

**Study on the Introduction and Dissemination of  
DAB/Adjudicators in the Asian Region**

**Study Report**

**March 2010**

**JAPAN INTERNATIONAL COOPERATION AGENCY**

**KYOTO UNIVERSITY**

**NIPPON KOEI CO., LTD.**

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## ABBREVIATIONS

ADR	:	Alternative Dispute Resolution
AJCE	:	Association of Japanese Consulting Engineers
APA	:	FIDIC Assessment Panel for Adjudicators
DAB	:	Dispute Adjudication Board
DB	:	Dispute Board
DRB	:	Dispute Review Board
DRBF	:	Dispute Resolution Board Foundation
FIDIC	:	International Federation of Consulting Engineers
ICC	:	International Chamber of Commerce
JICA	:	Japan International Cooperation Agency
MA	:	FIDIC Member Association
MDB	:	Multilateral Development Bank



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## Chapter 1 Outline of the Study

### 1.1 Background of the Study

Japan International Cooperation Agency (JICA) revised the “Sample Bidding Documents under Japanese ODA Loans - Procurement of Works (hereinafter referred as “the Sample Bidding Documents”)” in June 2009, harmonizing the procurement process with other international organizations, and adopted the “Conditions of Contract for Construction MDB harmonized edition” issued by the International Federation of Consulting Engineers (FIDIC) in cooperation with Multilateral Development Banks (MDB). One of the main features of the documents is introducing the DB (Dispute Board)<sup>1</sup> as the resolution process of contract dispute.

Under this situation, more and more Japanese ODA loan projects are considered to set up DB, therefore it is urgently required to grow up the professional adjudicators in Asian region where most of the projects are conducted.

To cope with this requirement, JICA conducted the “Study on the Promotion of DAB Adjudicators in the Asian Region” and studied how to grow up the adjudicators. This previous study pointed out there are many challenges to make practical use of DB. It also pointed out the needs for education and qualification of the adjudicators on the “supply side”, and the needs for enhancement of awareness of the DB of the stakeholders including the employers and contractors on the “demand side”. To introduce DB effectively, it is important to address those challenges concurrently.

As a result, this Study is conducted to analyze more specifically how to resolve those challenges and introduce DAB effectively in Asian countries where many Japanese ODA loan projects are operated.

### 1.2 Objective of the Study

The objective of the study is to prepare the introduction and dissemination of DB into Japanese ODA loan projects after 2010. The outcome of the study shall be as follows:

- ① Roadmap for introduction and dissemination of DAB to Japanese ODA loan projects
- ② Training kit for educating adjudicators
- ③ Qualification procedure of adjudicators (draft version)

In order to achieve these objectives, the Study Team carried out two times of overseas survey (in Cambodia, Vietnam, Indonesia, Bangladesh, and Sri Lanka) and DAB promotion seminar in Tokyo

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<sup>1</sup> The word “DAB (Dispute Adjudication Board)” which is used in FIDIC Red Book 1999 year version was changed to “DB (Dispute Board)” in FIDIC MDB edition. The functions of DAB and DB are identical basically. In this report, the word “DB” is used in principle except where “DAB” was used in the past events.

in addition to the necessary study in Japan.

### 1.3 Study Team

The study has been carried out by the joint venture of Kyoto University and Nippon Koei Co., Ltd., and the following members were assigned for the study.

	Position	Name	Organization
1	Team leader/Expert on international contract	Toshihiko Omoto	Kyoto University
2	Expert on ODA project management (1)	Yukinobu Hayashi	Nippon Koei
3	Expert on ODA project management (2)	Yoshihiko Yamashita	Nippon Koei (AJCE)
4	DAB Process advisor	Gordon Jaynes	Kyoto University (individual)

### 1.4 Time Schedule of the Study

The study has been made in five months from November, 2009 to March, 2010. The major events in the course of the study are as follows:

- 1) Contract Date : 02 November, 2009
- 2) Inception Report Submission : 12 November, 2009
- 3) First Phase Overseas Survey : 18 November to 25 November, 2009  
(Cambodia and Vietnam)
- 4) Survey Report Submission (for 1st Survey) : 01 January, 2010
- 5) Second Phase Overseas Survey : 25 January to 03 February, 2010  
(Indonesia, Bangladesh and Sri Lanka)
- 6) DAB Promotion Seminar (Tokyo) : 18 February, 2010
- 7) Survey Report Submission (for 2nd Survey) : 26 February, 2010
- 8) Study Report Submission : 19 March, 2010

## Chapter 2 Field Survey

### 2.1 Objectives of Field Survey

The field surveys were carried out in five countries including Cambodia, Vietnam, Indonesia, Bangladesh and Sri Lanka, where large scaled projects finance by JICA ODA loans are expected, for the following purposes:

#### 1) DAB Process Promotion Seminars

The DAB Process Promotion Seminars was held in order to deepen understanding of contractual dispute resolution process with DB by Japanese ODA loan recipient agencies, project executing agencies, construction industries in the subject country such as contractors and consultants. In the seminar, questionnaire survey was conducted to hear issues on contractual dispute settlement and opinions for introduction and dissemination of DB process from participants to the seminar.

#### 2) Meeting with Japanese ODA Loan Recipient Bodies and Implementing Agencies

The meetings were held with Japanese ODA loan recipient agencies and project executing agencies to sort out issues and problems for introducing and disseminating DB process in Japanese ODA loan projects in the subject countries and to study realistic and concrete measures for overcoming such problems.

#### 3) Exchange of Opinions at JICA Office

The hearing was conducted at JICA office in the surveyed countries regarding the settlement of contractual dispute in Japanese ODA loan projects, then opinions were exchanged for introduction and dissemination of DB process

### 2.2 Time Schedule of Field Survey

The field surveys were carried out in two times. The first trip covered Cambodia and Vietnam, and the second trip covered Indonesia, Bangladesh and Sri Lanka with the following itinerary:

**Table 2.1 Itinerary of First Phase Field Survey**

Date	Activities
18 Nov., 2009	Travel (Japan to Phnom Pen)
19 Nov., 2009	Meeting at JICA office DAB process promotion seminar (Phnom Pen) Meeting with executing agencies (PAS)
20 Nov., 2009	Meeting with executing agencies (PPWSA, EDF)
21 Nov., 2009	Travel (Phnom Pen to Hanoi)
22 Nov., 2009	Holiday
23Nov., 2009	DAB process promotion seminar (Hanoi)

24 Nov., 2009	Meeting with executing agencies (MPMU, MPI, MOC)
25 Nov., 2009	Travel (Hanoi to Japan)

**Table 2.2 Itinerary of Second Phase Field Survey**

Date	Activities
25 Jan. , 2010	Travel (Japan to Jakarta)
26 Jan. , 2010	Meeting at JICA office Meeting with executing agencies (PNL)
27 Jan. , 2010	Travel (Jakarta to Dhaka)
28 Jan. , 2010	Meeting at JICA office DAB process promotion seminar (Dhaka)
29 Jan. , 2010	Travel (Dhaka to Colombo)
30 Jan. , 2010	Preparation for seminar
31 Jan. , 2010	Holiday
1 Feb., 2010	Meeting at JICA office DAB process promotion seminar (Colombo)
2 Feb., 2010	Meeting with executing agencies (RDA, DER, CEB, NWSDB)
3 Feb., 2010	Travel (Colombo to Japan)

### 2.3 DAB Process Promotion Seminar

The DAB Process Promotion seminars were held in Cambodia, Vietnam, Bangladesh and Sri Lanka according to the Program shown in Attachment 2.1. The seminar materials used in the seminar are attached in Appendix 2-2.

The actual numbers of participants are more than expected and they are classified into type of organization as follows:

**Table 2.3 Nos. of Participants to the DAB Seminar**

Organization	Nos. of Participants			
	Cambodia	Vietnam	Bangladesh	Sri Lanka
Government	52	125	50	56
Consultant	12	14	1	14
Contractor	2	2	-	18
MDBs	-	-	-	8
Education	-	6	-	1
JICA	11	10	2	8
Total	77	157	53	105

In the seminar, a lot of questions are asked by the participants. The typical questions and answers made by study team are recorded in Appendixes 2.3.1 to 2.3.4

#### 2.4 Meetings with JICA ODA Loan Project Implementation Agencies

Minutes of the meetings with JICA ODA Loan implementing agencies in surveyed counties are recorded in Appendixes 2.4.1 to 2.4.11.

Most frequently exchanged opinions with JICA ODA Loan implementing agencies (hereinafter called as “Implementing Agencies”) in subject countries are summarized below in which the results of questionnaires have also taken into consideration.

- Each country expressed many hesitant opinions about introducing DB as the system is new and inexperienced.
- Many Implementing Agencies consider DB cost is expensive. Though they understand effectiveness of DB, cost burden is most difficult issue and expressed realization of low cost DB.
- It was frequently heard that trial implementation of pilot projects may be useful to prove benefit of DB to the employers.
- Some expressed anxiety in finding appropriate adjudicators.
- Source of claims and disputes are attributable to 1) late site possession, 2) unforeseeable physical conditions, 3) price escalation, 4) delayed payment, and 5) variations.
- Expectations to JICA were 1) holding of seminars and workshops, and 2) support for adjudicator fosterage.
- Following issues were confirmed as the problems associated with contract administration:
  - There were many cases that binding power of Engineer’s decision or DB’s decision is not respected.
  - Despite of the fact that standing DB is mandated, there were cases that DB employment was postponed by negotiations between contract parties.
  - There were cases that internal staff of employer plays the Engineer’s role. A project under such circumstance could effectively employ DB.
- A thorough understanding of DB by Implementing Agencies (or the Employer) as well as by government’s procurement, financial and legal departments is quite necessary for dissemination of DB.

### 2.4.1 Cambodia

#### 1) Port Authority of Sihanoukville (PAS)

At present, they don't find strong necessity of employing DB. However, there were opinions that they will consider DB positively if financial support is granted. They feel the cost of DB is rather expensive and expressed anxiety about the employer's financial burden. They find it necessary to obtain understanding of Implementing Agencies such as MOEF (Ministry of Economy and Finance).

#### 2) Phnom Penh Water Supply Authority (PPWSA)

Nirota Water Supply Project (JICA ODA Loan project) could be a potential pilot project for DB. As the project is under bidding stage, it may be difficult to select as a pilot project. Size of the project is large enough for DB. After reviewing the condition of contract, it was found out that the contract prescribes that claims or dispute should be relegated to adjudicator for resolution. This provision is different from FIDIC DB, but similar to statutory adjudication in UK. DB is not familiar in Cambodia. Government recommends Alternative Dispute Resolution (ADR). In this connection, provision similar to ADR is used in local procurement. The PPWSA expressed importance of team spirit between employer, contractor and consultant.

#### 3) Electricite du Cambodge (EdC)

At present, hydropower projects have been implemented by BOT system. There are many medium-small size transmission-distribution projects that are directly procured by EdC as an employer. There were opinions that DB does not fit into present situation. In fact, DB is not acknowledged yet in Cambodia. In many cases, lawyers or National Audit Authority involve with dispute resolutions.

### 2.4.2 Vietnam

#### 1) Major Project Management Unit (MPMU)

MPMU is the Implementing Agency for JICA ODA Loan projects. They have undertaken projects such as Improvement of Kim Lien Intersection, Urban infrastructure construction project in North Thang Long. MPMU stressed importance of clarification about the benefit of employing DB to the employers. There were opinions about the necessity of modification of legal framework in Vietnam. The Study Team explained that DB does not contradict with arbitration or litigation. The MPMU find it difficult to employ DB by themselves. Higher authority, Hanoi Peoples Committee intervenes in the process of claim or dispute resolutions.

#### 2) Ministry of Planning and Investment (MPI)

Vice Minister Mr. Dong attended the meeting. Mr. Dong expressed that he has knowledge about DB and understands benefits of DB to the employers. He attended the DB seminar held in May 2009 in Ho Chi Minh City, hosted by DBF (Dispute Board Foundation). As the next step forward, they proposed of launching a pilot project. Through the project, we can experience DB process and able to prove effectiveness of DB. Based on understanding that a number of adjudicators are quite small at present, MPI expressed importance of transparent process in the selection of adjudicators. It would be an essential condition for dissemination of DB. MPI said that PPA (Public Procurement Agent) and CPS (Center for Procurement Support) of MPI can play a major role in fostering adjudicators.

### 3) Ministry of Constructon (MOC)

With regard to the question about benefit of DB to employers, the Study Team explained that maximum benefit is to avoid expensive arbitration by resolving disputes before completion of construction at a high rate of success. In addition, function of dispute prevention is also a great advantage for employers. As DB cost is considered expensive, effectiveness of DB should be verified through trial implementation of large-scale pilot projects according to MOC.

## 2.4.3 Indonesia

### 1) PT PLN

PLN has no construction projects that employed DB. Therefore, understanding of DB is very little. However, PLN intends to introduce JICA Sample Bidding Documents (2009 edition) in new JICA ODA Loan projects. The Peusangan hydropower project, currently in bidding stage introduced the JICA Sample Bidding Document (2009 edition) in which DB is included. Since DB cost is a matter of concern, they are greatly interested in the progress of pilot projects whose DB cost will be granted by JICA.

## 2.4.4 Sri Lanka

### 1) RDA (Road Development Authority)

Southern Transport Development Project is composed of 4 packages and introduced FIDIC Red Book 4<sup>th</sup> edition which includes DB. The project employs 3-persons DB. All of the adjudicators are Sri Lankan. Two packages have employed Japanese contractors. Though there was DB's decision in one of the 2 packages, it was not agreed and currently in arbitration (ICC rules). Employer has not complied with DB decision. Regarding other packages, DB made decisions on 5 to 6 claims, however, employer has not accepted all of the DB decisions. As can be seen in these cases, the employer does not comply with DB decisions. They try to renegotiate with contractors regarding DB's decision which is disadvantageous to them (payment to contractors)

With reference to these contract management, the Study Team stressed the fact that unless

otherwise overruled in arbitration or litigation, DB decision is final and binding. Therefore, contract parties are obliged to comply with DB decisions.

Daily fee for Sri Lankan adjudicators is USD\$300 to USD\$500. There were opinions that this rate is very high in comparison with that of government officials.

Most of the cases in the past, adjudicators are called when disputes have been filed. There were concerns that dispute prevention of DB is not properly functioning in the experienced project.

## 2) Department of External Resources (DER), Ministry of Finance and Planning

DER is in charge of loan procedures and procurement in JICA ODA Loan projects. It has no direct connection with DB. DB system seems reasonable, however, it is necessary to justify whether it is effective for employers through comparative study of cost simulations, namely projects with and without DB.

## 3) Ceylon Electricity Board (CEB)

At present, there have no serious construction disputes on projects undertaken by CEB. Though they understand the concept of DB, none of their projects introduced DB. In case of DB employment, CEB expressed ad-hoc DB would be sufficient. They were concerned that adjudicators in Sri Lanka have not enough experience yet.

## 4) National Water Supply & Drainage Board (NWSDB)

Secondary Town & Rural Community Based Water Supply and Sanitation Project (ADB loan) currently under construction is composed of 16 contract packages. The project introduces FIDIC MDB edition as the conditions of the contract in which 3-persons ad-hoc DB is employed. All of the adjudicators are Sri Lankan. Engineer is selected from employer's staff. There was a report that a claim on price fluctuation was relegated to DB, however, it was carried over to arbitration.

The concept of DB was well understood. The issue was choice of standing or ad-hoc DB. As majority of NWSDB's projects are small-scale, they were hesitant in employing standing DB.

## 2.5 Questionnaire Survey

### 2.5.1 General

The Questionnaire survey was carried out using Questionnaire Sheet shown in Appendix-2.5 in the DAB seminars in Cambodia, Vietnam, Bangladesh and Sri Lanka. The following subjects are investigated:

#### 1) Impression of the Seminar



- 2) Opinions on adoption of DB
- 3) Type of prevailing claims and experience of claim handling

The answers were obtained from 392 respondents which correspond to 56% of total participants. The breakdown of answers in country and organization is as below:

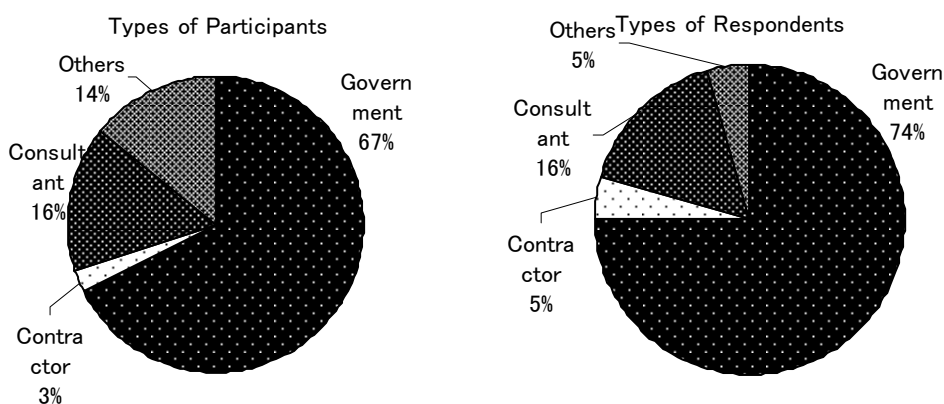
**Table 2.4 Answer to the Questionnaire**

	Country	Nos. of Answer (Rate)	Nos. of Respondents by Organization			
			Government	Contractor	Consultant	Others
1)	Cambodia	44 (60%)	74%	5%	16%	5%
2)	Vietnam	52 (33%)	71%	4%	8%	17%
3)	Bangladesh	44 (83%)	98%	-	2%	-
4)	Sri Lanka	79 (75%)	55%	18%	15%	12%
	Total	219 (57%)	72%	8%	11%	9%

### 2.5.3 Result of Questionnaire Survey in Cambodia

#### 1) Types of the respondents

Among those who answered the questionnaire, 33 which is 75 % of total 44 answers are of government / government-related organizations and companies (hereinafter referred simply as “government”). Others include 2 contractors and 2 others (5 % each), and 7 consultants (16 %). As for the answer rate which is calculated as number of the answers divided by the number of the participants, there is slight difference among the types of respondents, except the rate of “others” is rather small, the reason of which is most of “others” are JICA officials including Japanese staff.



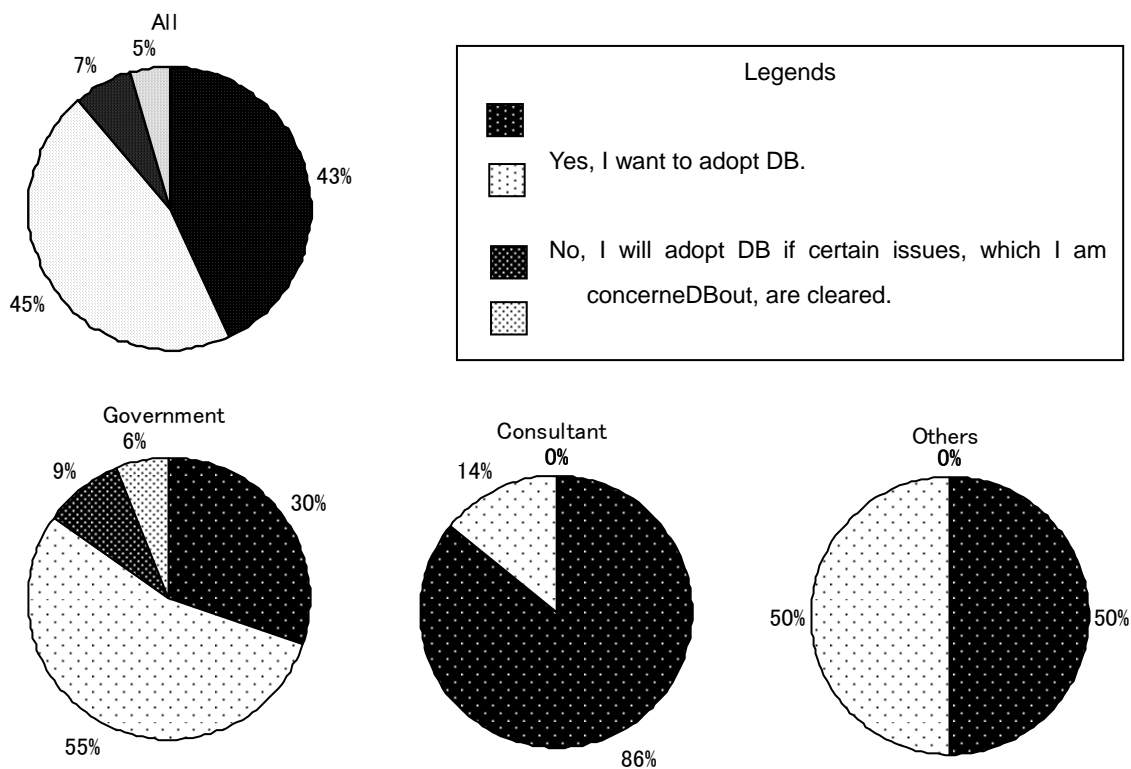
**Figure 2.1 Types of Participants and Respondents**

## 2) The Impression of the Seminar

As for the impression of the DB seminar, three evaluation axes which are “interesting”, “useful” and “clear and easy to understand” were introduced, for each of them respondents chose one from 5 options, “extremely”, “very much”, “fair”, “not very much” and “not at all”. Those 5 answers are exchanged to the marks as “extremely” is 5 points, “very much” is 4 points... and “not at all” is 1 point. The averages of those marks are; “interesting” is 3.93 points, “useful” is 3.90 points, and “clear and easy to understand” is 3.64 points. From the marks, it seems they have large interest about DB while the seminar was a little difficult for them. The reason why they thought it difficult is considered that the seminar was held in English including all the handouts and questionnaire. In fact, the seminar held in Vietnam was the same contents with interpreter and translated handouts, and there are little differences among those three evaluation axes. Although there is no free comments which point out the difficulties of the language or request for the interpreter etc., those who are not good at English might not have answered the questionnaire, and this should be taken care at the next seminar.

