Dispute Boards (DBs). The topic is clearly of widespread national interest: of the approximately 160 conference delegates, there were representatives from every continent except Antarctica – 109 from Europe, 16 from Africa, 11 from North America, 9 from Asia, 5 from Australia and 2 from South America.

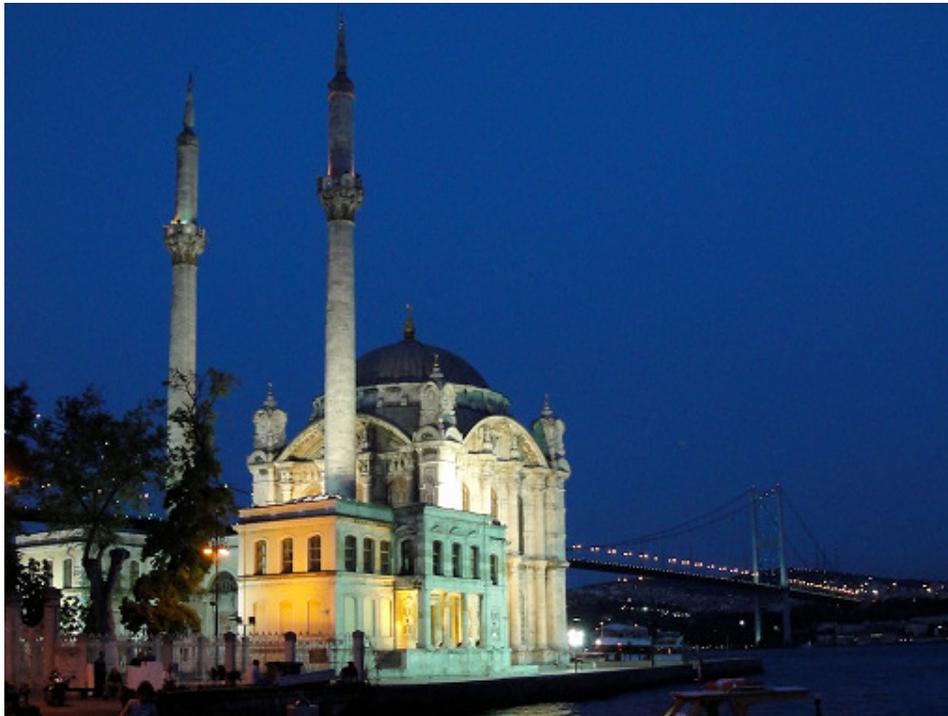


**Fatih Sultan Mehmet Bridge, the second bridge spanning the Bosphorus from Europe to Asia. Designed by Freeman Fox and completed in 1988 it has a main span of 1090m. Named after the 15c Ottoman Sultan Mehmed the Conqueror who took Constantinople (Istanbul) in 1453 and ended the Byzantine Empire.**

The conference took place at the Marmara Taksim Hotel in the heart of Istanbul. Unusually, conference sessions were not held in the afternoon, giving delegates a chance to see something of the spectacular and historical city of Istanbul during their stay. The gala conference dinner on Saturday night was on a cruise on the Bosphorus - that

very busy (and narrow) stretch of water from the Black Sea to the Sea of Marmara and separating Europe from Asia (with only two fixed crossings by suspension bridges).

The first day's conference sessions were devoted to an overview of dispute resolution in Turkey, and trends in construction dispute resolution in the region. The importance of the construction industry to Turkey's economy can be gauged from the fact that, in 2009, Engineering News Record rated Turkey's construction industry second in the world after China, and ahead of the USA. In 2008, Turkish contractors executed \$23b of international contracts. Of the top 225 international contractors in 2009, 31 were Turkish companies. Notwithstanding these world-class contractors, and the huge amount of construction they undertake in Turkey and overseas, resolution of construction disputes in Turkey is almost exclusively confined to the courts, and arbitration is not used. Times to resolve disputes of 10-15 years are not uncommon. Courts typically appoint a panel of three experts to assist the judge(s), comprising two engineers and one jurist. Notwithstanding that FIDIC contracts are frequently used in the international contracts undertaken by Turkish contractors, DBs are not used at present in Turkey. One of the barriers to their use is a question mark over whether there are sufficient independent, impartial and appropriately skilled experts available in Turkey to undertake the demanding role of a DB member.



**Mecidiye Mosque (built in 1855) in the lively area of Ortaköy in Istanbul, adjacent to the First Bosphorus Bridge linking Europe and Asia, completed in 1973.**

Conference presentations on construction dispute resolution in other countries in the region included the following issues of interest:

- Cairo International Airport Terminal 3 was successfully executed under the FIDIC Red Book 1992, with World Bank Special Conditions for the use of a DB. The standing DB comprised members of Egyptian, British and German nationality. The Board made recommendations on seven disputes (six cost, one time), deciding in favour of the Contractor 6/7. The parties accepted all of the DB's recommendations, and no

disputes needed to be referred to arbitration. The initial contract price was US\$347m, and the final price was US\$523m. In the dispute over a non-performing subcontractor which the Contractor lost, the provisions of the local law prevailed over the special provisions of the Contract. [This reinforces a position that is important in many countries: the provisions of local laws, such as the procurement law, may prevail over the provisions of the contract. The governing law may well have protective measures for local entities.]

- Libyan law requires all construction disputes to be resolved through the courts - there is no provision for arbitration. However, with the approval of the Prime Minister's office, on a case-by-case basis, contracts can provide for alternative methods of dispute resolution. The provisions of contracts are governed by the Libyan Procurement Rules 2007.
- The law in the UAE recognises arbitration, and most construction contracts incorporate arbitration as the final binding dispute resolution mechanism. Nevertheless, in practice most construction disputes are settled by negotiation. There are a number of provisions under the UAE Civil Code that are of interest to common lawyers:
  - custom or actual intentions of the parties can be considered in contract interpretation if the parties' intentions are unclear;
  - the parties must conduct their obligations in good faith;
  - a contractor may obtain relief from an onerous contractual liability under the exceptional circumstances provision, however this is largely untested;
  - the parties' liabilities are not strictly confined to the express terms of the contract.
- Stephen Hibbert (expatriate Australian lawyer) spoke on construction law in Abu Dhabi, the capital of the UAE. He highlighted the importance of the construction industry to the Abu Dhabi economy - 60% of the \$450b GDP (50% of Australia's GDP, but with a population of only around 1 million). Indicative of the current construction workload, US\$60b of contracts have recently been let for six nuclear power plants.

Since 2007, Abu Dhabi law mandates the use of bespoke contracts based on amended FIDIC contracts (for which Abu Dhabi has negotiated a 40 year licence with FIDIC).

These contracts:

- define the role of the Engineer;
  - mandates the use of Dispute Adjudication Boards (DABs) as the first procedure for dispute resolution;
  - require final dispute resolution by arbitration to be carried out within the precincts of Abu Dhabi, and through Abu Dhabi institutions.
- The Japanese International Cooperation Agency (JICA) provides technical cooperation and other forms of aid promoting economic and social development in developing countries. It promotes the use of FIDIC contracts and Dispute Adjudication Boards (DABs), mainly in Asia in the projects which it funds.

On the second day of the conference, Calliope Sudborough (ICC Deputy Manager for ADR and Dispute Boards) spoke on the ICC provisions in respect of DBs. Unlike the ICC oversight of arbitration under the ICC Rules, the ICC does not get involved in the management of DBs under the ICC Dispute Board Rules. [These rules, uniquely, provide for Dispute Resolution Boards, Dispute Adjudication Boards and combined DBs]. However, on request, the ICC will appoint DB members, based on a worldwide search for the most suitable candidates (as it does for the appointment of experts); the ICC does not maintain an approved list of DB members as it does for Arbitrators. The effectiveness of DBs in providing dispute resolution which the parties accept as final and binding (notwithstanding that, contractually, parties always have the option of arbitration or litigation) is highlighted by the fact that of the approximately 600 arbitrations administered by ICC since 1999, only 26 clearly involved issues arising from DBs (and only two of these involved the ICC DB Rules). ICC's experience with its Rules for Dispute Boards (promulgated in 2004, and freely available on its website) highlights that:

- DB members like the procedural guidance in the conduct of DBs in the Rules;

- DB members like equal remuneration for all members of a DB;
- the parties benefit from the informal assistance that DBs can provide, before a dispute reaches the formal referral stage.

At lunch on the second day, Graeme Peck spoke on the Australian experience of DBs in the context of relationship contracts. This is an area in which Australia is a world leader. Graeme emphasised that, notwithstanding the cooperative nature of relationship contracting, there is still a role to play for DBs (with the exception of "pure" alliance contracts). This was reinforced by examples of a number of major relationship contracts under way or concluded in Australia (including the recently opened Gateway bridge in Brisbane) which have been successfully concluded on (or before) time and on budget, with no disputes going beyond the DB (and in most cases without the DB having to formally adjudicate on a single dispute referral).