## 3) Adoption of DB

As for the willingness to adopt DB, almost half of them chose “Yes, I want to adopt DB”. Together with “No, I will adopt DB if certain issues, which I am concerned about, are cleared.”, more than 90 % of the respondents chose positive answers. Looking into the types of the respondents, government seems to be less positive compared with contractor or consultant; among 33 respondents who are of government, 10 (30 %) chose “Yes”, 18 (55 %) chose “I will adopt if certain issues are cleared”, while 3 (9 %) chose “No, I don’t want to adopt DB”. 2 of 2 contractor (100 %) answered “Yes”, and all the consultants and others chose either “Yes” or “I will adopt if certain issues are cleared”. It should be noted, however, numbers of “contractor” and “others” are no more than 2 each therefore they are not necessarily representing all of the entities’ opinion. This holds in the subsequent analysis.



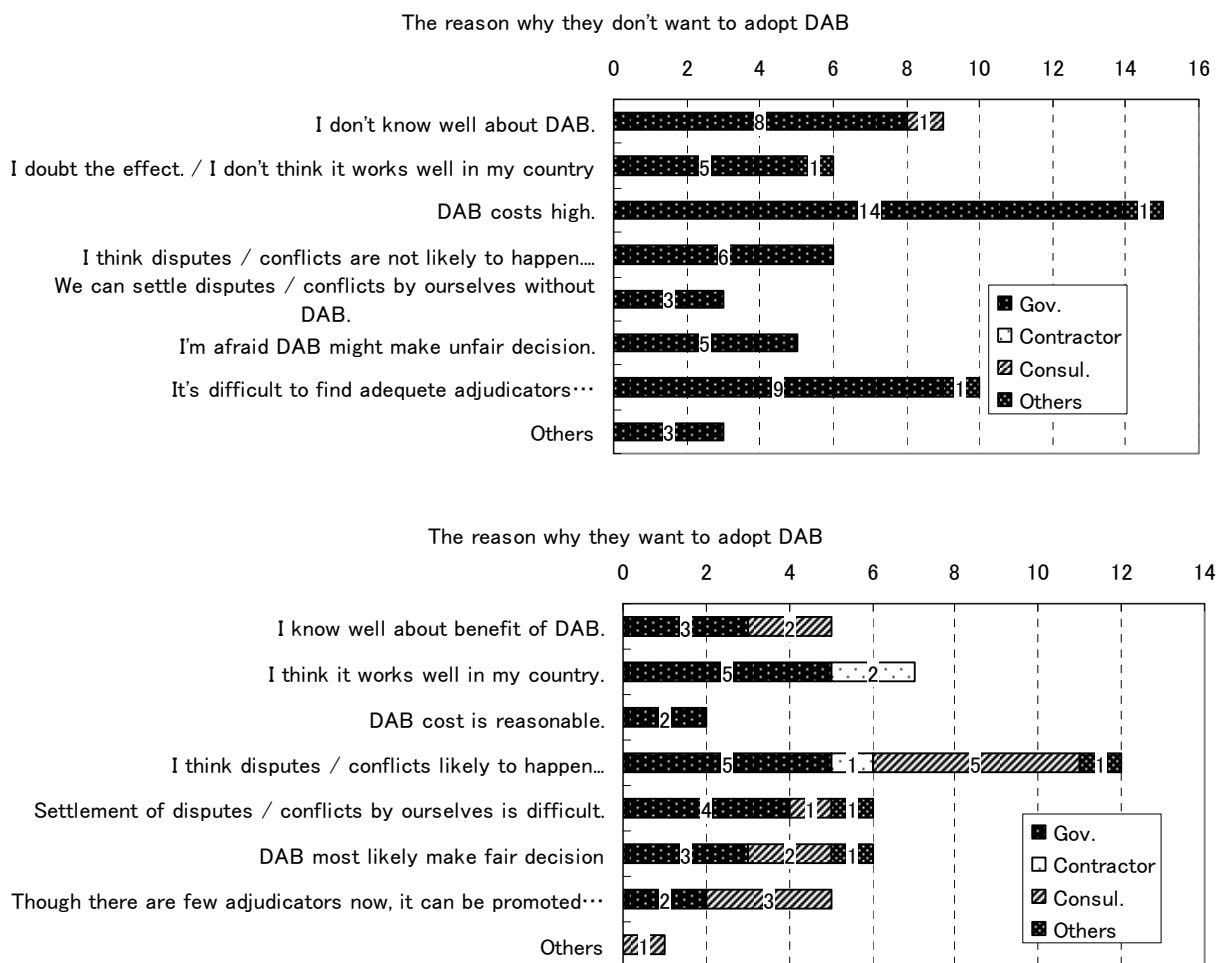
\*The graph of the contractor is omitted because 2 of 2 (100%) answered “Yes”.

**Figure 2.2 Willingness to Adopt DB**

As the reason why they don’t want to adopt DB, many of them pointed out high cost and the difficulties of finding adequate adjudicators. On the other hand, for the reason to want to adopt DB, the largest number chose “I think disputes / conflicts likely happen in the project.”, which means they have considerable degree of awareness about the claim and the risk it escalate to the dispute. In fact, there are some free comments saying although they are not counting on DB, they feel the needs of dispute resolution system. Especially, many consultants pointed out the risk of dispute.

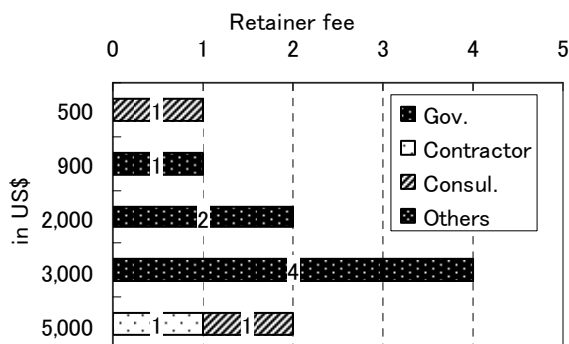
The next largest reason was “I think DB works well in my country”, especially, 2 of 2 contractors chose this reason (here small number of the parameter should be considered).

As can be seen above, in Cambodia, they seem to be comparatively ready to adopt DB even there are some challenges such as cost and finding adequate adjudicator.



**Figure 2.3 The Reason Why They Want / Don't Want to Adopt DB**

As for the fee they are willing to pay for DB, many respondents left this question blank, as well as the answer price varied a lot, so it can hardly be concluded but it seems they tend to consider the price lower than international standard. Besides, there were opinions that the government can hardly bear the cost of the DB therefore it is desirable to be assisted by ODA fund.



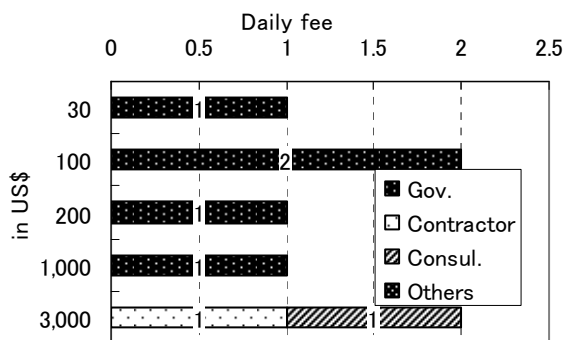


Figure 2.4 Payment to DB

4) The Experience of Making / Dealing with Claims

As for the experience of making / dealing with claims, around 40 % of 39 respondents excluding those who did not answer, have the experience. Especially, the percentage of “yes” is larger on contractor, consultant and others.

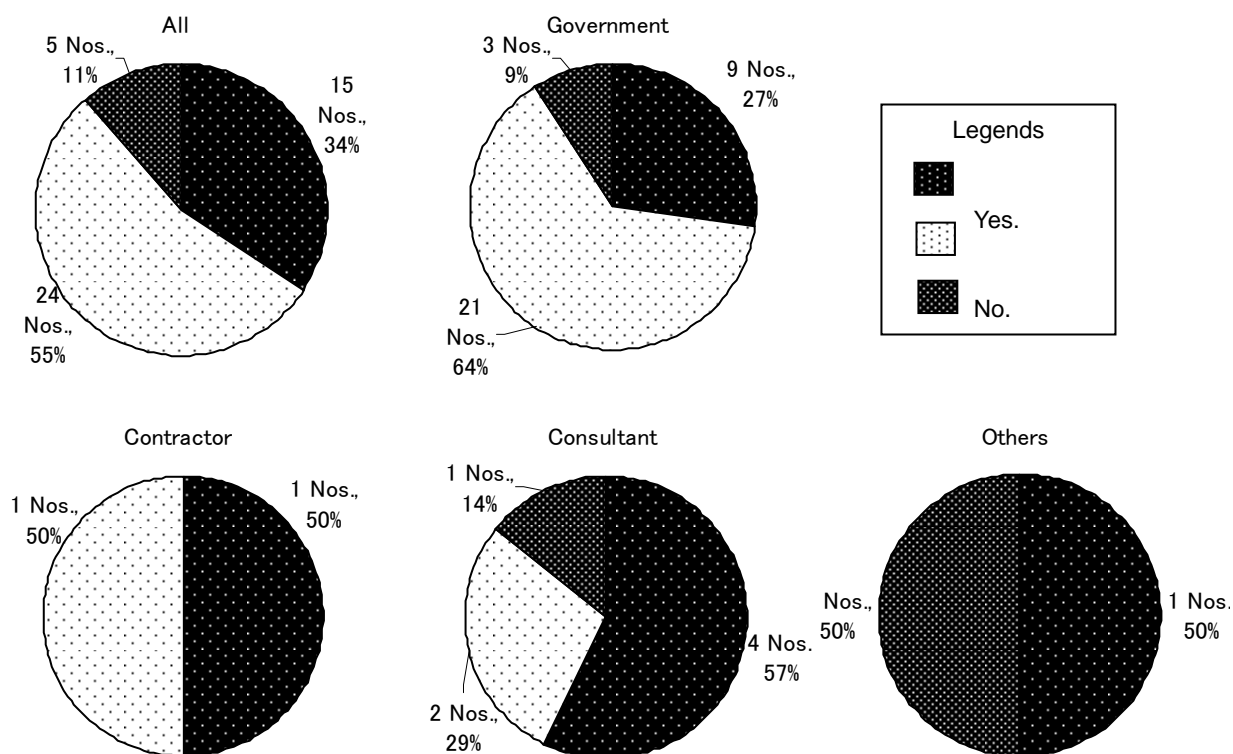
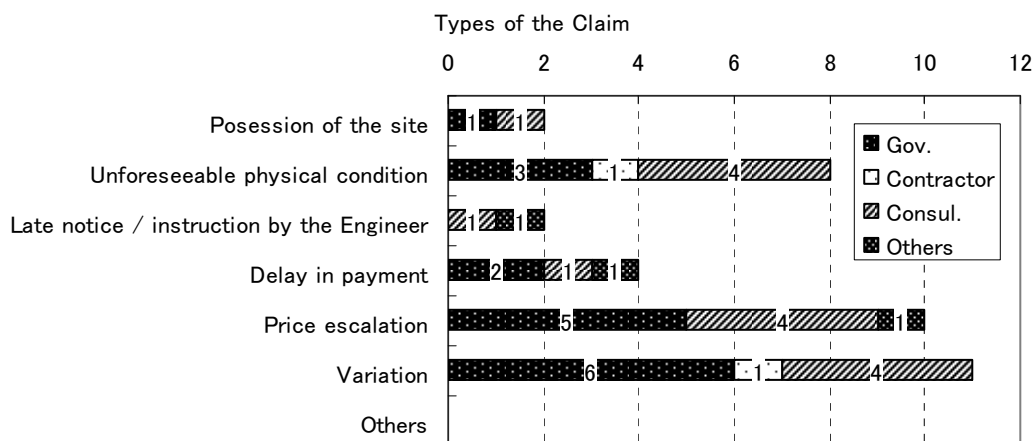
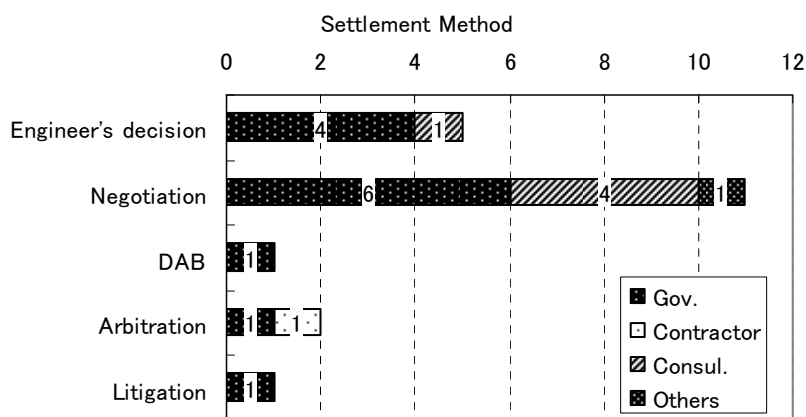


Figure 2.5 Experience of Making / Dealing with Claims

As for the types of the claims, “Variation” was the largest, followed by “Price escalation”, “Unforeseeable physical condition”. Although more than half of them were settled by “Negotiation”, “the Engineer’s decision” accounted around 30 %, there are few answers of “DB”, “Arbitration” and “Litigation” as well. It should be noted that DB is not said to have practically introduced in Cambodia, the answer “DB” is possibly wrong answer; respondent might have not fully understood the question. It is possible that there are still more wrong answers than this, although they will hardly affect the tendency of the answer as a whole.



**Figure 2.6 Types of the Claim**



**Figure 2.7 Settlement Method**

For the difficulties they feel in dealing with claims, many pointed out cost, time, and technical issues.

5) Others / Free Comments

In relation to the support they want JICA to provide in order to disseminate DB, many respondents commented they want to adopt DB for less budget by financial aid or technical and

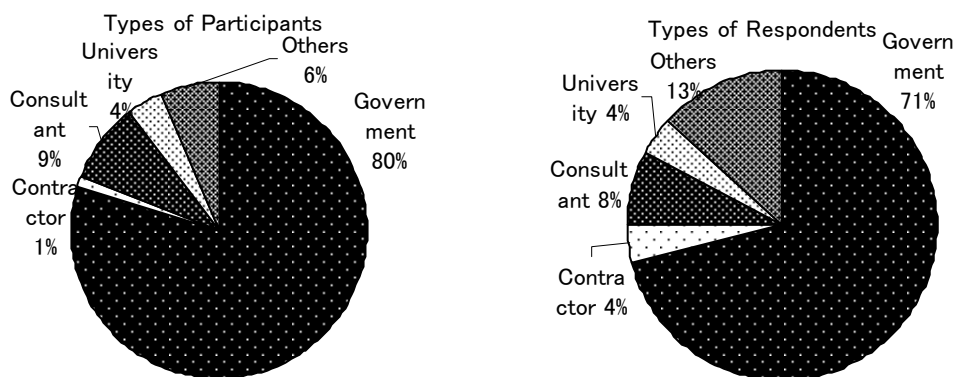
financial support to grow up local adjudicator etc. As described above at “the reason not to adopt DB”, “cost” seems to be a big bottleneck. There are many comments to request technical support such as “training” as well. The “training” includes growing up local adjudicators, promoting understanding of DB like the seminar held in this study, preparing a guideline to practically introduce DB in Cambodia, etc. In conclusion, comprehensive support both financially and technically is required for the introduction of DB.

Summary of the result is shown in Appendix-2.6.1.

### 2.5.3 Result of Questionnaire Survey in Vietnam

#### 1) Types of the Respondents

52 people who answered the questionnaire consist of 38 (73 %) government / government-related organizations and companies (hereinafter referred as “government”), 1 (2 %) contractor, 5 (10 %) consultants, 2 (4 %) university / research institute and 6 (12 %) others. It is considered “others” includes JICA and other private company, some respondents checked “others” despite the name of organization filled in the space is government-owned entity which should be sorted in “government”. Although those answers with the name of organization were re-sorted during the counting process, it should be noted that still there might be some answers which are included in “others” but actually are “government”.



**Figure 2.8 Types of Participants and Respondents**

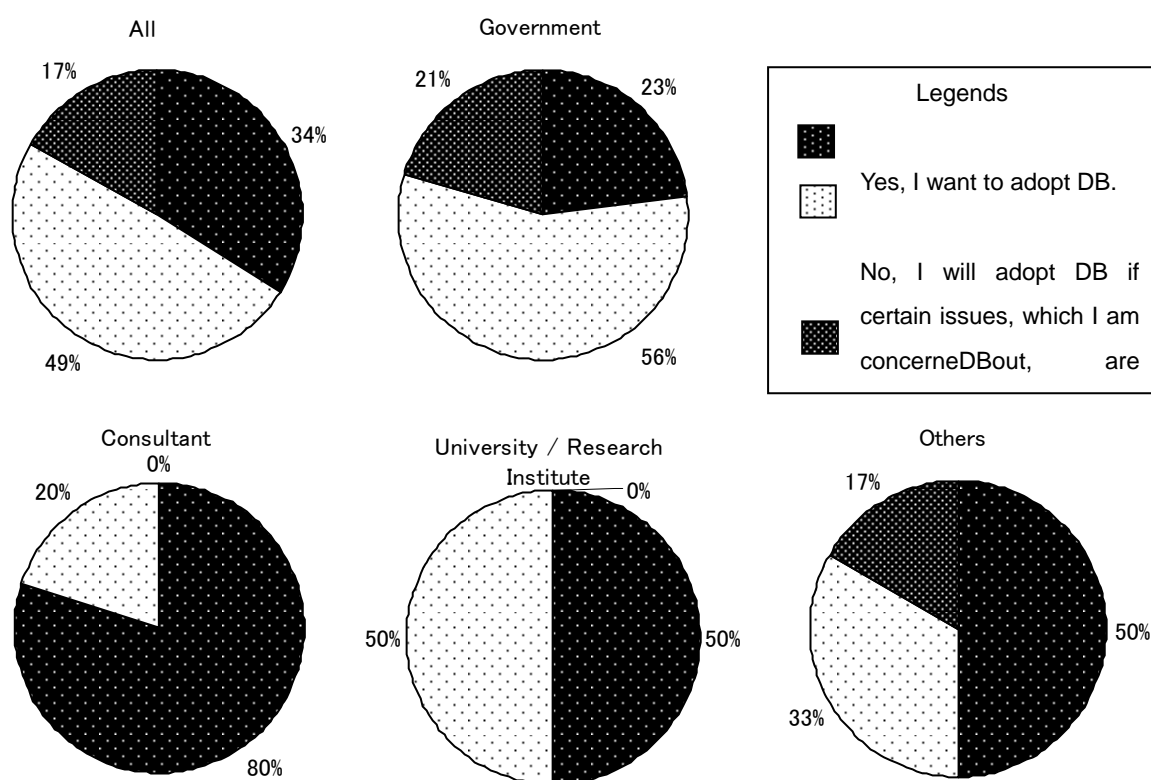
#### 2) The Impression of the Seminar

As 5 options of the evaluation items are exchanged into numerical value and the average scores are as follows; “interesting” is 3.52 points, “useful” is 3.62 points, and “clear and easy to understand” is 3.53 points. The scores of those three axes were almost same, unlike in Cambodia

the score of “clear and easy to understand” is lower than the other two. In Vietnam, all the materials were translated into Vietnamese and interpreter was placed, which considered to have contributed to the understanding of the participants. However, the score of each axis was lower than that of Cambodia, which shows that Vietnamese people’s interest and awareness of DB considered to be lower than that of Cambodian. Especially, the score of “interesting” varied a lot; the interest to DB is considered to be differ greatly from person to person.

### 3) Adoption of DB

As for the willingness to adopt DB, 34 % answered “yes”. Together with 49 % of “I will adopt DB if certain issues are cleared”, almost 90 % of them had positive answer. Looking into the types of the respondents, in contractor, consultant and university / research institute, more respondents answered “yes” than in government. It should be noted, however, there is only one contractor and two university / research institute, so they might not appropriately represent all of them. Also, “others” might include the answers of government as stated above.



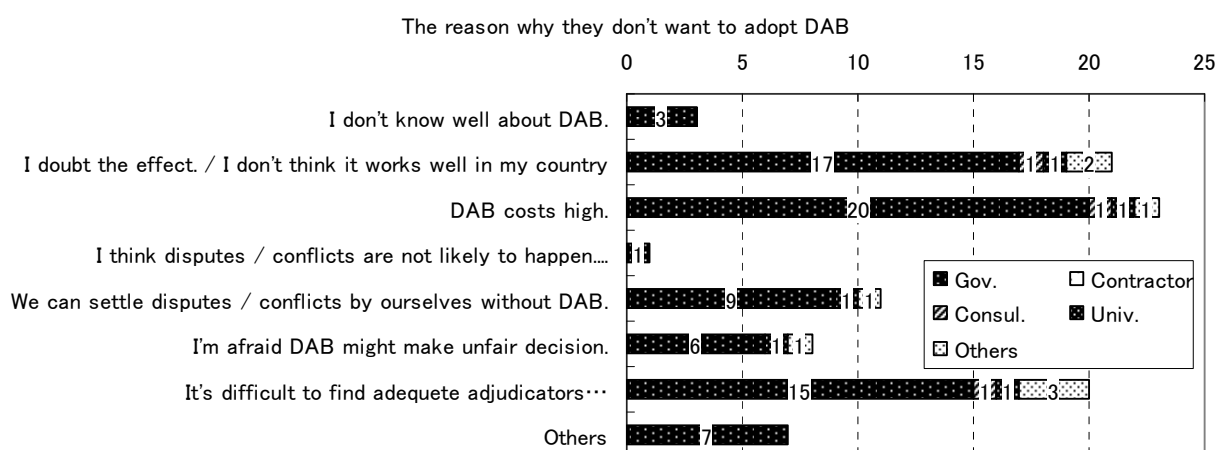
\*The graph of the contractor is omitted for there is only one contractor (who answered “yes”).

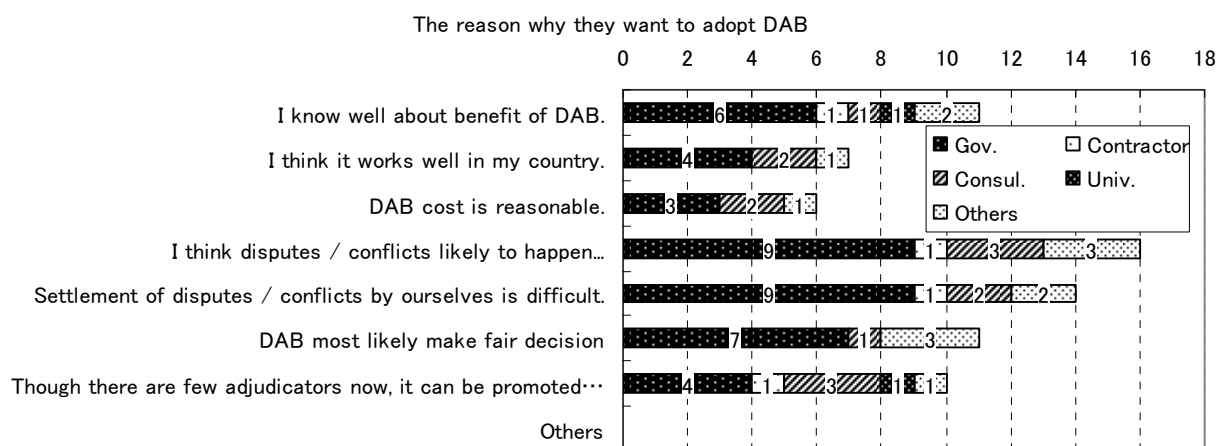
**Figure 2.9 Willingness to Adopt DB**



As the reason they don't want to adopt DB, many respondents chose "I doubt the effect. / I don't think it works well in my country." as well as the cost and difficulties in finding adequate adjudicators. In fact, there were considerable numbers opinions like "guideline should be prepared according to Vietnamese law", "it should be coordinated with relating organizations (such as Ministry of Justice)." It is considered that in Vietnam, they feel it difficult to maintain DB in accordance with Vietnamese legal and political framework. It is partly because their political system stands on socialism. On the other hand, there are quite a few opinions asking for more supports to promote understanding of DB (such as DB seminars); lack of understanding of DB might be leading to the thoughts describeDBove. However, there were few answers "I don't know well about DB" as the reason not to want to adopt DB.

As the reason they want to adopt DB, the largest numbers chose "I think conflicts / disputes likely to happen", same as Cambodia. "Settlement of disputes conflicts by ourselves is difficult" is the next largest, followed by "DB most likely make fair decision", "I know well about the benefit of DB". Comparatively few respondents chose "I think it works well in my country".





**Figure 2.10 The Reason They Want / Don't Want to Adopt DB**

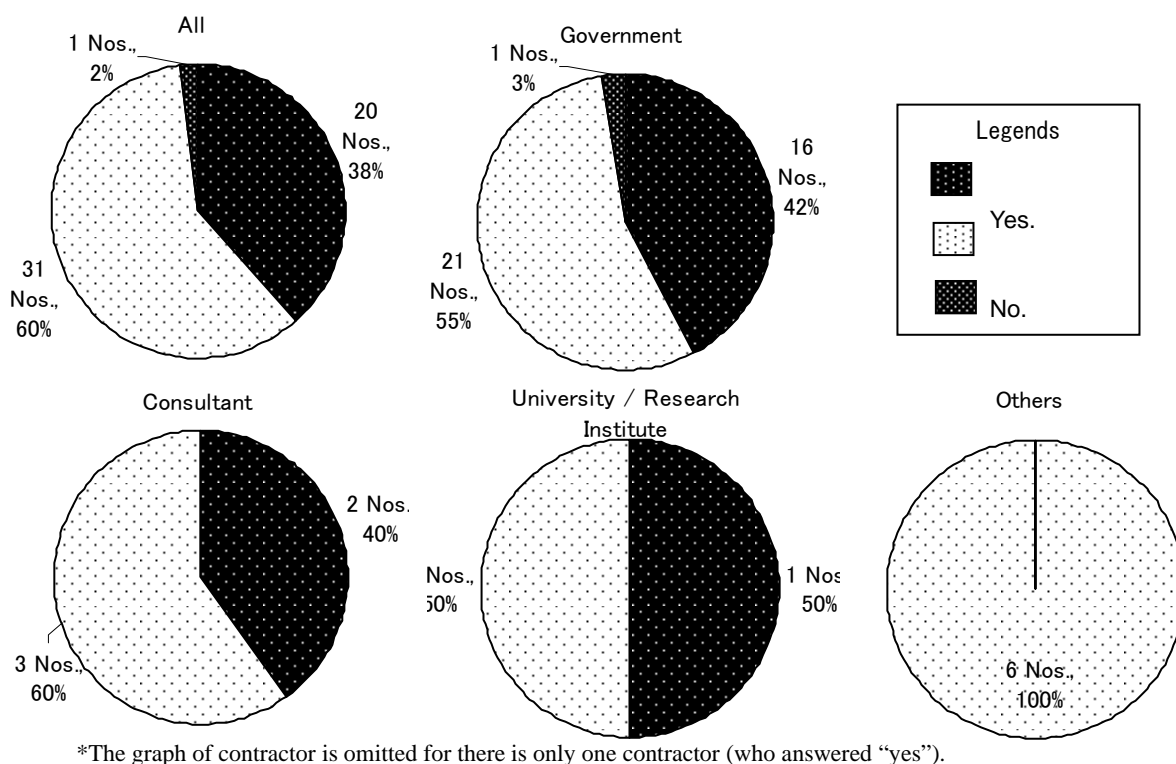
As the fee for DB they are willing to pay, there were very few answers which greatly varied, so it can not be clearly concluded but the price tends to be more than Cambodia. International standard might be acceptable in Vietnam. Other than numerical answers, some opinions stated “It should be according to Vietnamese regulation”, others said “Decide upon the scale of the project”, “According to the disputes they settled”. There is opinion that the payment to DB should be included in Loan agreement, not born by government budget.

Retainer fee (US\$)		(Average: 13,500 US\$)				
	Total	Gov.	Contractor	Consul.	Univ.	Others
1,000	1					1
3,000	1	1				
5,000	1	1				
10,000	1	1				
12,000	1	1				
50,000	1	1				
Daily fee (US\$)		(Average: 1,350 US\$)				
	Total	Gov.	Contractor	Consul.	Univ.	Others
200	2	2				
2,500	2					2

**Figure 2.11 Payment to DB**

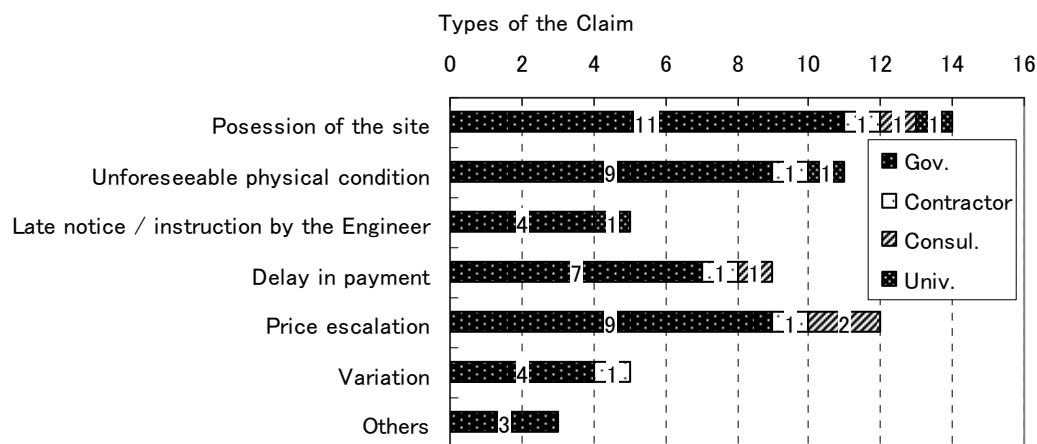
#### 4) The Experience of Making / Dealing with Claims

Those who had the experience of making / dealing with claims were around 40 % of all the respondents, which is almost same as Cambodia.

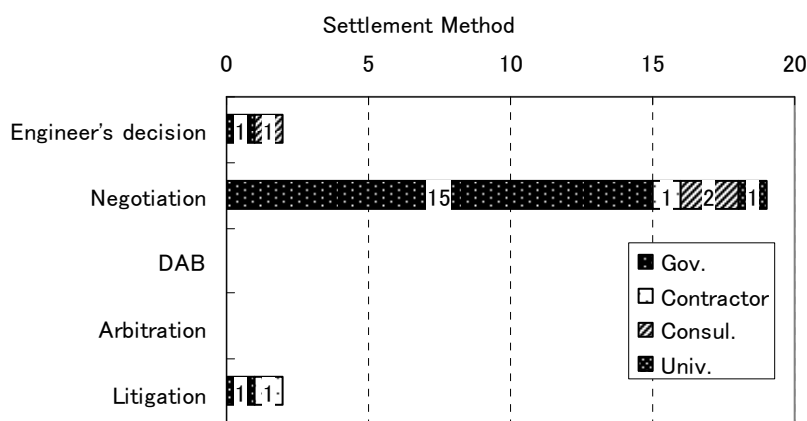


**Figure 2.12 Experience of Making / Dealing with Claims**

As the types of the claim, the largest number is "Possession of the site", followed by "Unforeseeable physical condition", "Price escalation". Almost all of them were settled by Negotiation.



**Figure 2.13 Types of the Claim**



**Figure 2.14 Settlement Method**

As for the difficulties they feel in dealing with claims, many people pointed out the language (including English and technical term) and the cost. Others are unclear contract provisions, time, negotiation, etc. few people pointed out the difficulties in relation to the political system in Vietnam, such as “changed regulations which has not been updated intime” and “Employer is usually the public organization who can not decide independently to settle the problem”.

5) Others / Free Comments

As for the support they want JICA to provide in order to disseminate DB, there are a number of comments to ask for budgetary support, training opportunity to promote understanding of DB, training to grow up adjudicators or training relating project management, preparing DB guideline in accordance with Vietnamese regulation, coordination with relating organizations, pilot project, etc. In particular, a person from VECAS (Vietnam Engineering Consultant Association) which is Vietnamese National Member Association of FIDIC said “JICA should support for training of Vietnamese consultant's experts through organizations like VECAS (support for material and lecturers)”, it is expected to be a good local partner to support JICA when a seminar or training is held in Vietnam. There was an opinion from government saying “DB adjudicator should be trained through associations like VECAS” as well.

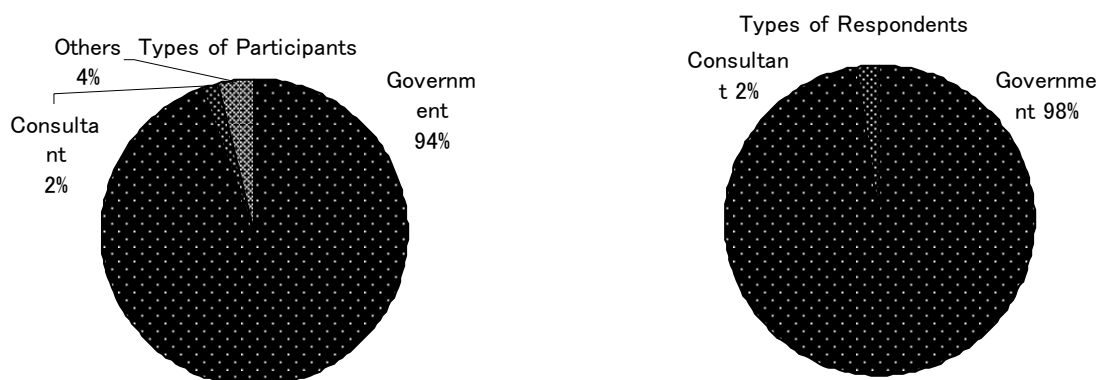
Summary of the result is shown in Appendix-2.6.2.

2.5.4 Result of Questionnaire Survey in Bangladesh

1) Types of the Respondents

Among 44 respondents who answered the questionnaire, 43 (98 %) were government /

government-related organizations. The rest 1 (2 %) was consultant. “Others” counting 4 % in participants were JICA staff therefore they did not answer the questionnaire.



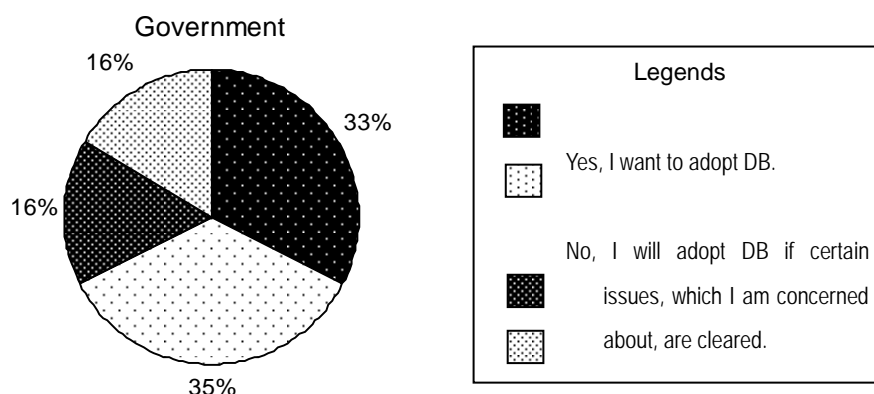
**Figure 2.15 Types of Participants and Respondents**

## 2) The Impression of the Seminar

As 5 options of the evaluation items are exchanged into numerical value. The average scores are; 3.83 points for “interesting”, 3.74 points for “useful” and 3.69 points for “clear and easy to understand”. There are slight differences of average scores among those terms, but scores of “useful” and “clear and easy to understand” were lower than that of “interesting”. Besides, scores were lower than Sri Lanka in every terms.

## 3) Adoption of DB

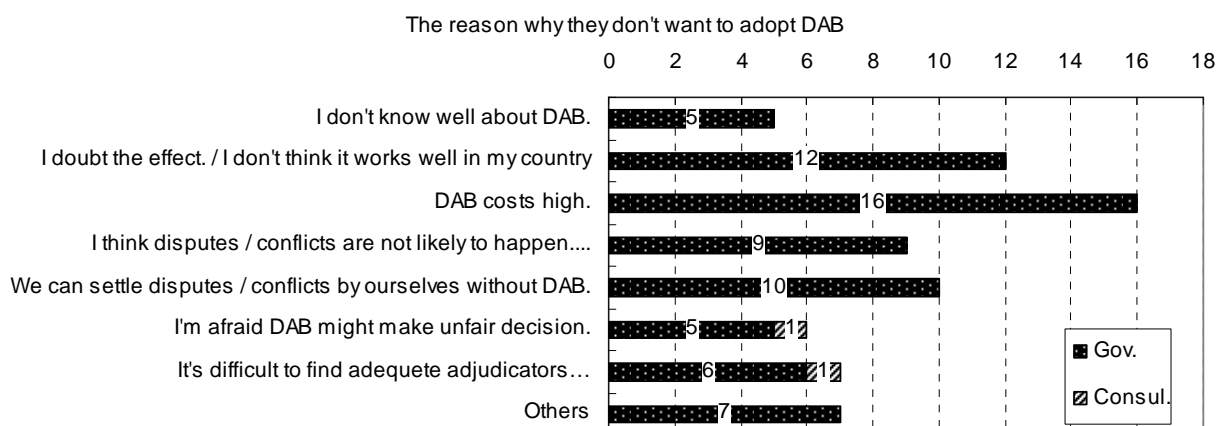
As for the willingness to adopt DB, among 43 governments 14 (33 %) chose “Yes” and 15 (35 %) chose “No, I will adopt DB if certain issues which I am concerned with are cleared.” The rate of them against 36 respondents excluding 7 who did not answer is 39 % and 42 % each, in total, around 80 % of them have positive answer. 1 consultant chose “No, I don’t want to adopt DB.”

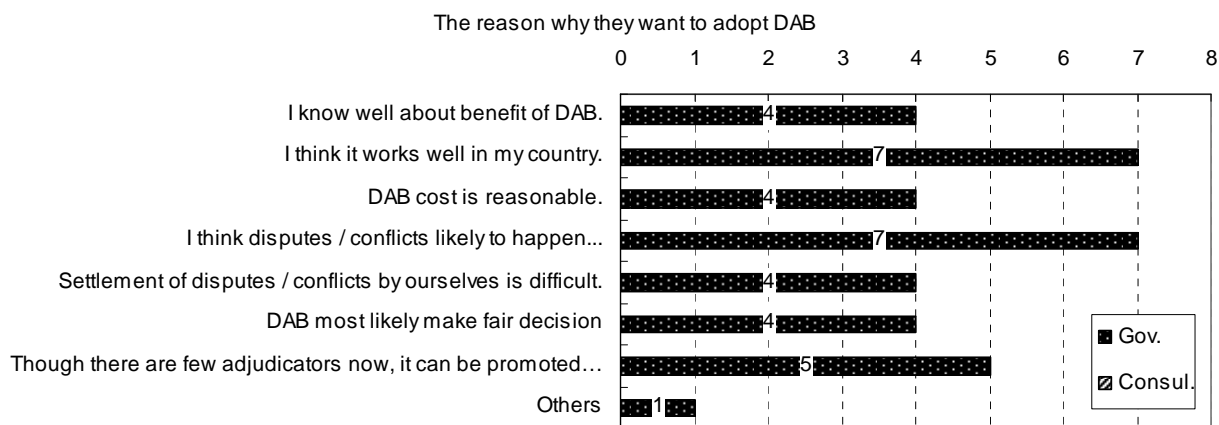


\*The graphs other than government is omitted because 98% of the respondents are government.