**Haghia Sophia, the largest and best known mosque in Istanbul. Haghia Sophia is more than 1400 years old, and was built as a Christian Church by Emperor Justinian in the 6th century.**

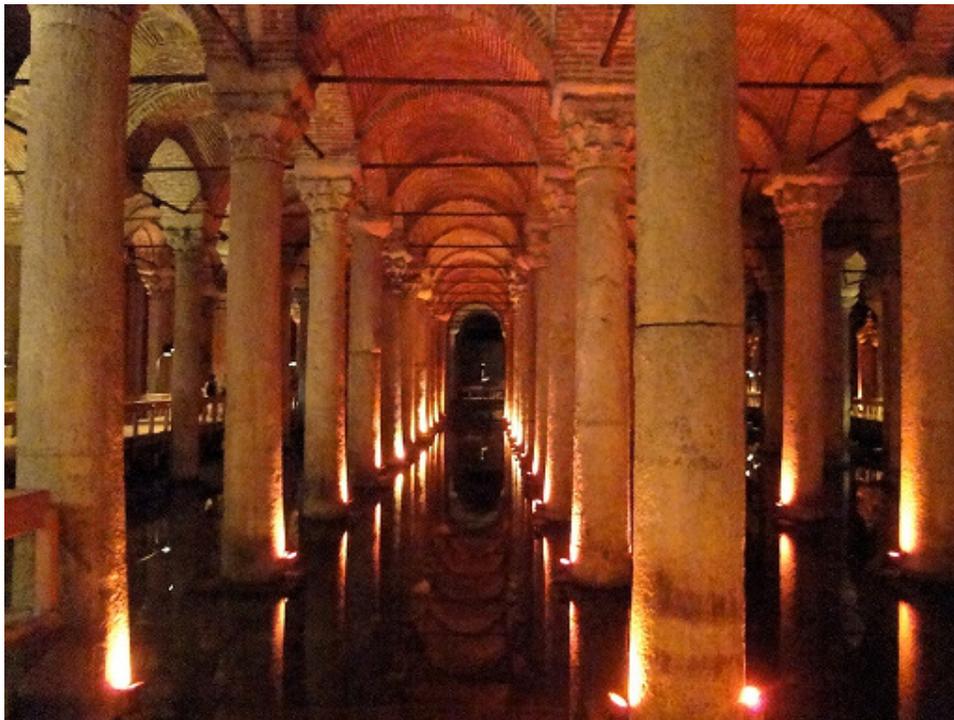
The other sessions at the conference were devoted to interactive sessions, in which the conference participants, working in small groups, had the opportunity for discussion and debate on a variety of topics important to the implementation and application of DBs. These topics included:

- main obstacles in resolving disagreements while considering typical actions which escalate normal disagreements into formal disputes;
- the challenges of operating clause 20 of the FIDIC conditions;
- pathological DBs, considering actions which frustrate the effective use of DBs;
- effective use of the DB process (ad hoc DBs, local vs foreign DB members, use of retainers);

- document control (use of party agreement of facts, use of common documents bundle);
- fair hearing.

Many of these issues resonate with similar discussions on these topics which take place at arbitration conferences. However, the reduced formality of DB hearings, and the primary role of the DB in dispute avoidance (rather than the dispute resolution implicit in a DB determination of a dispute) mean that these issues are frequently resolved in a different way than is the case in arbitration (which is generally subject to the applicable Arbitration Act).

All the conference papers were supplied on a USB stick for later printing after the conference. A list of these papers follows. Anyone interested in referring to any of these papers is welcome to contact Donald Charrett ([d.charrett@vicbar.com.au](mailto:d.charrett@vicbar.com.au)).



**The Basilica cistern - an underground chamber approximately 138 metres (453 ft) by 64.6 metres (212 ft). It was rebuilt and enlarged by Emperor Justinian. The enlarged cistern provided a water filtration system for the Great Palace of Constantinople and other buildings on the First Hill, and continued to provide water to the Topkapi Palace after the Ottoman conquest in 1453 and into modern times.**

A two-day workshop was held prior to the conference. Workshop participants were limited to 80, to allow for small-group interactive sessions. The participants were a mix of construction professionals (engineers, architects, quantity surveyors, project managers etc) and lawyers. Under the workshop theme "The allocation of risk and the duties and responsibilities of the Dispute Adjudication Board under the FIDIC Contract", the first day was devoted to the provisions of the Red and Yellow Book FIDIC contracts, and the second day to practical issues involved with DBs. The following topics were discussed in the individual sessions:

- common risk areas in construction contracts;
- operation of claim and dispute resolution provisions
- the role of the Engineer and Employer's Representative;
- establishment of the Dispute Adjudication Board;
- the adjudication process;
- the effects of Dispute Adjudication Board decisions under FIDIC contracts.

The participants were split into 3 separate sessions, each of which had 3-5 tutors experienced in the use and application of DBs. With the exception of an Engineer/Adjudicator from South Africa, the tutors were all from Europe, the majority being engineers and other construction professionals and not lawyers. The workshop sessions were generally very well run, and virtually all of the attendees participated actively in the discussions. Notwithstanding the differences between countries and legal systems (common law and civil law), the discussions highlighted that there are more similarities in dispute resolution in construction law around the world than there are differences. Further, although the use of Dispute Boards is not well known in Australia, the dispute avoidance and dispute resolution techniques that they employ are based on tried and tested principles that are familiar to all Mediators, Adjudicators and Arbitrators.

### **Papers for the DRBF 10<sup>th</sup> Annual International Conference Istanbul May 2010 - Construction disputes at the crossroads**

<b>Title</b>	<b>Author</b>
<b>Friday 14 May: Overview of dispute resolution in Turkey and trends in construction dispute resolution in the region</b>	
Dispute avoidance and resolution in construction projects: on paper or on the minds of people? FIDIC applications and dispute resolution in Turkey (PowerPoint)	Levent Irmak, Turkey
Answers to the Moderator's preliminary questions	Necip Türegün (Turkey)
Dispute resolution in complex construction contracts	O Barut (Turkey)
Answers to the Moderator's preliminary questions	Associate Professor Dr Yalçın Tezcan (Turkey)
A dam good thing	Gordon Jaynes (USA)
Dispute resolution in Islamic financial contracts of Islamic financial institutions - issues	Mr Justice (R) Khalil-Ur-Rehman Khan (Pakistan)
Overview of the construction dispute resolution scene in Dubai, UAE	Bariş Nazlım (Dubai)
Construction of Terminal 3 Cairo International airport (PowerPoint)	Cumhur Kaur
Dispute resolution in North African countries Case Study: Libya (PowerPoint)	Ahmed Benbarka (Libya)
<b>Saturday 15 May Problems in administering dispute resolution</b>	
An Engineer's/Dispute Adjudication Board's decision is enforceable by an arbitral award	Christopher Seppälä (France)
Main obstacles to resolving disagreements and escalation into disputes (PowerPoint)	Murray Armes (UK)
Challenges in operating Clause 20 of the FIDIC conditions (Workshop scenarios)	
Pathological DBs (Workshop Case Studies)	

Title	Author
Experiences with DRBs in relationship contracts in Australia	GM Peck & A McLennan (Australia)
<b>Sunday 16 May Cost control in the use of DBs</b>	
Effective use of the DB process (Workshop questions)	
Documents control -- preventing and resolving issues in document control in the Dispute Adjudication Board process (Workshop questions)	
Basic principles for "fair" hearing Workshop scenarios	Graham Easton (Australia)

## New processes for claims in the District Court – don't get caught out

New processes for civil claims in the District Court have been in place since November 2009. However, people are still being caught out by failing to comply with the new simple procedures. The summary judgment process is no longer used for simple debt recovery matters. There are now duties on both parties to take action within specified time frames and if these are not complied with judgment may be granted against them without a formal hearing process.

Businesses that are experiencing cash flow problems in the current economic climate should be aware of the new Court processes to ensure they don't get caught out. If you find yourself in a situation where Court proceedings have been initiated against you or your business do something about it. If you don't unnecessary Court costs will be incurred and your credibility will be adversely affected, especially if the judgment is registered in the Mercantile Gazette or with Veda Advantage (formerly Baycorp).

The procedure for obtaining judgment is now much faster if the defendant has no defence to the claim against them.

All business and individuals should be aware of the following processes and their obligations:

1. A Notice of Claim is filed and served on the Defendant.
2. The Defendant then has 30 working days to file and serve a response.
3. If no response is received from the Defendant then **Judgment by default** can be obtained.



**Tracy Robinson**

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