**Figure 2.16 Willingness to Adopt DB**

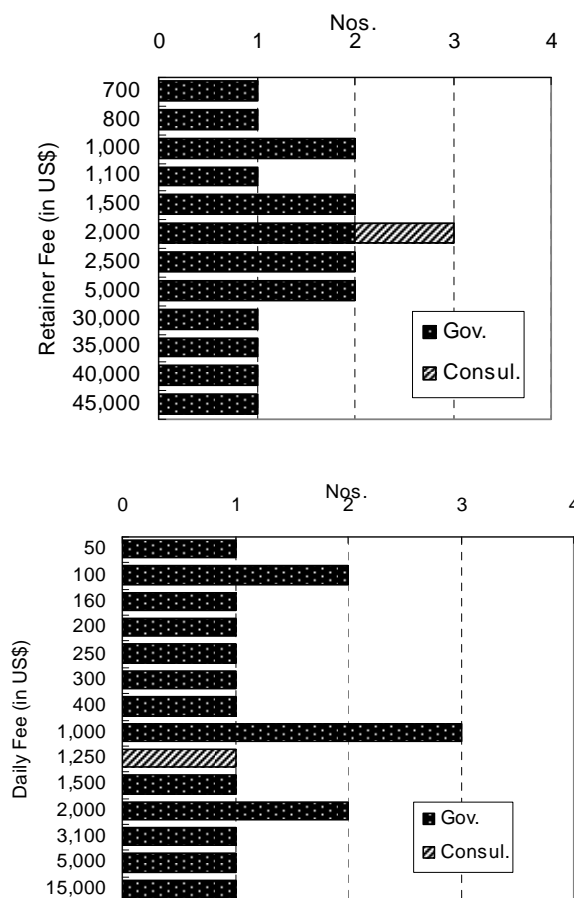
As the reason not to want to adopt DB (multiple answer allowed), “DB costs high” is the largest, followed by “I doubt the effect.”, “We can settle disputes / conflicts by ourselves without DB.” And “I think disputes / conflicts are not likely to happen.” Those who chose “It’s difficult to find adequate adjudicators.” are rather few compared with other countries (Cambodia, Vietnam and Sri Lanka). As the biggest reason (chose 1 reason), the largest number chose “DB costs high.” It counted more than 60 % of those who answered “No, I don’t want to adopt DB. / No, I will adopt DB if certain issues which I am concerned with are cleared.” On the other hand, as for the reason to want to adopt DB, the largest number chose “I think it works well in my country.” and “I think disputes / conflicts are likely to happen in the project.” It is considered that the recognition about the effect of DB or the possibility of disputes / conflicts differs greatly between those who want to adopt DB and those who don’t.





**Figure 2.17 The Reason They Want / Don't Want to Adopt DB**

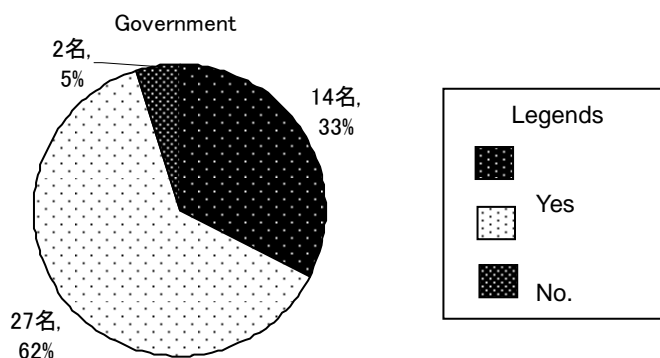
As the fee they are willing to pay for DB, there were very few answers which greatly varied, so it can not be clearly concluded. However, as for retainer fee, there are roughly two types; less than US\$ 5,000 and more than US\$ 30,000, and as for daily fee, many answered less than US\$ 5,000, more than half indicated less than US\$ 1,000.



**Figure 2.18 Payment to DB**

#### 4. The Experience of Making / Dealing with Claims

In government, 14 (34 %) of 41 valid answers excluding 2 who did not answer chose “Yes, I have.” 1 consultant answered “Yes”.

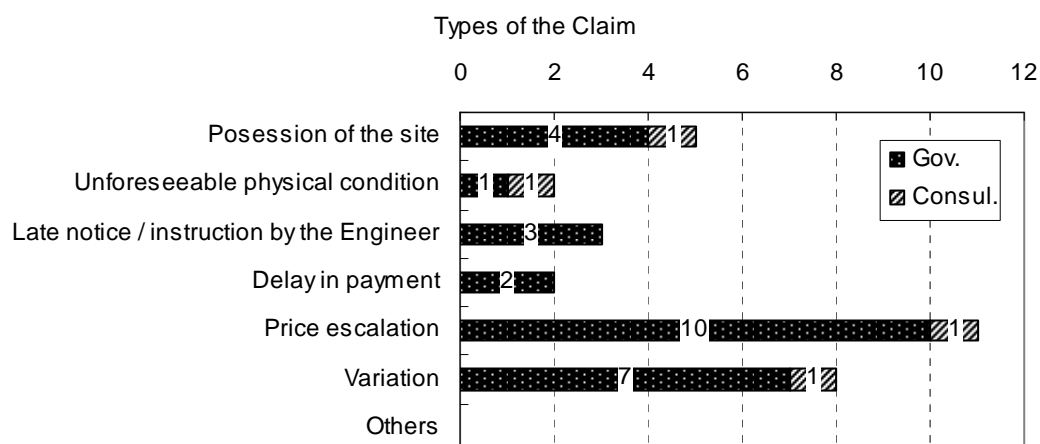


\*The graphs other than government is omitted because 98% of the respondents are government.

**Figure 2.19 Experience of Making / Dealing with Claims**

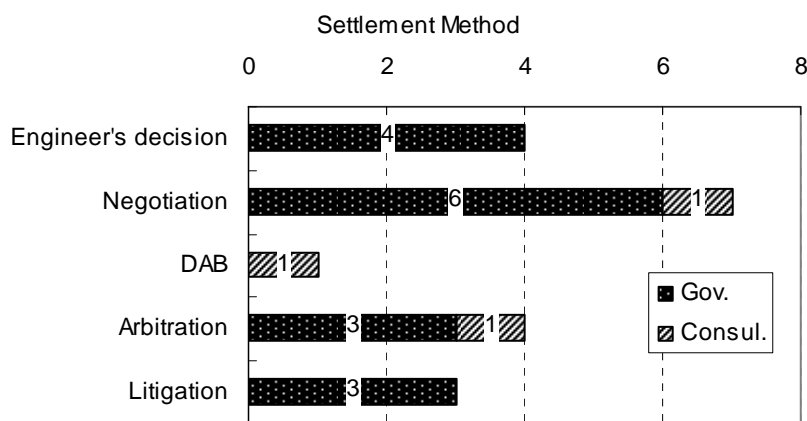
As for the types of claim, the largest number chose “Price escalation”, followed by “Variation”. As for the settlement method, “Negotiation” is the largest. However, it counted only less than half of those who have the experience of claim, which is rather low compared with other countries. On the other hand, those who chose “Engineer’s decision”, “arbitration” and “litigation” were comparatively many.

As for the difficulties in dealing with claims, time, cost, negotiation, understanding of the contract, lack of documents, etc. were indicated.



**Figure 2.20 Types of the Claim**





**Figure 2.21 Settlement Method**

### 5. Others / Free Comments

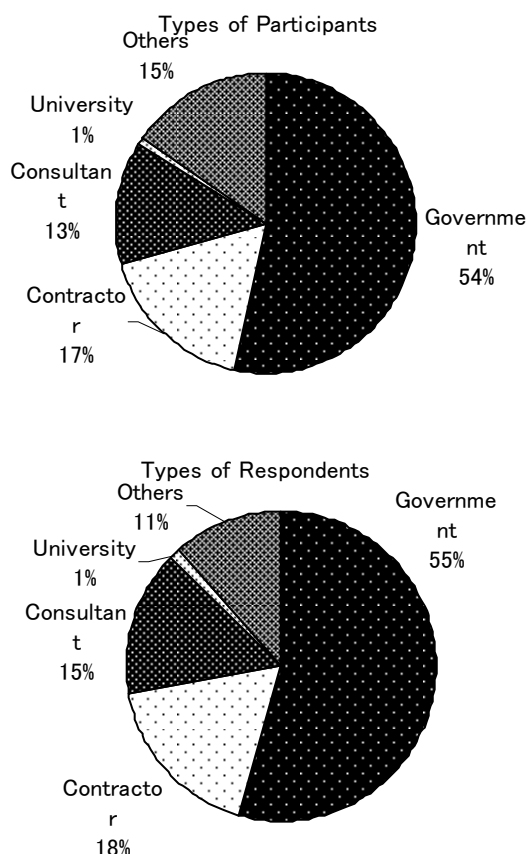
As for the support they want JICA to provide in order to disseminate DB, there are a many comments asking for the seminar which is for the employer and the contractor to promote understanding of DB. There are few request for the seminar to grow up local adjudicators. There are requests for the support for financial aspects such as funding DB cost, making DB fee less, etc. Other comments include “include DB into JICA’s bidding documents, guidelines, etc.”, “Preparing rules or guidelines”, “Conducting pilot project”, “Preparing the list of available adjudicators”.

Summary of the result is shown in Appendix -2.6.3.

### 2.5.4 Result of Questionnaire Survey in Sri Lanka

#### 1) Types of the respondents

Among those who answered the questionnaire, 43 which is 55 % of total 79 answers are of government / government-related organizations and companies (hereinafter referred simply as “government”). Others include 14 (18 %) contractors, 12 (15 %) consultants, 1 (1 %) university and 9 (11 %) others. Many of those who answered “others” are donors such as ADB and WB. There are slight differences of response rate (nos. of respondents / nos. of participants) among the types of respondents.



**Figure 2.22 Types of Participants and Respondents**

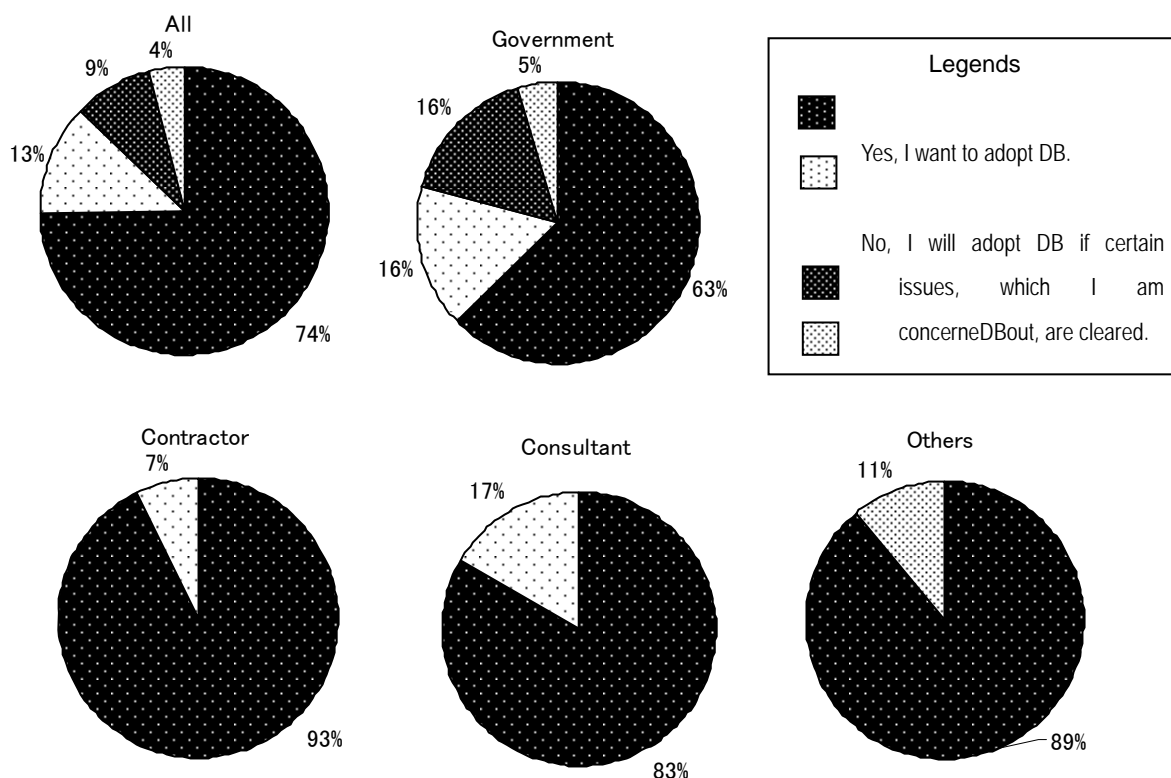
## 2) The Impression of the Seminar

As for the impression of the DB seminar, three evaluation axes which are “interesting”, “useful” and “clear and easy to understand” were introduced, for each of them respondents chose one from 5 options, “extremely”, “very much”, “fair”, “not very much” and “not at all”. Those 5 answers are exchanged to the marks as “extremely” is 5 points, “very much” is 4 points... and “not at all” is 1 point. The averages of those marks are; “interesting” is 3.91 points, “useful” is 3.99 points, and “clear and easy to understand” is 4.04 points. For every axis they mark high score, which means they have large interest about DB. The scores of “useful” and “clear and easy to understand” are especially high, which means the contents of the seminar seems to have covered fully what participants expected. There is a comment pointing out 2 pm which was the time of the seminar is the busiest traffic time so it’s better to hold the seminar in the morning.

## 3) Adoption of DB

As for the willingness to adopt DB, almost 3/4 of them chose “Yes, I want to adopt DB”.

Together with “No, I will adopt DB if certain issues, which I am concerned about, are cleared.”, almost 90 % of the respondents chose positive answers. Although 7 government chose “No, I don’t want to adopt DB.”, no consultant, contractor, university and donor chose “No, I don’t want to adopt DB.” In government, the rate of “Yes” is smaller than other entities, still more than 60 % chose “Yes”. In Sri Lanka where DB has already used, their understanding and awareness of DB are considered to be relatively high, and they seem to have positive impression about DB which they have already experienced, which is reflected to this answer of the question.



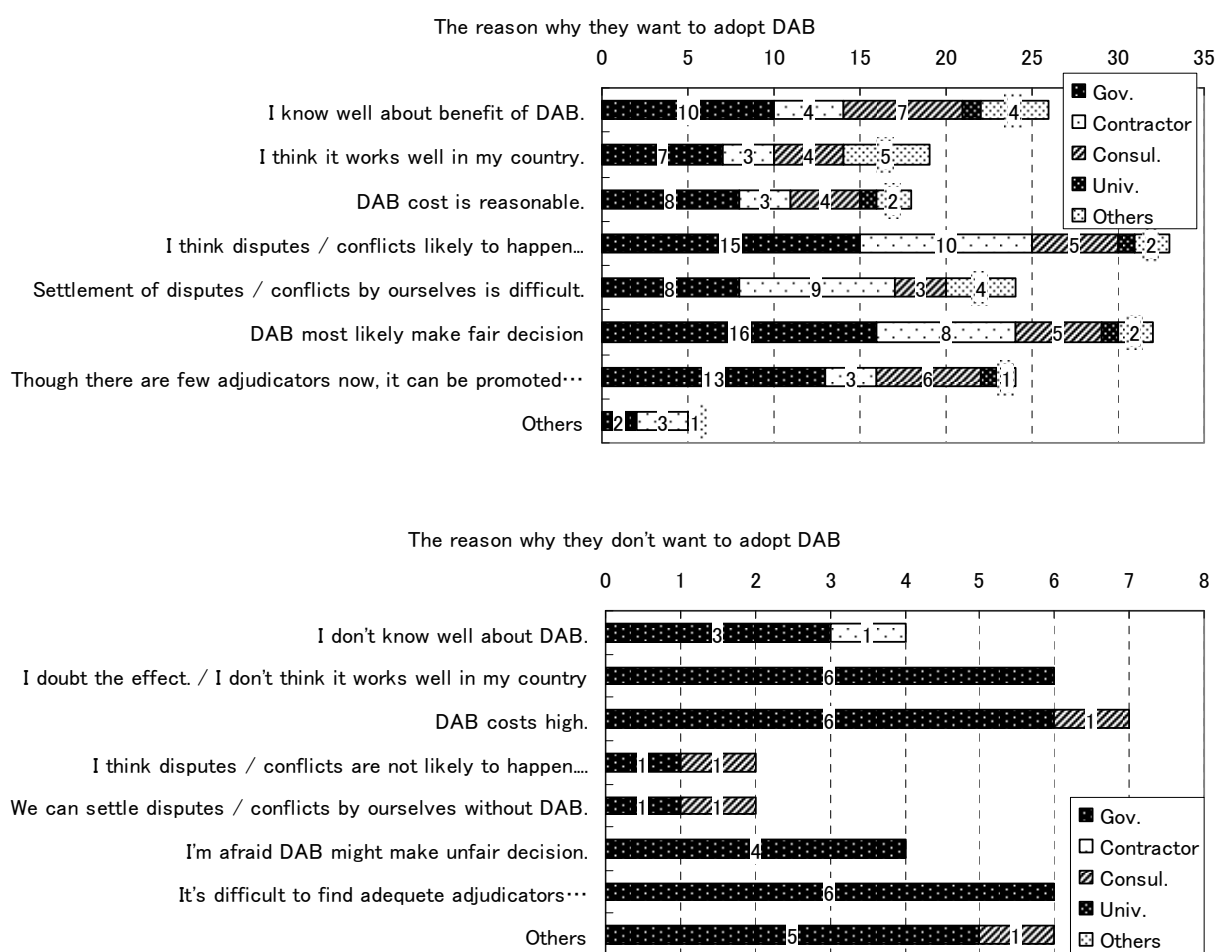
\*The graph of the university is omitted because there is only 1 answer (which chose “Yes”).

**Figure 2.23 Willingness to Adopt DB**

As for the reason why they want to adopt DB (multiple answers allowed), the largest number chose “I think disputes / conflicts likely happen in the project.”, followed by “DB most likely make fair decision.”, and “I know well about benefit of DB.” There are 2 free answers (both from contractor) pointing out the fairness of DB like “The Engineer does not stand in fair position.” Furthermore, as the biggest reason (chose 1 reason), most of them chose “DB most likely make fair decision.” (14 nos. which is 24 % of those who answered “Yes”) and “I think disputes / conflicts likely happen in the project.” (12 nos.; 20 %), these two elements are considered to be large

motivation to adopt DB.

As for the reason not to want to adopt DB, on the other hand, the largest number chose “DB costs high.”, followed by “I doubt the effect.” and “It’s difficult to find adequate adjudicators. / There are few certified adjudicators.” Other free answer include “Politician can deny DB’s decision.”, “Contractor may give bribes to DB members and get favorable decision.”, “Depending on the contract. I would prefer.”, “All the contracts are finalized (without DB).”, “The project scale is small.”, etc. In Sri Lanka, although there are a number of local adjudicators, it seems both their quality and their number is not enough.



**Figure 2.24 The Reason Why They Want / Don't Want to Adopt DB**

As for the fee they are willing to pay for DB, many respondents answered less than US\$ 2,000 for Retainer fee and US\$ 1,000 for Daily fee, which are rather lower than international standard. Average of the answers is; US\$ 2,168 for Retainer fee and US\$ 491 for Daily fee.

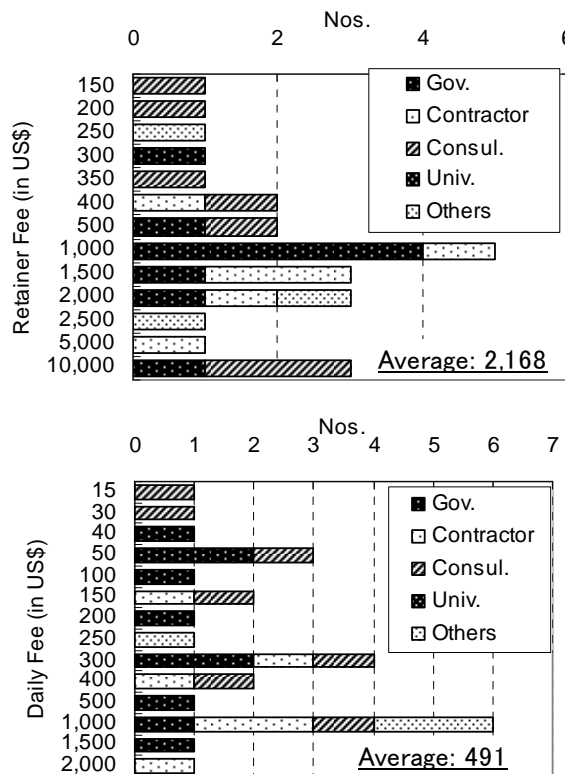
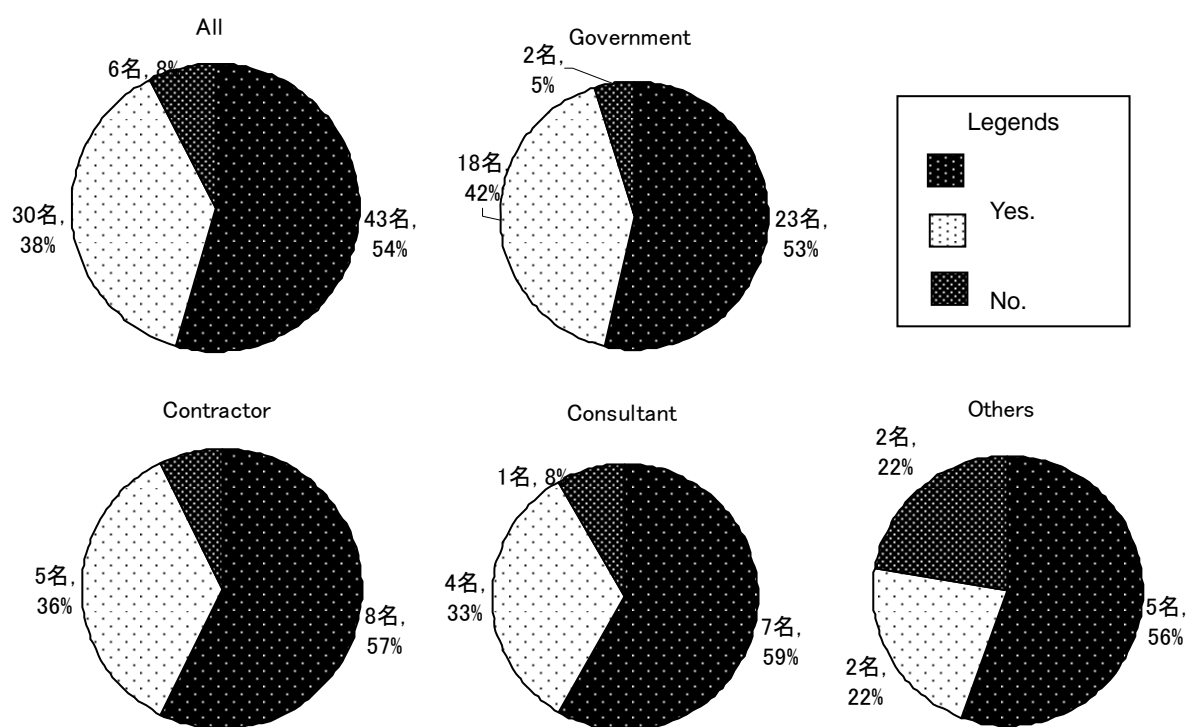


Figure 2.25 Payment to DB

#### 4) The Experience of Making / Dealing with Claims

As for the experience of making / dealing with claims, around 60 % of total 73 answers excluding 6 who did not answer selected “Yes, I have.” There are slight differences among the types of their position (government, contractor, consultant, etc.) and it seems they all have comparable experience of making / dealing with claims in almost same extent. There are comments by “others (donor)” that they did not directly handle claims (claims were occurred in their financed project).



**Figure 2.26 Experience of Making / Dealing with Claims**

As for the types of the claims, “Variation” and “Unforeseeable physical condition” are mainly selected. Other free answers include “Suspension of work”. For the settlement method, many respondents chose “Negotiation”, however, almost half of those who answered they had the experience of claims chose “Engineer’s Decision”. There are comparatively many answers of “DB” or “arbitration” as well and some commented that “although DB decision was made, the Employer is not satisfied with it.”

As for the difficulties they feel in making / dealing with claims, many respondents pointed out “insufficient documents or records”. Other answers include unclear contract document, different contract understanding, technical issues, negotiation, time, the Employer (or the Contractor) does not obey DB’s decision, etc.

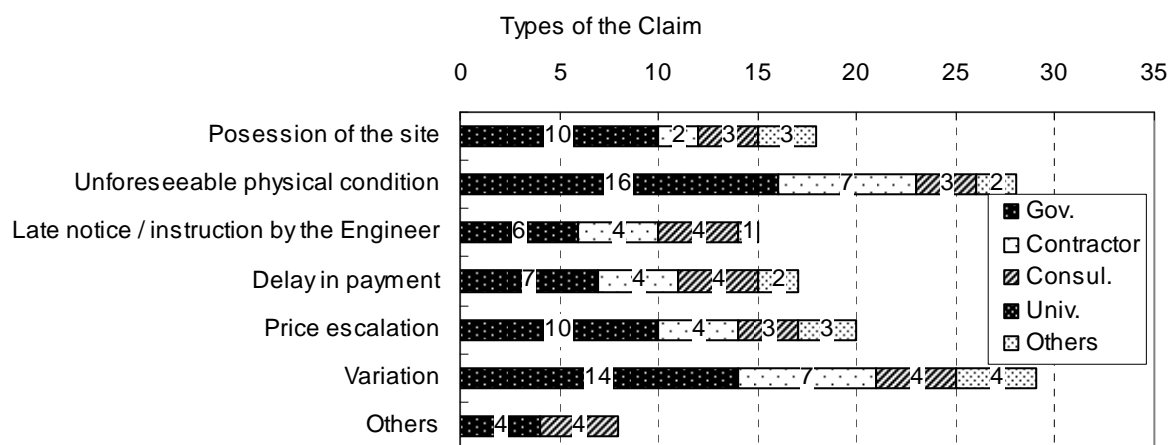


Figure 2.27 Types of the Claim

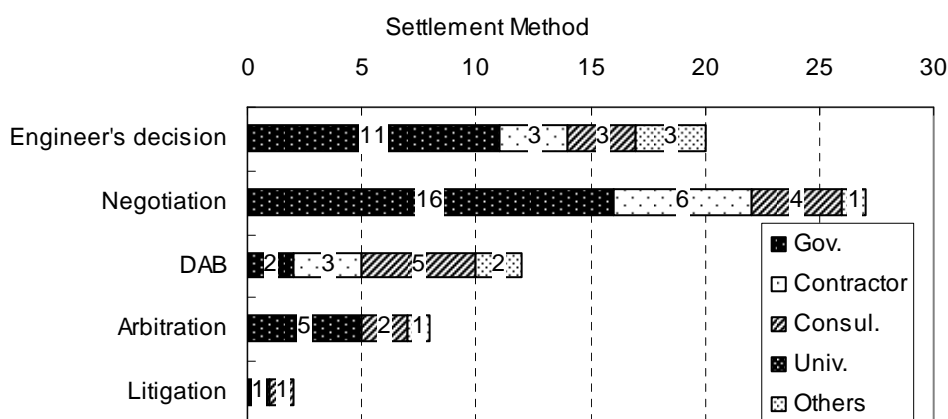


Figure 2.28 Settlement Method

5) Others / Free Comments

In relation to the support they want JICA to provide in order to disseminate DB, many respondents requested the opportunity of training such as seminar and workshop. This “training opportunity” includes both promotion seminar for the stakeholders such as employers and contractors to promote their understanding and awareness of DB and training seminar to grow up DB adjudicators. In Sri Lanka, DB is considerably widely used, however, it is considered that lack of understanding of DB leads to failing to obey DB decision, or some local adjudicators do not have adequate experiences and DB ability. For the contents of the seminar, some comments say they want to know more practical experience and actual case.

Other comments are; financial support (funding DB cost, developing the environment to enable them to use DB for less cost, etc.), to include DB clauses in bidding documents, contract documents, guidelines, etc. of JICA, etc. There is a comment suggesting to set up the center to grow up adjudicators and promote DB under ICTAD.

Summary of the result is shown in Appendix -2.6.4.

## Chapter 3 Seminar in Japan

### 3.1 DAB Process Promotion Seminar

The DAB Process Promotion Seminar was held on 18 February 2010 in Tokyo for the following purposes.

- 1) Explanation of outline of DAB/DB
- 2) Reporting result of field survey
- 3) Briefing of fostering plan of adjudicators
- 4) Questionnaire survey

The participants are mainly from contractors and consultants in Japan and its breakdown by organization is as follows:

**Table 3.1 Participants to the DAB Seminar**

Organization	Nos. of Participants
Contractor	31
Consultants	25
Law firm	1
Associations of Construction industries	8
JICA	5
Others	3
Total	73

Appendix-3.1 shows seminar program and Appendix- 3.2 contains seminar materials used in the seminar.

“Question and Answer” session was very active and recorded in Appendix-3.3.

### 3.2 Questionnaire Survey

#### 3.2.1 General

The questionnaire sheets shown in Appendix-3.4 were distributed to the seminar participants for investigation of the following subjects:

- 1) Opinions on introduction of DB
- 2) Opinion on fostering of adjudicators

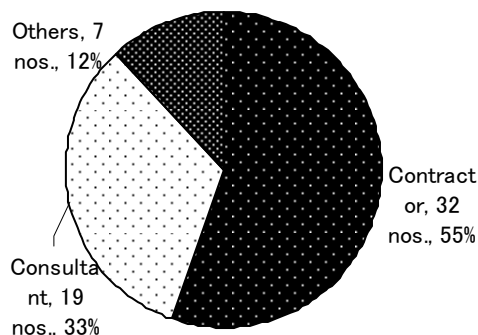
The answers were obtained from 58 participants corresponding to 80% of the total participants.



### 3.2.2 Result of the Questionnaire Survey in Tokyo

#### 1) Types of the Respondents

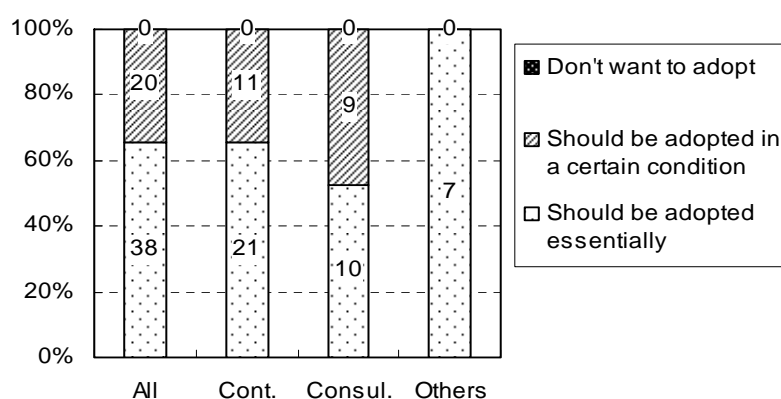
58 respondents answered the questionnaire, which include 32 contractors, 10 consultants, and 7 “others”. “Others” includes charitable organization, business association, lawyer, etc.



**Figure 3.1** Types of the Respondents

#### 2) Attitude to the adoption of DB

About the adoption of DB to the projects financed by JICA, 38 nos. which is 2/3 of all the respondents answered “It should be essentially adopted.” Other 20 respondents (1/3) answered “It should be adopted in a certain condition.” and nobody answered “I don’t want to adopt DB.” It seems they have positive opinion about the adoption of DB. Especially, all the “others” respondents answered “It should be essentially adopted.”



**Figure 3.2** Adoption of DB

As for the reason why DB should be adopted, there are a number of comments that it can solve or prevent disputes effectively, which accordingly enable them to conduct the project with lower

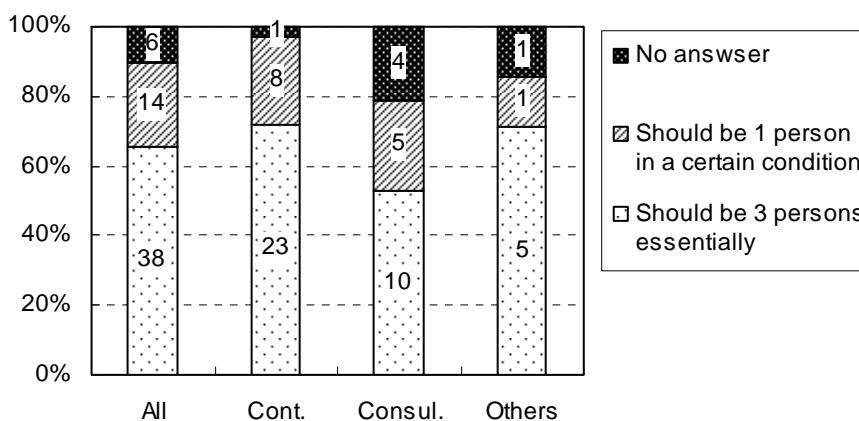
cost, etc. Other comments include it can ensure fairness during conducting the contract or project, it can cut down the time and cost to make and deal with claims, it can reduce the Engineer’s burden, etc. Many contractors mentioned the fairness, which means that they may feel current operation of contract unfair.

As for the “certain condition” in which they think DB should be adopted, many of them mentioned the size or the contract value of the project, characteristics of the work, the Employer’s assuring to bear the cost, and the parties’ consensus.

### 3) Numbers of the DB Member

As for the numbers of the DB member, around two-third (2/3) of the respondents answered that DB should be essentially three persons. Most of them stated the reason is to secure impartiality / fairness. Other reasons include it can reflect the opinion of both the Employer and the Contractor (when each party choose one member and the third member is chosen by those two members), it can make the parties easier to accept the decision, DB needs both lawyer and engineer, etc.

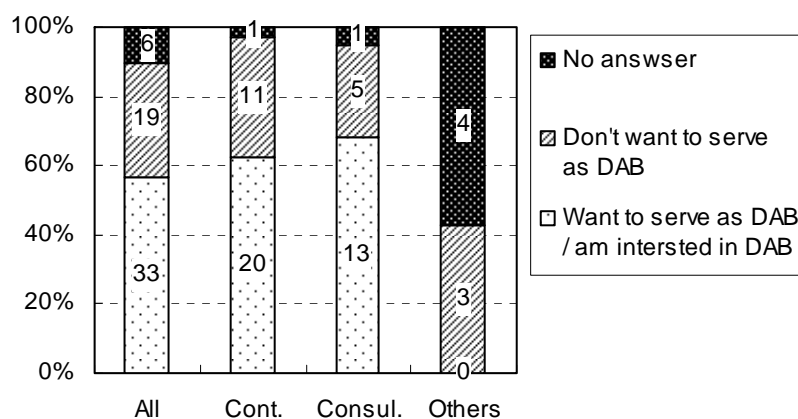
As for the “certain condition” in which DB should be one person, many respondents mentioned the size or the contract value of the project, and characteristics of the work.



**Figure 3.3 Numbers of the DB Member**

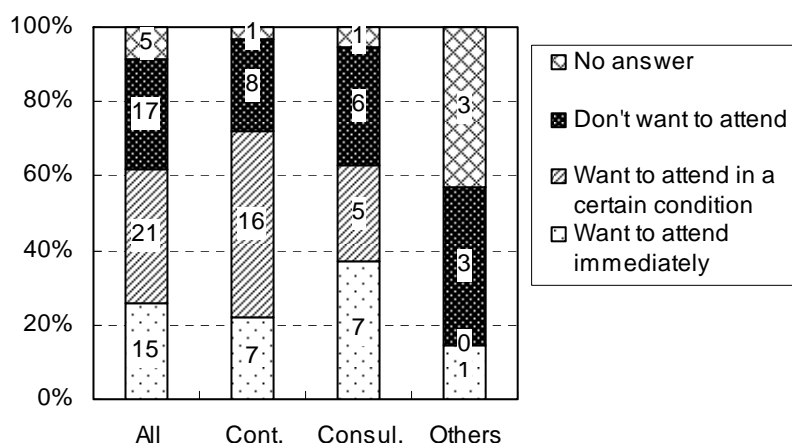
### 4) Interest in Serving as an Adjudicator

33 numbers which is around 60 % of all the respondents answered they want to serve as DB or they are interested in it. Especially, nearly 70 % of the consultants and more than 60 % of the contractors answered they want to serve / interested in serving as DB.



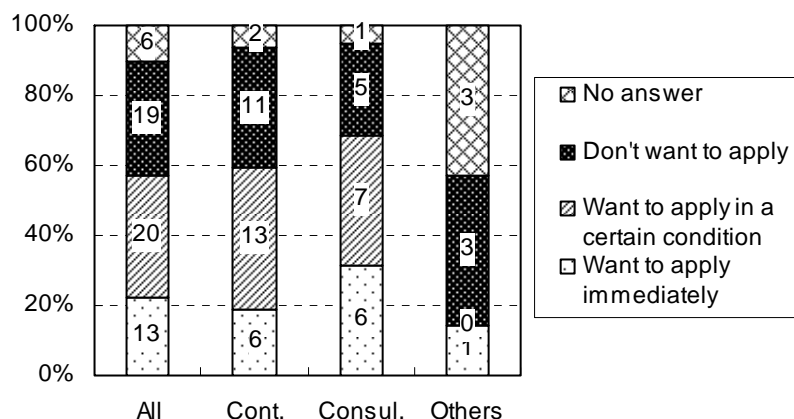
**Figure 3.4 Interest in Serving as an Adjudicator**

As for the DB Training Course, more than 60 % of the respondents answered they want to attend it either immediately or in a certain condition. More consultants answered they want to attend immediately, and more contractor answered they want to attend in a certain condition. As for the “certain condition” they want to attend the Course, many of them pointed out the cost and the time. There are comments that they want to attend the Course not to become an adjudicator but the knowledge about DB will be useful for their current work as the contractor or the consultant (engineer).



**Figure 3.5 Interest in DB Training Course**

As for the Adjudicator’s Assessment Workshop, nearly 60 % of the respondents answered they want to apply either immediately or in a certain condition. As the “certain condition” they want to apply for the Workshop, less people pointed out the cost compared with the Training Course.



**Figure 3.6 Interest in Adjudicator's Assessment Workshop**

### 5) Others / Free Comments

As the challenges regarding adoption of DB, there are many comments relating “cost”. It is divided into two aspects; one is how to bear the cost, e.g. indicate cost-benefit of DB, define the source of the cost, JICA’s financing the DB cost, etc., the other is to lower the adjudicator’s fee itself. The latter one will be greatly relating with growing up local adjudicators. Other challenges commented are; to secure binding force of DB’s decision, understanding and consensus about DB by the Employer (parties). There are comments which question the selection of the DB members, fairness of the DB’s decision, etc. While some comment that DB will ease the Engineer’s burden, others comment that it’s a pity that DB is introduced because the Engineer has been losing its trust, or DB and the Engineer will be conflicting, which means they are not fully understand DB.

As for the contents of the seminar, there are some comments asking for more detailed explanation and practical experiences. Many of them have positive opinions about the seminar or the adoption of DB.

For the seminars and workshops either DB promotion seminar like this time or DB training and assessment workshops which will be held in the future, not only those who want to become adjudicators but also those who consider the knowledge necessary for their current work as the contractor or the consultant are considered to attend. Even they do not have the intent to serve as an adjudicator immediately, it is possible they become professional adjudicators in the future. Therefore more seminars should be held for wider range of people in addition to the seminars / workshops aiming to train adjudicators immediately, which increases the contract parties’ ability to manage the contract and the project in the short run, and increases the numbers of potential adjudicators in the long run.

## 4 Training Kit for Promotion of Adjudicators

### 4.1 Purpose of Making Training Kit

The training kit is to be used for the DB training workshop in which the trainees learn the knowledge and practice necessary to become a DB member. The Study Team revealed there has been no such training kit even in FIDIC headquarter and the kit (which is attached to this report) had to be entirely made up from scratch by the Study Team. The trainees must satisfy the requirements for applying the Adjudicators Assessment Workshop except the term “(7) completing DB training workshop” provided in Section 2, Attachment – 1 of the Appendix – 5.1.

The kit includes “Trainer’s Version” in addition to trainee’s version. In Trainer’s Version, notes for the trainer are given as necessary in every key topic. In addition, a hypothetical scenario is attached as a reference in making case study.

### 4.2 Structure of the Training Kit – How to use it?

#### 4.2.1 Structure of the Training Kit

The training kit is entitled “JICA DB Training Kit” which consists of a sample programme of the Workshop, text, Power Point slides for presentation and other relevant attachments. Brief description of each content is shown below:

- Acknowledgement: Acknowledgments to the bodies, institutions and individuals who gave permission to the Study Team to reproduce and include some part of their publications.
  - Preface: Preface by JICA
  - A Sample Programme: A sample programme for a training workshop is shown.
  - Text (for trainee): The main text.
  - Attachments: Copy of Power Point slides for presentation  
a sample Site visit report and DB Decision  
Dispute Adjudication Agreements, FIDIC 1999 Red Book  
Extracts from FIDIC Contracts and MDB Harmonised Edition  
ICC Dispute Board Rules  
Other relevant articles
  - Text (for trainer): The main text (with trainer’s notes and sample hypothetical scenario).
-

#### 4.2.2 How to use the Kit?

The Kit is designed to suit a five-day workshop shown in Table 4-1. From their own experience and knowledge, the trainers are required to develop hypothetical scenarios for case study to suit the programme. A typical format of a workshop is shown below:

- **Trainers:** 3 trainers, who are registered in the FIDIC President's List of Approved Adjudicators, will be appropriate
- **Trainees:** Max about 24 (3 trainees/DB x 8 DBs), who satisfy the requirements necessary for applying to the Assessment Workshop (see Attachment – 5.1, Appendix – 1)
- **Workshop:** Lectures cover all subjects included in the text of the Training Kit, Q & A and discussions to acquire knowledge and practice necessary to become a DB member. The trainees develop hypothetical case scenarios for trainees' role-plays. This case study shall be done through the groups, each of them consisted by several trainees.
- **Assignments:** Assignments will be given as evening homework. Some of the assignments shall be submitted by the beginning of the following morning session. Drafting an attractive CV as an experienced and competent DB adjudicator is a good practice. The trainers will review and return them during the workshop. Preparation for mock hearings will be made in a group (a DB). Each trainee is required to write his "Decision" as if he/she is the Chair.
- **Completion Certificate:** Successful trainees will receive a Completion Certificate by the implementing body of the workshop.

**Table 4-1 A Sample Programme for A Five-Day Training Workshop**

		Program	Purpose	Form or Method
Day 1	AM	Introduction of Trainers/Trainees Introduction to Dispute Board <ul style="list-style-type: none"> <li>• What is FIDIC?</li> <li>• What is a Dispute Board?</li> <li>• Arbitration Rules</li> </ul>	Review of history / Structure / Current status of FIDIC Review of history/Concept of DB Arbitration as the final resort of dispute resolution and its costs	Lecture with PPT, Q&A and interactive discussion
	PM	Setting up a DB <ul style="list-style-type: none"> <li>• Procedure</li> <li>• DB Member's Qualifications</li> <li>• Adjudicator's Lists</li> </ul> DB Costs	Contractual procedure of setting up a DB, Professional requirements of DB members, application of existing adjudicators lists Right understanding of Cost components of DB	Lecture with PPT, Q&A and interactive discussion
	Evening Home- Work	Prepare a draft CV	A chance for a participant to draft a good CV for promoting him/herself a competent DB adjudicator	Trainers should review the drafts and return them to participants with comments during the Workshop
Day 2	AM	Operation of Dispute Board (1) <ul style="list-style-type: none"> <li>• Site visits</li> <li>• DB meeting</li> <li>• Site tour</li> <li>• Informal discussion of potential disputes</li> </ul>	Understand and acquire the knowledge and practice of DB function, point out and consider the things to remember at each stage of DB operation	Lecture with PPT, Q&A and interactive discussion
	PM	Operation of Dispute Board (2) <ul style="list-style-type: none"> <li>• Site visit report</li> <li>• Supplying information to DB Members during intervals of Site visits (monthly reports, updated work schedule, claim notice, other important letters, etc.)</li> </ul>	Understand and acquire the knowledge and practice of DB function, point out and consider the things to remember at each stage of DB operation	Lecture with PPT, Q&A and interactive discussion
	Evening Home- Work	Preparation for Mock Hearing	Understanding a hypothetical scenario and each party' s case (participants are provided each party' s position paper).	Group work by the participants divided into groups with three members (a DB)

		Program	Purpose	Form or Method
Day 3	AM	Operation of Dispute Board (3) <ul style="list-style-type: none"> <li>• Referral &amp; Time Limit</li> <li>• Written Submissions</li> <li>• Hearing(s)</li> <li>• Transcripts</li> </ul>	Proper understanding and acquiring knowledge and practice of procedure of referral / hearings / documentation/ transcript	Lecture with PPT, Q&A and interactive discussion
	PM	Operation of Dispute Board (4) Mock hearings for workshop participants	Understanding and acquiring knowledge and practice: Rules of hearing, role of each participant, proper reaction at a difficult situation	3 participants make 1 group; 3 groups play roles of: Group 1: DB, Group 2: Employer, Group 3: Contractor Continued on by the other 3 groups.
	Evening Home-Work	Possible extension of Mock hearings	ditto	ditto
Day 4	AM	Operation of Dispute Board (5) <ul style="list-style-type: none"> <li>• DB Decision Purpose</li> <li>• DB Decision Structure</li> <li>• DB Dissents</li> </ul>	Learning writing a decision in a proper structure satisfying requirements, what to be done if unanimous decision is not possible?	Lecture with PPT, Q&A and interactive discussion
	PM	After the Decision <ul style="list-style-type: none"> <li>• “Amicable Settlement” period</li> <li>• Enforceability of DB decision</li> </ul>	After a decision is given, what should be done if either or both parties are not satisfied? Duty to make efforts for amicable settlement  Understanding and acquiring knowledge about enforceability of a DB decision and remedies when the decision is not complied with	Lecture with PPT, Q&A and interactive discussion
	Evening Home-Work	Preparation for drafting of mock decision	Practice of writing a DB decision	Individual participant writes a decision as if he/she is Chair or one-person DB
Day 5	AM	Review and discussions of draft “Decisions”	Interactive review of draft decision of each participant	Discussion by all participants
	PM	Review and discussions of draft “Decisions”  Close	Assessment of draft decision of each participant  Presentation of Completion Certificates	Lecture, Q&A and interactive discussion



## Chapter 5 Guideline for Implementation of Qualification Procedure of DB Adjudicators (Draft)

### 5.1 Purpose of Making the Guideline

It is considered to be essential to increase the number of adjudicators who have their nationalities in the Asian countries to disseminate DB into the projects funded by Japanese ODA loan in Asian region. Thus it is preferable that FIDIC Member Associations (MAs) or other organizations such as universities in Asian region accredit the adjudicators, and develop and maintain the National Lists of Approved DB Adjudicators (NLs) , which will be used for appointment when the projects require DB members. In this report, those organizations shall be called “accrediting organization” hereafter.

Attached “Guideline for Implementation of Qualification Procedures of DB Adjudicators (draft version)” which is shown in Appendix 5-1 is developed for the “accrediting organization” to conduct assessment of DB adjudicators and list those who passed on NLs, showing the detailed procedures of the qualification.

The following subjects have been studied to develop the Guideline for Implementation of Qualification Procedures of DB Adjudicators (draft):

### 5.2 Operation of the Qualification Procedure and the Organizations to Maintain NLs

According to the survey and hearing conducted by the Study Team at the DAB seminars at six Japanese ODA loan recipient countries and at the meetings with the executing agencies of those recipient countries and hearing from APA (Assessment Panel of Adjudicators) members of the FIDIC President’s List of Approved Adjudicators, the Study Team has come to a conclusion that it would be appropriate that adjudicators are accredited as a listee of National Lists.

The reasons for this conclusion are as follows;

- FIDIC Head Office has its President’s List of Approved Adjudicators with currently around 50 listees, however they do not have the intension to increase the listees drastically so as to cover the projects all over the world.
- Instead, FIDIC Head Office encourages its Member Associations (MAs) to establish their own National Lists (NLs) of adjudicators, and provides the guidelines with admission criteria and procedures for reference.
- According to this policy of FIDIC, Some MAs in Europe have already established their NLs and started preparation for the training or the assessment.
- However, no Asian MAs have started even preparation of NLs.

In the meantime, not all of the MAs may agree with NLs, nor have they the abilities to establish them. Instead, if certain organizations such as universities in Asian region can conduct the assessment of the adjudicators and maintain NLs (or, say, Asian List), such organizations may play the role of MAs. Besides, it is acceptable that more than one qualification organization exist in one country (for example, in UK both ICE (Institution of Civil Engineers) and ACE (Association for Consultancy and Engineering) conduct their own assessment and maintain the lists).

### 5.3 Assessment Panel for Adjudicators

To conduct the assessment appropriately, Assessment Panel for Adjudicators must be established inside the accrediting organizations.

However, in the Asian countries where adjudicators are yet to be grown up, there are not enough human resources with adequate abilities and experiences to assess the candidates. Therefore the member(s) of NL's APA (Assessment Panel of Adjudicators) should be dispatched from FIDIC APA or President's List of Adjudicators for the time being. When the adjudicators are grown up in Asian region and NLs are developed in the future, those adjudicators can become the members of NL's APA.

### 5.4 Requirements to Apply for Assessment

The requirements to apply for the assessment to become adjudicators are shown in Attachment – 1, “Sample Application Requirements for Assessment of an Approved Adjudicator” of Appendix – 5.1, “Guideline for Implementation of Qualification Procedure of DB Adjudicators (Draft)”.

FIDIC gives sample requirements for assessments for listing on the NL based on the requirements which Association for Consultancy and Engineering (ACE) in United Kingdom has developed. Study Team has review them and eliminated some terms which are not considered to be necessary and made some amendments taking into account the characteristics of Asian countries:

	Requirements	Amendments
1	Adequate professional indemnity insurance	Because indemnity liability is not required in the DB agreement, this condition is eliminated.
2	detailed knowledge of FIDIC consultant-client agreements and FIDIC works contracts	Because it is not considered to be necessary, this condition is eliminated.

3	Duty to provide the evidence of commitment to the continuing education programme	Because it may be hard in some countries to take the continuing education programme, this condition is eliminated. This matter should be considered individually.
4	Language capabilities of the country	Because it is aimed for international projects, this condition is replaced with requirement for English language ability.(*)
5	Academic and/or professional qualifications	Because the names and the system of such qualifications shall vary from country to country, specific criteria are not given. This matter should be considered individually. (**)

Basically, those who satisfy the requirements shall be; engineers who are working (or have worked) for consultants or contractors; government organizations implementing construction contracts; professional quantity surveyors; and lawyers specialized in construction contracting. The applicants shall send the application form with required documents, which shall be vet by APA (Assessment Panel for Adjudicators) and APA reports and recommends to the accrediting organizations those who are eligible to take assessment.

(\*) English language ability should not be necessarily scaled by the score of TOEFL or TOEIC, etc. Instead, it shall be assessed during the assessment workshop; writing ability through the writing tests, speaking and communication ability through the role play, discussion and interview.

(\*\*) Taking Japanese case as an example, those who have completed career collage, specialized vocational high schools, or junior collage may be considered to satisfy the requirements if they have adequate experiences of construction contract management and dispute resolution etc. In fact, QS (Quantity Surveyor) in UK is not university-educated but many of them have ample experiences. Therefore APA shall assess the ability through application form, assessment workshop and interview by a unanimous decision.

## 5.5 Training prior to Assessment

It is recommended that training be in two parts, both of which must be completed to apply for the assessment workshop.

The first training would focus on full understanding of the FIDIC MDB Harmonised Conditions for Construction (“MDB edition”). It is likely that some of those seeking to be listed will have accumulated experience with use of the 1999 Edition of the FIDIC Conditions for Construction. However there are many significant differences between the 1999 Edition and the MDB edition and

all who seek assessment and listing should take training on the Harmonised edition prior to the assessment. It is considered to be appropriate that the training programme follows “Module 1: Practical Use of FIDIC Contracts” and “Module 2: Management of Claims and the Resolution of Disputes” which contents are regulated by FIDIC. The training shall be 4-days course. The seminars of Module 1 and Module 2 are frequently provided by FIDIC registered seminar providers in Europe and Middle East. In Japan, JICA organized the seminars toward the implementing organizations of Japanese ODA loan projects and JICA national staff in February 2010. JICA plans to hold the same seminars in Indonesia, Vietnam and Japan in fiscal 2010.

The second part of the pre-assessment training would focus on the DB (Dispute Board). It is likely that many applicants for assessment will have had little, if any, experience with Dispute Boards. Therefore this part provides specific training on the proper use and operation of a Dispute Board. This training would use the training materials developed under the present Study. This training would be of five days period. Most of the attendees to this training are considered to be the applicants for the adjudicators assessment workshop hence it will be appropriate that this training is provided by the accrediting organization or other related organizations such as FIDIC or DRBF.

## 5.6 Assessment Workshop

Assessment workshop shall follow that of FIDIC President’s List of Approved Adjudicators, which is three days period (see appendix 5.1). The ability to interpret FIDIC MDB edition and familiarity to DB process will be tested through quiz with multiple choice answers regarding the knowledge of MDB Conditions and case studies on hypothetical cases. Case studies shall also be used to judge the ability to seize potential contract problems and communication ability with the parties and other DB members. In addition, abilities of “Decision” making (which includes the satisfaction to the requirements which “Decision” should be equipped with, ability to apply the contract and writing ability) as a DB chairperson or one-person DB shall be assessed through case studies as well. Communication skills in English shall be assessed by individual interview.

## 5.7 Listing on the NL of Approved Adjudicators

APA is a neutral and independent third party appointed by the accrediting organization. APA shall recommend those who are considered to be appropriate to be listed on NL to the accrediting organization, and accrediting organization finally decides the listees and list them on NL, based on that recommendation.

## 5.8 Frequency of the Assessment and Scale of the NL

According to the study conducted in the Japanese ODA Loan recipient countries, possible candidates who are likely to pass the assessment are not expected so many in each country. Therefore assessment shall be conducted for around 20 assessees from the host country and neighbouring countries in one series (the first two phases described in clause 3 of the Guideline for Implementation of Qualification Procedures). When the assesses from neighbouring countries pass the assessment, they will be listed on the NLs of their own countries, not the host country. (Frequency of the assessment workshop, expected numbers of approved adjudicators and possible supports from JICA are explained in Chapter 6, “Roadmap”).

## 5.9 Updating and Maintaining the NL

APA shall review the NLs periodically and recommend to update the lists to the accrediting organizations. Then the accrediting organizations shall decide the updating based on that recommendation. Such review would be at, say, three year intervals following FIDIC President’s List of Approved Adjudicators. APA shall judge eligibility of each listee based on his/her report regarding such matters as; further training relevant to work as a DB member; service on DBs and other experience on contracts using MDB edition; relevant publications, since listing or latest review. The first thing to be considered is the listee’s intention to serve as a DB member, or physical possibility to work. As for the other conditions, it may differ in the countries or areas, i.e. some listees might have had no chance to serve as a DB member because there have not been suitable projects. Therefore no specific requirements can be given but APA shall judge case by case.

## Chapter 6 The Roadmap for the Introduction and Dissemination of DB Adjudicators in the Asian Region

### 6.1 Objectives of the Roadmap and Countermeasures to be Done

Setting the objectives of the roadmap as 1) training of and increasing the number of the adjudicators in Asian region, and 2) introducing DB into Japanese ODA Loan projects in Asian region, the problems to be solved shall be summarized as below, based on the study done thus far.

**Table 6-1 Objectives of the Roadmap and Problems to be Solved**

Objective	Problem
Training of and increasing the number of the adjudicators in Asian region	<ol style="list-style-type: none"> <li>1) Currently there are not enough human resources with adequate abilities to become DB adjudicators</li> <li>2) There are little chances of training DB adjudicators</li> <li>3) The National List of approved DB adjudicators (NL) has not yet developed.</li> </ol>
Introducing DB into Japanese ODA Loan projects in Asian region	<ol style="list-style-type: none"> <li>1) All the stakeholders such as project executing organizations, contractors and consultants are lacking the understanding of DB.</li> <li>2) Especially, many of project executing organizations are concerned about DB costs hence the benefit for the Employer has to be proved.</li> <li>3) The disbursement flow of the DB costs in ODA loan has not been established.</li> </ol>

The countermeasures to be done in order to solve the above problems shall be summarized in six terms as shown below.

**Table 6-2 Objectives of the Roadmap and Countermeasures to be Done**

Objective	Countermeasure
Training of and increasing the number of the adjudicators in Asian region	<ol style="list-style-type: none"> <li>1) Study on the current status of training and assessment of adjudicators by FIDIC Member Associations</li> <li>2) Holding the adjudicators training workshops in Asian region</li> <li>3) Holding the adjudicators assessment workshops and accreditation (which includes establishing the structure of assessment and accreditation) in Asian region.</li> </ol>
Introducing DB into Japanese ODA Loan projects in Asian region	<ol style="list-style-type: none"> <li>1) Study on the current status of dissemination of DB by MDBs</li> <li>2) Implementing pilot projects supported by JICA</li> <li>3) Continuous holding of the seminars to promote DB</li> </ol>

The above countermeasures should be done at an early date, which will be surely encouraged by

the commitment and support from JICA.

As the method for JICA to support them, two methods which are 1) JICA commissions the study, and 2) JICA initiates the implementation, shall be suggested. Detailed items to be done can be sorted in those two methods as shown below.

**Table 6-3 Countermeasures on the Roadmap and the Supporting Methods by JICA**

Supporting method	Countermeasure
Commissioned study from JICA	<ol style="list-style-type: none"> <li>1) Study on the current status of dissemination of DB by MDBs</li> <li>2) Study on the current status of training and assessment of adjudicators by FIDIC Member Associations in Asian region</li> <li>3) Study on the current status of training and qualification systems of adjudicators by FIDIC Member Associations in Europe</li> <li>4) Validity verification of JICA DB Training Kit (which is done simultaneously with the adjudicators training workshop and assessment workshop)</li> <li>5) Continuous holding of the seminars to promote DB</li> </ol>
Implementation initiated by JICA	<ol style="list-style-type: none"> <li>1) Implementing pilot projects supported by JICA</li> </ol>

Brief overview of each item in table 6-3 is suggested in the following sections.

## 6.2 Study on the Current Status of Dissemination of DB by MDBs

FIDIC Red book MDB Edition was published in 2005 and has been used widely as the standard bidding documents of 9 Multilateral Development Banks (MDBs) such as World Bank, Asian Development Bank. Already 5 years have passed since MDB Edition was first introduced, therefore it is considered that DBs have been adopted in many projects financed by those MDBs. The study is to be conducted to investigate the situation and the effect of adopting DB in those projects. The study is to be conducted in the following manner:

- 1) Objective organizations: World Bank, Asian Development Bank, European Bank for Reconstruction and Development
- 2) Items to be studied:
  - Policies regarding adoption of DB
  - Actual situation of adopting DB in construction projects
  - The effects by adopting DB
  - Problems and challenges in regard to adopting DB
  - Disbursement method of the DB costs
  - Activities to train adjudicators

- Resources of appointed DB members

### 6.3 Study on the Current Status of Training and Assessment of Adjudicators by FIDIC Member Associations

As described in the section 5.2, FIDIC considers it realistic and therefore recommendable for training adjudicators and improving the number of them that its Member Associations (MAs) make and maintain their own National Lists of Approved Adjudicators. Section 5.2 also suggests that in case MA can hardly play the role as an accrediting organization in the country, it is considered to be possible that other organizations such as universities cover such a role instead of MA.

To disseminate DB in developing countries in Asian region, it is considered to be necessary to reduce DB costs, therefore it is essential to train the adjudicators and increase the number in Asian region. However, no National List of approved adjudicators (NL) has been, or is being established in any Asian countries. On the other hand, a number of MAs in Europe and other developed countries have already started preparation for the training and/or the assessment, even some established already their own NLs.

It is considered to be helpful for drawing up more detailed promotion plan of DB adjudicators to conduct the study on the current status of training and assessment by FIDIC MAs both in Asian region and in Europe and other developed countries.

#### 6.3.1 Study on the Current Status of Training and Assessment of Adjudicators by FIDIC Member Associations in Asian region

FIDIC ASPAC (Asia-Pacific Member Associations) which is the association of the FIDIC MAs in Asian and Pacific regions has a membership of 20 countries as shown below.

**Table 6-4 Summary of ASPAC Member Associations**

	Country	Name of the MA	Short name	Nos. of affiliate companies	Nos. of members or affiliates
1	Australia	Association of Consulting Engineers Australia	ACEA	238	16,000
2	Bangladesh	Bangladesh Association of Consulting Engineers	BACE	26	680
3	China	China National Association of Engineering, Consultants	CNAEC	305	18,566
4	China, Hong Kong	Association of Consulting Engineers of Hong Kong	ACEHK	-	4,024
5	China, Taipei	Chinese Association of Engineering Consultants, Taipei, China	CAEC	34	2,353
6	India	Consulting Engineers Association of India	CEAI	-	26,746
7	Indonesia	National Association of Indonesian, Engineering Consultants	INKINDO-TEKNIK	273	922
8	Iran	Iranian Society of Consulting Engineers	IRSCE	-	1,856
9	Japan	Association of Japanese Consulting Engineers	AJCE	99	5,250
10	Korea	Korea Engineering and Consulting Association	KENCA	-	3,448



11	Malaysia	Association of Consulting Engineers Malaysia	ACEM	-	580
12	Nepal	Society of Consulting Architectural and Engineering Firms	SCAEF	-	43
13	New Zealand	Association of Consulting Engineers New Zealand (Inc.)	ACENZ	168	9,000
14	Pakistan	Association of Consulting Engineers Pakistan	ACEP	88	2,646
15	Philippines	Council of Engineering Consultants of the Philippines	CECOPHIL	25	1,498
16	Singapore	Association of Consulting Engineers Singapore	ACES	-	1,840
17	Sri Lanka	Association of Consulting Engineers, Sri Lanka	ACESL	-	1,185
18	Thailand	Consulting Engineers Association of Thailand	Out of FIDIC 2008	-	-
19	Vietnam	Vietnam Engineering Consultant Association	VECAS	98	3,267
20	Uzbekistan	Uzbek Association of Consulting Engineers	UZACE	-	-

Among these countries excluding the countries in Oceania, Japan, Philippines, Sri Lanka, India, Hong Kong, and Singapore are considered to have the potential to supply DB adjudicators. Although Hong Kong and Singapore are not Japanese ODA Loan recipient countries, they are often appointed as the Seat of international arbitration and there will be a lot of possible candidates of DB adjudicator. In India and Sri Lanka, they have already started to adopt DB into domestic projects, hence there will be a lot of candidates. In Philippines, CECOPHIL (Council of Engineering Consultants of the Philippines), together with DRBF, is conducting seminars and trainings and is willing to develop the lists. There will be a number of candidates as well.

The study is to be conducted to investigate the current status of the activities regarding developing and maintaining NLs in the following manner:

- 1) Objective countries: Japan, Philippines, Sri Lanka, India, Hong Kong, Singapore
- 2) Items to be studied:
  - Activities relating to training of adjudicators
  - Current status and future prosperity of adjudicators assessment
  - Challenges in training and assessment of adjudicators
  - Necessity and efficiency of JICA's support

### 6.3.2 Study on the Current Status of Training and Assessment of Adjudicators by FIDIC Member Associations in Europe

The study is to be conducted to investigate the activities of other developed countries which have launched training and assessment of adjudicators, and apply them to the adjudicators promotion plan in Asian region. The study is to be conducted in the following manner:

- 1) Objective countries : Germany, Poland
- 2) Items to be studied :
  - Activities relating to training of adjudicators

- Adjudicators assessment method
- Management method of the National List
- Activities of listed adjudicators

Study Team has acquired the information that *Verband Beratender Ingenieure* (the German Federation of Consulting Engineers) which is the FIDIC Member Association in Germany has recently established the accreditation procedure for its National List and planning to organize the seminar and the training course.

In Poland, SIDR which is the FIDIC MA in Poland has already established its National List (NL) with currently 28 approved adjudicators. The list is available online from FIDIC website.

#### 6.4 Validity Verification of JICA DB Training Kit

JICA DB Training Kit and Guideline for Implementation of Qualification Procedure of DB Adjudicators (Draft) which have been developed in this study are the tools to promote adjudicators. To verify the validity of these tools through practical use of them is the necessary step to disseminate the use of these tools.

Validity of JICA DB Training kit can be verified by monitoring the progress of the trainees of the training workshop which will be held in the following manner:

- 1) Venue: Japan
- 2) Period: 5 days
- 3) Number of the trainees: around 10 trainees
- 4) Recruitment method: nomination from construction related associations
- 5) Requirements for attendance: Those who satisfy the Application Requirements for Assessment of an Approved Adjudicator (Attachment 5-1)
- 6) Trainees: Three trainees, at least one of them should be selected from FIDIC President's List of Approved Adjudicators

The trainees have to take the assessment workshop following the training workshop and analyzing the result of the assessment will enable to estimate the validity of JICA DB Training Kit.

As for the recruitment method, nomination from construction related associations (such as AJCE and OCAJI) is suggested. According to the questionnaire survey conducted in the DB promotion seminar held in Tokyo in March 2010, more than 60 % of the attendees are willing to attend the training course, and it will not be difficult to recruit the trainees.

It is necessary for securing the sustainability of the process that FIDIC MA or other organizations such as universities conduct the assessment autonomously, however, during this verification period it is recommended that JICA gives financial support to get the process off the ground. Through the assessment workshop, the validity of the Guideline for Implementation of Qualification Procedure of DB Adjudicators (Draft) which has been developed in this Study can be verified as well.

Furthermore, it is considered to be meaningful to hold the training and assessment workshop as an advanced approach in Asian region first in Japan, which shows Japan will lead this field and feed back the lessons obtained through this process toward Asian region.

If the assessment shall be held once a year, assuming five successful candidates become listed each time, there will be around 25 DB listees in five years. If these activities are implemented in some other countries in Asian region, there will be more than 50 qualified adjudicators, which will greatly contribute to promoting DB in Japanese ODA Loan projects.

#### 6.5 Continuous Holding of the Seminars to Promote DB

JICA has conducted DAB promotion seminars in 7 Asian countries including Japan so far. Around 100 people attended on the average, which shows they have high interest in DB in every country.

**Table 6-5 Records of DB promotion seminars**

	Country	Date	Nos. of Participants
1	India	22nd August 2008	16
2	Philippines	28th August 2008	111
3	Cambodia	19th November 2009	77
4	Vietnam	23rd November 2009	157
5	Bangladesh	28th January 2010	53
6	Sri Lanka	1st February 2010	105
7	Japan	11th July 2008 (Kyoto) 18th July 2008 (Tokyo)	132
	Total		651

Because DB is newly developed method of dispute resolution, it is very effective and essential for disseminating DB to keep on promoting it toward all the relating industries such as contractors, consultants, and legal circles. In fact, there were many comments during the seminars to demand further seminars. Therefore it is suggested to hold DB seminars continuously in the following manner:

- 1) Proposed venue of the seminars : Indonesia, Vietnam (Ho Chi Minh City), Pakistan
- 2) Expected attendees of the seminars : Organizations relating to Japanese ODA loan,

Executing agencies of Japanese ODA loan projects (the Employer), Contractors, Consultants, Lawyers, MDBs

3) Contents of the seminar

- Basics of DB
- Practice of DB
- Introduction to adjudicators training and assessment (introducing the outcome of this study)

Seminar materials shall be developed reflecting the contents of the meetings with executing agencies and Qs & As in the past seminars (which are shown in the chapters 2.2, 2.3, and 3.1 in this report).

6.6 Implementing Pilot Projects Supported by JICA

6.6.1 Purposes of Pilot Projects

It is suggested that JICA leads implementing pilot projects for the purposes described below:

- 1) To prove that introducing DB into construction contract makes the project implementation smoother, which leads to the employer’s benefit consequently.
- 2) To ease the project implementing agency’s hesitation to adopt DB into their projects by JICA’s support covering the DB costs.

6.6.2 Preliminary Actions for Implementing Pilot Projects

Prior to implementing pilot projects, those items described below should be studied:

- 1) Confirmation of the needs for the pilot project  
In this study, many executing agencies of Japanese ODA loan projects expressed their demands for the pilot project. The needs and the effects should be confirmed again.
- 2) Study of the funding method  
Regarding the financial support, legal and institutional potential problems shall be studied. The process of appointing DB members, signing the agreement with DB members, and flow of funds shall be studied as well.  
As the process of appointing DB members and signing the agreement, those alternatives shown below are suggested at the moment:

	Process	Characteristics
Alternative - 1	JICA appoints DB members and sign the agreement	Simple and clear process; funding, appointing DB members, signing the agreement consistently by JICA.

		For the contracting parties, because they don't choose DB members by themselves, they might become less earnest or cooperative.
Alternative - 2	The contracting parties (the Employer and the Contractor) appoint DB members and sign the agreement	Compared with Alternative – 1 above, the contracting parties will be more earnest and cooperative because they choose DB members by themselves.
Alternative - 3	For both alternatives above, JICA funds the retainer fee for the scheduled contract period and the fees and the expenditure for the regular site visits scheduled once in four months. When the work is delayed or disputes happen and are referred to DB, additional costs for them are to be shared by the parties equally.	It makes it possible to estimate and fix the amount to be funded by JICA more accurately.  For the contracting parties, it makes them have incentives to prevent disputes occur and refer them,, if not prevented, to DB, and to complete the work within contract period.

A sample estimate of DB costs for a pilot project is shown in Appendix 6-1.

3) Study of the selecting method of the pilot projects

The criteria and process to select a pilot project shall be studied.

Temporarily, the following simplified criteria are suggested:

- (1) Size of the project: The contract value is more than JPY 10 billion.

In case the contract value is less than JPY 10 billion, DB costs will be more than 1 % of contract value, which will seem to be costly.

- (2) Phase of the project: The projects which conditions of contract are going to be prepared.

Because the Employer has to agree on the pilot project and the funding method and the selection method of DB members should be described in the contract, it is preferable that the conditions of contract are going to be prepared.

- (3) Characteristics of the work: The projects in which disputes are likely to happen due to e.g. geological conditions

This Study has revealed that many of the claims are caused by 1) delay in the Site Possession, 2) unforeseeable physical conditions, 3) price fluctuation, 4) delay in payments, 5) Variations. Selecting those projects in which disputes are likely to happen will be recommendable to have more chance to prove the DB's effects of dispute prevention and early resolution.

- (4) Time for Completion of the project: More than three years

The longer the time for completion of the project is, the more chances to prove the function of DB in each stage of the project there will be. Taking into account the contract value and the characteristics of the work described above, more than 3 years is considered to be appropriate.

4) Selection of the project

The projects satisfying above mentioned criteria are shortlisted and finally several pilot projects are to be selected from the list.

### 6.6.3 Implementing Pilot Projects

To implement pilot projects, the related parties (Employer, Contractor, Consultant, and JICA) should remember the points shown below:

- Competent adjudicators should be selected from FIDIC President's List or National Lists as DB members
- A Standing DB should be placed immediately after signing of the contract to make the best use of DB function to prevent disputes.
- Cost reduction of DB shall be considered during the progress of the project to the extent of keeping the DB effect sufficiently.
- In case the assessment workshop has been held and there are newly listed "approved adjudicators", "Mentoring" by experienced DB members to train those adjudicators is possible taking the opportunity of the pilot projects.
- Implementation of several pilot projects in different countries with different characteristics in parallel enables more reliable analysis of the effectiveness of DB.

### 6.7 Roadmap

Those activities, as JICA commissioned studies, are suggested to be implemented from fiscal 2010 according to the Roadmap below.

	Activities	2010										2011					
		4	5	6	7	8	9	10	11	12	1	2	3	4	5	6	
1	Study on the current status of dissemination by MDBs				■												
2	Study on the current status of training and assessment by FIDIC MAs in Asian region						■										
3	Study on the current status of training and assessment by FIDIC MAs in Europe								■								
4	Validity verification of JICA DB Training Kit																
	1) FIDIC contract training (Module 1 and 2)										■						
	2) DB training											■					
	3) Assessment												■				
5	Continuous holding of seminars to promote DB								■								

**Figure 6.1 The Roadmap for Implementing JICA Commissioned Studies**

The pilot projects are supposed to be implemented according to the schedule shown below.

	Activities	2010				2011				2012				2013			
		I	II	III	IV	I	II	III	IV	I	II	III	IV	I	II	III	IV
1	Preliminary actions		■														
2	Selecting pilot projects			■													
3	Introducing DB									■	■	■	■	■	■	■	■
4	Process of Japanese ODA Loan project																
	1) Preparing the bidding document																
	2) Bidding																
	3) Evaluation of the bid and signing the contract																
	4) Construction work																

**Figure 6.2 The Roadmap for Implementing Pilot Projects**

# APPENDICES





**Japan International Cooperation Agency (JICA)**

**DAB (Dispute Adjudication Board) Seminar  
Phnom Penh, Cambodia**

Date : November 19, 2009

Time : 14:00 – 17:15

Venue : Phnom Penh Hotel

**Seminar Programme**

13:00 – 14:00	Registration	
14:00– 14:05	Opening Remarks	Professor, Dr. Toshihiko OMOTO, Kyoto University
14:05 – 14:35	The Position of DAB in FIDIC Conditions of Contract	Yukinobu HAYASHI, General Manager, Nippon Koei Co., Ltd
14:35 – 15:35	The Practice of Dispute Boards	Professor, Dr. Toshihiko OMOTO, Kyoto University
15:35 – 15:50	Coffee Break	
15:50 – 17:15	Open Discussion and Qs & As	



**Japan International Cooperation Agency (JICA)**

**DAB (Dispute Adjudication Board) Seminar**

**Hanoi, Vietnam**

Date : November 24, 2009

Time : 14:00 – 16:10

Venue : Hanoi Daewoo Hotel, Orchid Room

**Seminar Programme**

13 : 30 - 14 : 00 Registration

14 : 00 - 14 : 05 Opening Remarks

Toshio NAGASE, Senior Representative, JICA Vietnam Office)

14:05 – 14:35 The Position of DAB in FIDIC Conditions of Contract

Yukinobu HAYASHI, General Manager, Nippon Koei Co., Ltd.

14:35 – 15:35 The Practice of Dispute Boards

Professor, Dr. Toshihiko OMOTO, Kyoto University

15:35 – 16:05 Open Discussion and Qs & As

16:05 – 16:10 Closing Remarks (JICA)

Toshio NAGASE, Senior Representative, JICA Vietnam Office)



**Japan International Cooperation Agency (JICA)**

**DAB (Dispute Adjudication Board) Seminar**

**Dhaka, Bangladesh**

Date : January 28, 2010

Time : 14:00 – 17:00

Venue : Pan Pacific Sonargaon

**Seminar Programme**

13:30 – 14:00      Registration

14:00 – 14:35      The Position of DAB in FIDIC Conditions of Contract  
Yukinobu HAYASHI, General Manager, Nippon Koei Co., Ltd.

14:35 – 15:35      The Practice of Dispute Boards  
Professor, Dr. Toshihiko OMOTO, Kyoto University

15:35 – 15:50      Coffee Break

15:50 – 17:00      Open Discussion and Qs & As



**Japan International Cooperation Agency (JICA)**

**DAB (Dispute Adjudication Board) Seminar  
Colombo, Sri Lanka**

Date : February 1, 2010

Time : 14:00 – 17:00

Venue : Hilton Colombo Residence

**Seminar Programme**

13:30 – 14:00	Registration
14:00 – 14:35	The Position of DAB in FIDIC Conditions of Contract Yukinobu HAYASHI, General Manager, Nippon Koei Co., Ltd
14:35 – 15:35	The Practice of Dispute Boards Professor, Dr. Toshihiko OMOTO, Kyoto University
15:35 – 15:50	Coffee Break
15:50 – 16:20	ADR and DRB practice in Sri Lanka Tilak P. Kolonne, Director, VFORM Consultants Private Limited
16:20 – 17:00	Open Discussion and Qs & As

## About Speakers

### **Toshihiko Omoto, Dr.Eng.**

Dr/MSc/BSc (Civil Eng) MSc (Const Law & Arb)

Toshihiko Omoto is a First Class Civil Engineer in Japan and a Chartered Civil Engineer in UK, holding Master's and Doctor's Degrees in Civil Engineering awarded by Kyoto University, Japan, and Master's Degree in Construction Law and Arbitration awarded by King's College, University of London. He has over 35 years experience in the construction industry, including 30 years experience in the international projects. He worked for a major Japanese contractor for 25 years, for 15 years of which, he was involved in resolution of engineering and construction disputes, both by amicable settlement negotiations and by arbitration. In year 2000, he began his independent consultancy, specializing in dispute resolution. He has worked in 25 countries, representing and/or advising owners, contractors and insurers.

In 2006, he became a full time Professor at the Graduate School of Management (MBA) of Kyoto University and is the Head of Center for Research in Business Administration of MBA. He is a Fellow of the Chartered Institute of Arbitrators, UK, and currently serves as a Neutral; a Dispute Board Member, an arbitrator and a mediator. He is the Japan Representative of the Dispute Resolution Board Foundation and the Senior Advisor of the Japan Chapter of the Chartered Institute of Arbitrators. He regularly lectures on construction law and dispute resolution at several universities in Japan. He also authors frequently papers for publication in professional and academic journals.

### **Yukinobu Hayashi**

General Manager, PPP Project Department, Nippon Koei Co., Ltd.

Yukinobu Hayashi has over 30 years of professional experience in project management for various types of infrastructure development projects in Asia, Middle East, Africa and Latin American countries. Since his graduation from University with a B. Sc. in mechanical engineering in 1977, he has been working for Nippon Koei Co., Ltd. He has involved in construction planning and scheduling, project cost estimate, tender document preparation, tender evaluation, and assessment of contractual claims for the projects undertaken by the firm.

He has a deep understanding on construction contracts especially FIDIC. As a member of Association of Japanese Consulting Engineer (AJCE), he has drafted Japanese versions of FIDIC contracts including Red Book 1999, Yellow Book 1999 and FIDIC Contract Guide.

Japan International Cooperation Agency

## SEMINAR MATERIALS FOR DAB SEMINAR

1. Position of DAB in FIDIC Conditions of Contract
2. Practice of Dispute Boards
3. Adjudication/ DAB practice in Sri Lanka<sup>1</sup>

February 2010

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<sup>1</sup> Only used in the seminar in Sri Lanka



DAB Process Promotion Seminar

## Position of DAB in FIDIC Conditions of Contact

JICA

(Japan International Cooperation Agency)

Yukinobu Hayashi  
Nippon Koei Co., Ltd

JICA DAB Seminar 2010

2

## Topics

- JICA Procurement Documents
- Dispute Settlement Procedures in FIDIC Contracts
- Basic Knowledge of DAB/DB in FIDIC Contracts
- Differences between FIDIC Red Book 1999 and MDB Edition in Relation to DAB/DB



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## JICA Documents related to Procurement of Works

1. Guidelines for Procurement under Japanese ODA Loan (2009)
2. Sample Bidding Documents
  - Prequalification Documents (2007)
  - **Procurement of Works (June 2009)**
  - Supply and Installation of Plant and Equipment (2006)
  - Civil Works – Smaller Contract (2000)
3. Guide Book and Check List
  - Handbook for Procurement under Japanese ODA Loans (2009)
  - Evaluation Guide for Prequalification and Bidding (2007)
  - Check List for One Sided Contracts (2006)

*(All available at JICA WEB site)*



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## JICA Sample Bidding Documents - Works

- Current version
  - Issued in June 2009
  - General Conditions : FIDIC RedBook MDB harmonised edition
  - DAB (DB) : standard
- Old version
  - issued in 1999
  - General Conditions : FIDIC RedBook 1987 (4<sup>th</sup> Edition)
  - DAB: optional



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## ADR (Alternative Dispute Resolution) and DAB

- Arbitration
- Mediation
- Conciliation
- Dispute Board\*1
  - Dispute Review Board
  - Dispute Adjudication Board (or Dispute Board)
  - Combined Dispute Board

\*1: Classification of ICC-Dispute Board Rule 2004



## Dispute Board

- Dispute Review Board, DRB
  - DRB issues recommendations.
- Dispute Adjudication Board, DAB
  - DAB issues decisions.
  - called as DB (Dispute Board) in MDB edition
- Combined Dispute Board, CDB
  - CDB issues recommendations.
  - however, CDB may issues decisions, if any Party (Employer and Contractor) so requests. The CDB has the power to do so even if the other party objects.



## Types of DB

- Full-term (standing) DB
  - appointed just after conclusion of the construction contract
  - periodical site visit regardless of dispute
  - adopted in Red Book 1999 and MDB edition
- Ad-hoc DB
  - appointed after occurrence of dispute
  - adopted in Yellow Book 1999 and Silver Book 1999



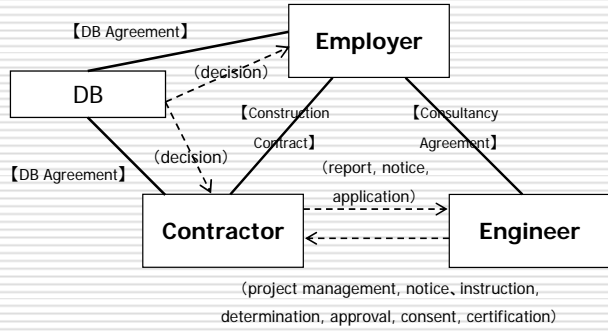
## Comparison : Full-term and Ad-hoc DB

	Full-term	Ad-hoc
Total DB cost	higher	lower
Function of dispute prevention by DB	Yes	No
Time for issuing decision after dispute	short	long





### Three Party System and DB in FIDIC



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### Dispute Settlement Procedures in FIDIC Contracts

- Red Book 1987
  - The Engineer makes determination of claim and decision of dispute
  - Same in Yellow Book 1987
- Red Book 1999 and MDB edition
  - The Engineer makes determination of claim, and DB makes decision of dispute
  - Same in Yellow Book 1999
- Silver Book 1999
  - The Employer makes determination of claim, and DB makes decision of dispute

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### Why DB is introduced in FIDIC Documents

#### 1. FIDIC Questionnaire Survey in 1996

##### Question 16: Engineers' impartiality

Engineers are rarely impartial in exercising their powers under a contract

%	1	2	3	4	5	n
Cons	8	4	8	45	37	71
Cont	30	38	13	16	3	104
Client	12	19	12	31	27	26
Civil	22	32	14	19	14	79
Com	17	18	10	34	20	122
Tot	19	23	11	28	18	201

Engineers are usually impartial in exercising their powers under the contract

##### Question 17: Direction of engineers' partiality

Engineers typically favour the Contractor in administering contracts

%	1	2	3	4	5	n
Cons	1	4	39	46	8	71
Cont	1	2	16	38	42	104
Client	0	0	23	58	19	26
Civil	0	1	29	43	27	79
Com	2	3	23	44	28	122
Tot	1	2	25	44	27	201

Engineers typically favour the Employer in administering contracts

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### Why DAB is introduced in FIDIC Documents

#### Question 18: Engineer as dispute settler

Generally, it is a bad idea to incorporate terms which call upon the Engineer to settle disputes between the Employer and the Contractor

%	1	2	3	4	5	n
Cons	7	8	7	34	44	71
Cont	26	28	4	27	15	104
Client	27	8	4	12	50	26
Civil	15	27	5	27	27	79
Com	22	13	5	28	32	122
Tot	19	18	5	27	30	201

Generally, it is a good idea to incorporate terms which call upon the Engineer to settle disputes between the Employer and the Contractor

#### Question 19: Adjudicator as dispute settler

Someone other than the Engineer should be first line Adjudicator(s) in the event of disputes

%	1	2	3	4	5	n
Cons	14	10	6	25	45	71
Cont	30	24	3	23	20	104
Client	31	4	0	23	42	26
Civil	20	27	6	19	28	79
Com	27	10	2	27	34	122
Tot	24	16	3	24	32	201

The Engineer is the best person to be the first line Adjudicator in the event of disputes

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## Why DAB is introduced in FIDIC Documents

### Question 20: Decisions of adjudicators

An Adjudicator, or a formal adjudication board, should make recommendations, rather than decisions

%	1	2	3	4	5	n
Cons	13	17	4	23	44	71
Cont	15	19	8	24	34	104
Client	12	19	8	27	35	26
Civil	16	20	9	27	28	79
Com	12	17	5	22	43	122
Tot	14	18	6	24	37	201

An Adjudicator, or a formal adjudication board, should make decisions, rather than recommendations

### 2. It is often said that:

- 1) the Engineer is paid by the Employer
- 2) playing dual roles is very difficult
- 3) disputes are sometimes related to the design made by the Engineer
- 4) might be difficult to overturn Engineer's determination previously made



## Why DAB is introduced in FIDIC Documents

### 3. The Engineer would be required to obtain Employer's approval before taking some actions under the Contract.

#### 【In MDB Version】

- a) determination of EOT and/or additional cost under Cl. 4.12 [Unforeseeable Physical Conditions]
- b) instructing Variation exceeding specified amount
- c) approving proposal for Variation submitted by the Contractor
- d) specifying the amount payable in each of the applicable currencies



## Requirement on Engineer's Determination

- ❑ to be fair (unbiased) and professional
- ❑ with proper interpretation of the Contract
- ❑ after due consultation with the Employer and Contractor



These requirements remain unchanged from  
FIDIC Red Book 1987 version.



## FIDIC Contract Provisions related to DB (1)

### (Conditions of Contract for Construction)

#### 20 Claims, Disputes and Arbitration

- 20.1 Contractor's Claims
- 20.2 Appointment of DB
- 20.3 Failure to Agree DB
- 20.4 Obtaining DB's Decision
- 20.5 Amicable Settlement
- 20.6 Arbitration
- 20.7 Failure to Comply with DB's Decision
- 20.8 Expiry of DB's Appointment



## FIDIC Contract Provisions related to DB (2)

(Documents for Employment of DB)

- General Conditions of Dispute Board Agreement
- Procedural Rules
- Dispute Board Agreement



## 20.2 Appointment of DB

- The DB shall comprise, as stated in the Contract Data, either one or three suitably qualified persons.
- In case of 3-member DB, each Party nominate one member for approval of the other Party, if they fail to jointly appoint the DB.
- The first two members shall recommend and the Parties shall agree upon the third member, who shall act as a chairman.
- If an adjudicator list is provided in the Contract and agreed by the Parties, the member shall be selected from the list.
- DB's fee and expense shall be evenly paid by both Parties.
- If both Parties so agree, they can jointly seek opinion of DB at any time.



## 20.3 Failure to Agree DAB

- If Parties can not appoint DB member or agree DB member, an entity or official named in the Contract Data shall appoint member(s).
- Such appointment shall be final.
- The two Parties evenly share the remuneration of appointing entity or official.



## 20.4 Obtaining DB's Decision (1)

- Either Party may refer the dispute in writing to DB, if a dispute arises in connection with the Contract or execution of the Works including any dispute as to any certificate, determination, instruction, opinion or valuation of the Engineer.
- Both Parties shall make available to the DB related information and access to the Site.
- Within 84 days after receiving such reference, DB shall give its decision. The decision shall be binding on both Parties, unless and until it shall be revised in the amicable settlement or arbitral award.



## 20.4 Obtaining DB's Decision (2)

- If either Party is dissatisfied with DB's decision, either Party may give notice to the other Party of its dissatisfaction within 28 days and intention to commence arbitration.
- If DB has given its decision and no notice of dissatisfaction has been given by either Party within 28 days, then the decision shall become final and binding upon both Parties.



## General Conditions of Dispute Adjudication Agreement(1)

- This agreement is a tripartite agreement among the Employer, the Contractor and DB member.
- The DB member shall warrant that he shall be impartial and independent of the Employer, the Contractor and the Engineer.
- When appointing the member, the both Parties relied upon the member's representation that he/she is:
  - experienced in similar work
  - experienced in contract documentation
  - fluent in the language for communication



## General Conditions of Dispute Adjudication Agreement(2)

- The DB member shall be paid as follows:
  - monthly retainer fee
  - daily fee
  - expenses (travel expense, hotel, telephone, etc.)
  - taxes in the Country
- The retainer fee shall be reduced by 1/3 after Taking-Over Certificate is issued.
- The Contractor shall pay DB member's invoice in full and shall apply to the Employer for reimbursement of 1/2 of the amount.



## Procedural Rules

- The DB shall visit the site at the interval of not less than 70 days and not more than 140 days, unless otherwise agreed by the Parties.
- The purpose of site visit is to enable the DB to become and remain acquainted with the progress of the Works and of any actual or potential problems or claims, and ,as far as reasonable, to endeavour to prevent potential problems or claims from becoming dispute
- The DB shall prepare a report before leaving the site.
- If any dispute is referred to the DB, the DB shall:
  - act fairly and impartially, giving the Parties a reasonable opportunity of putting his case and responding to the other's case,
  - adopt procedures suitable to the dispute, avoiding unnecessary delay or expense



### Differences between FIDIC Red Book 1999 and MDB (1)

- ❑ In MDB version, the Board is called as DB (Dispute Board), not DAB (Dispute Adjudication Board)
- ❑ In MDB version, if the Engineer does not respond to the claim within the timeframe specified in the Contract, any of the Parties may consider that the claim is rejected by the Engineer and any of the Parties may refer to DB in accordance with SC 20.4.
- ❑ In MDB version, essential requirements to the members ,i.e. experience in similar works and contractual documents, and communication capability are spelled out in SC 20.2, besides DB General Conditions.



### Differences between FIDIC Red Book 1999 and MDB (2)

- ❑ Appointment procedure of DB in MDB version:
  - The Parties should first consider together who shall serve as the DB.
  - The first two members recommend the third member who will act as a chairman.
- ❑ In MDB version, the reduction of retainer is 1/3 rather than 1/2.
- ❑ In MDB version, the following text is added in respect of purpose of the site visit by DB:
  - “,as far as reasonable, to endeavour to prevent potential problems or claims from becoming dispute”

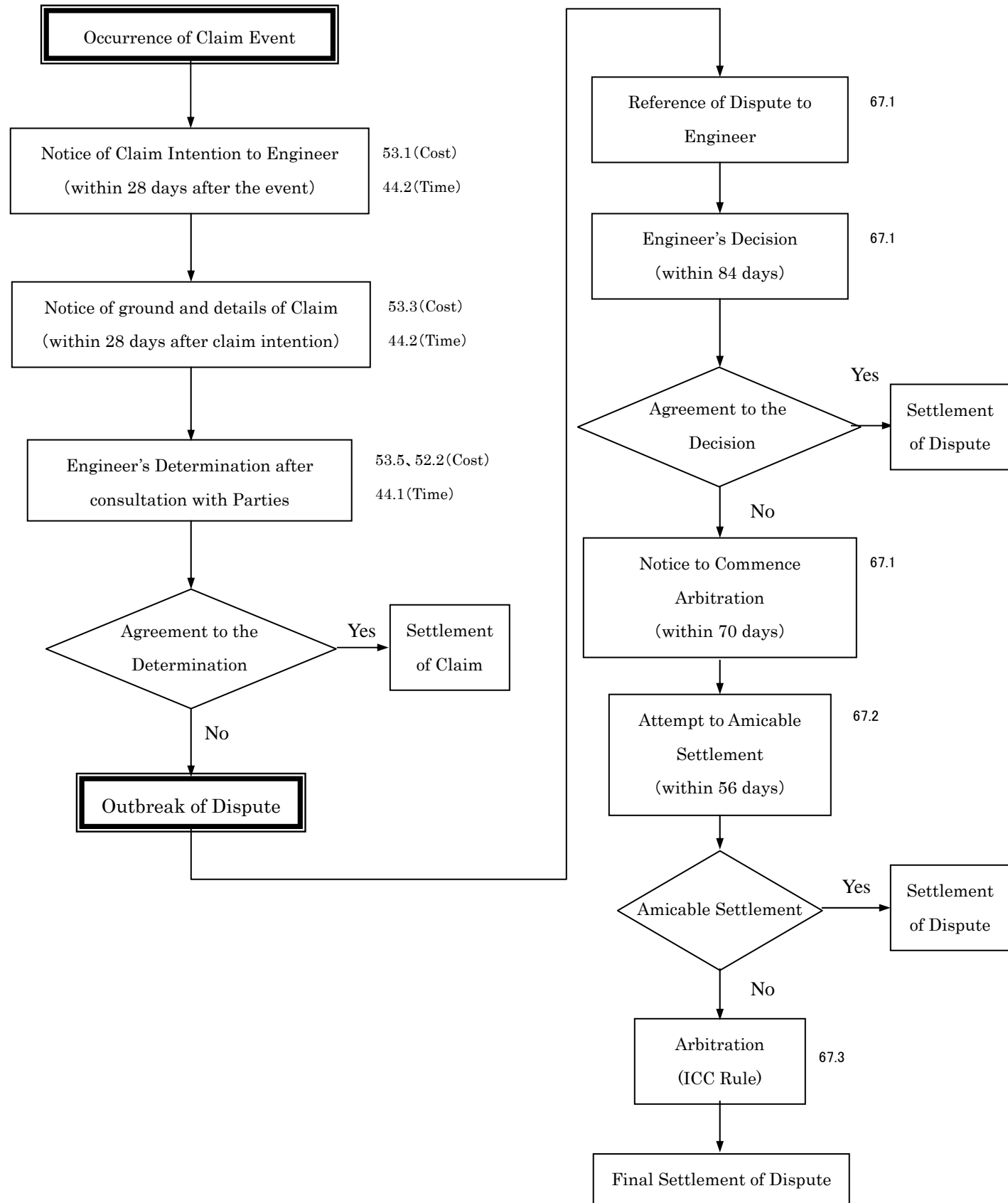


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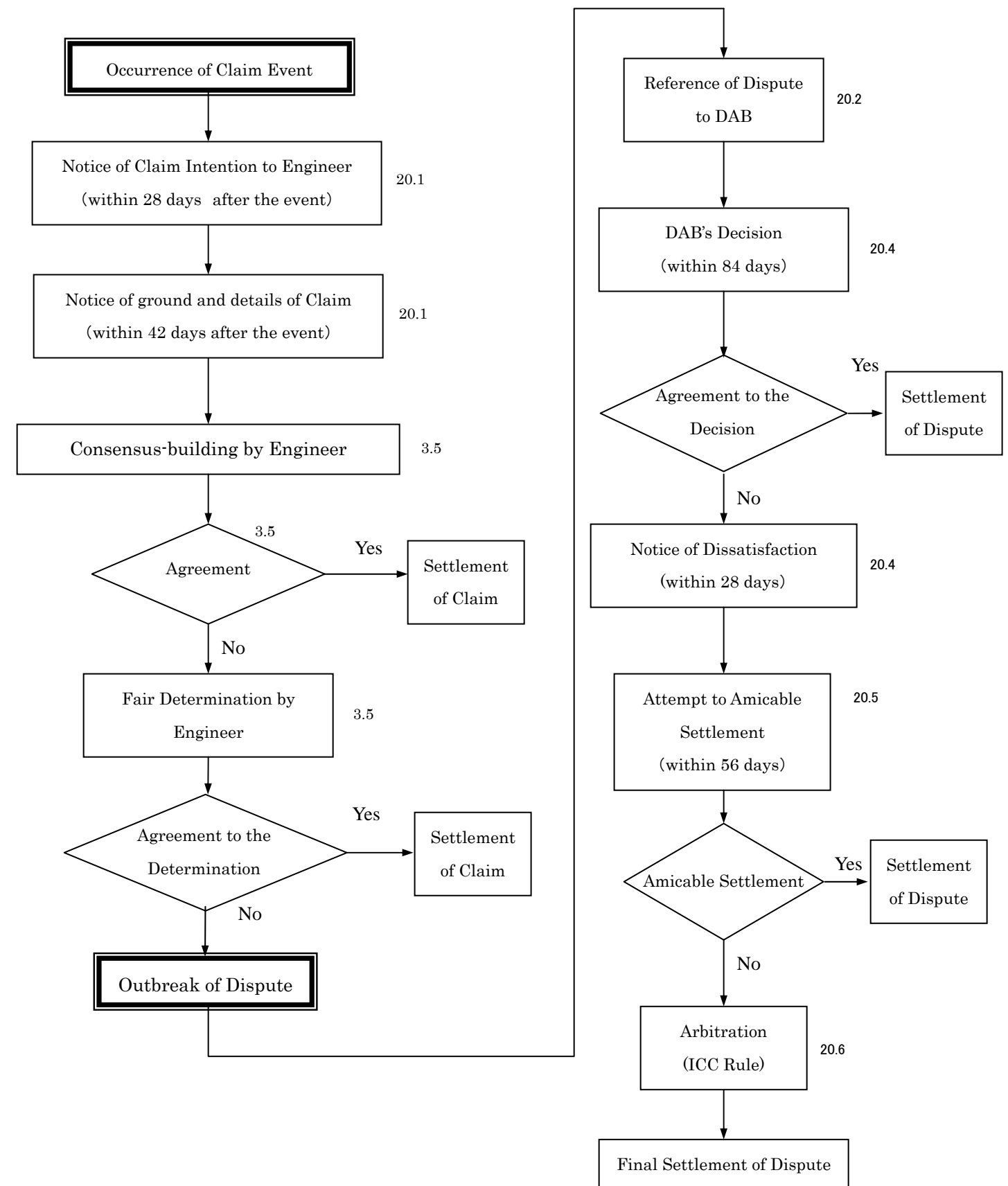
Thank you !!



Attachment-1 Procedure of Claim and Dispute Settlement (FIDIC Red Book 1987)



Attachment-2 Procedure of Claim and Dispute Settlement (FIDIC Red Book 1999 and MDB)





## DAB Process Promotion Seminar

# Practice of Dispute Boards

JICA  
(Japan International Cooperation Agency)

Professor Toshihiko Omoto, Dr.Eng.  
Graduate School of Management,  
Kyoto University

JICA DAB Seminar 2010

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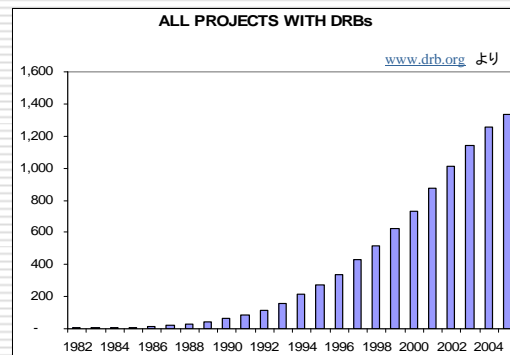
## Today's Topics: Dispute Boards

- Present State of DB's Dissemination
- Operation of DB
- Effects of DB
- Costs of DB
- Examples of DB



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## Present State of DB's Dissemination DRBF's Report



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## The Present State of DB's Dissemination DRBF's Report

- Reported projects are almost in USA
- DB is widely used in public sectors
  - California: The authority of transportation
  - Florida: The authority of transportation
  - Seattle: Metro
  - Alaska: The authority of electricity
  - Federal government: The ministry of energy
- DRB used in 1,200 projects in 2005
  - 1.2 references/ project to DRB
  - 2% of references to arbitration/litigation
  - 1% of above resolved before award/judgment



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## The Present State of DB's Dissemination outside the USA

- ❑ **Urtan Hydropower Project (China)**
  - US\$2 billion: 3,300 MW
  - 40 references to DAB, no claim to arbitration
- ❑ **Hong Kong International Airport**
  - US\$ 15billion
  - 6 references to DAB, 1 to arbitration, upheld
- ❑ **Katse Dam (South Arfica)**
  - US\$2.5 billion
  - 12 references to DAB, 1 to arbitration, upheld
- ❑ **Docklands Light Railway, UK**
  - US\$500 million
  - No reference to DAB
- ❑ **Saltend Private Gas Turbine Power Plant, UK**
  - US\$200 million
  - No reference to DAB
- ❑ **Many, Many more!**



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## Operation of DB

### Difference Between Other Means of Dispute Resolution

- ❑ DB is established before disputes take place
- ❑ Selection of DB members is agreed by both parties
- ❑ DB provides on-site dispute resolution
- ❑ Preventing disputes from taking place or escalating to formal disputes
- ❑ Early settlement of disputes
- ❑ DB provides regular Site visits and documents review to remain conversant with project development
- ❑ DB is more like part of project management, rather than means of dispute resolution
- ❑ Key to a successful DB; DB members to gain trust and regards for their neutrality, impartiality and capability



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## Operation of DB Qualifications of DB members

- ❑ **FIDIC/MDB Harmonized Edition Rules**
  - Language ability
  - experience in the kind of Work
  - experience in interpreting contract documents
  - Availability for site visits
  - Impartial and independent of contracting parties and Engineer
  - no interest financial or otherwise with contracting parties and Engineer and with the contract itself
- ❑ **Engineers or lawyers?**



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## Operation of DB

### Selection of DB Members/Establishment of DB

- ❑ Each party nominate one for the other party's approval, two members nominate the third member for both parties' approval  
→ Chairperson  
(The chairperson should be of different nationality from the two contracting parties.)
- ❑ The parties can make the selection together with the Engineer.
- ❑ DB members can be selected from a ballot of several candidates.
- ❑ Qualifications can be set down in advance (Example)
  - Selecting from FIDIC President's List
  - 2 Engineers + 1 Lawyer (chairperson)
  - 1 member shall be experienced in TBM tunneling work



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## The Operation of DB Information to be disclosed in making DB contracts

- ❑ Records of any professional or personal relationships with any director, officer or employee of the Employer, the Contractor or the Engineer, and any previous involvement in the overall project of which the contract forms part
- ❑ Records of any employment as a consultant or otherwise by the Employer, the Contractor or the Engineer
- ❑ Besides, information about the warranty on the impartiality and independence from the Employer, the Contractor and the Engineer



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## Operation of DB Example of Disclosure

- ❑ In this case, the candidate had been employed by one of the parties until 10 years ago for 7 years then no involvement since then
- ❑ The candidate warrants his independence on the party

Vice President  
Company Ltd.

Dear Sir,

To  
Project  
B  
Appointment of DAB

Thank you for your letter dated [ ] inviting me to provide a statement of availability to serve on a DAB to be constituted under this Contract.

I have reviewed the your letter and am pleased to advise you of my availability to serve on a DAB for this Contract and that, on the basis of the Project information contained in that letter,

1. I have no financial interests with, and am independent of the Parties and the Engineer.
2. I am familiar with the Conditions of Contract.
3. I am fluent in the language of the Contract.
4. I have extensive experience in the type of work that is being undertaken.

I understand that you have obtained my CV from the list of approved adjudicators published by FIDIC.

As a matter of disclosure, the Parties and the Engineer should be made aware that between the years 1990 and 1997 I was employed in [ ] as the position of Contracts Manager for the Far east. As part of the duties in that position I prepared Joint Venture Agreements and Subcontracts for projects on which I was involved, often tendered for contracts in joint venture with [ ] and on at least one occasion subcontracted work to this Company. The last involvement of this nature was 13 years ago in 1995 in connection with the [ ] Hydroelectric Project in [ ] I left the employ [ ] in 1997 have not had contact with [ ] since that time and consider that any previous involvement with this Company will not affect my independence should I be selected to serve as a member of the DAB for this Project.

Thank you for this consideration and I look forward to hearing back from you.



JICA  
Sincerely,  
© Toshihiko Omoto 2010

## Operation of DB Three-Party Agreement

- ❑ **Three-Party Agreement**
  - Signatures of the 3 parties
    - ❑ Each Member
    - ❑ Two Parties
  - Assignment of DAB procedures
    - Payment
      - ❑ Retainer Fee
      - ❑ Daily Fee

DISPUTE BOARD AGREEMENT PROJECT

Employer: Contractor: Member:

Whereas the Employer and the Contractor have entered into a contract (Specifically the "Contract Documents" for the " )

herein after referred to as the "Contract") and desire jointly to appoint the Member to act as one of the three persons who are jointly called the "DB";

The Employer, Contractor and Member jointly agree as follows:

1. The conditions of this Dispute Adjudication Agreement comprise the "General Conditions of Dispute Adjudication Agreement" and "Procedural Rules" that are in Volume 1, Section VII, pages 106 to 114 of the Contract, all other terms of the Contract that apply to the work of the DB, and the following provisions. In those provisions words and expressions shall have the same meanings as are assigned to them in the General Conditions of Dispute Adjudication Agreement.
2. In accordance with Clause 6 of the General Conditions of Dispute Adjudication Agreement, the Member shall be paid as follows:
  - A retainer fee of [ ] per month,
  - plus a daily fee of [ ] per day.
3. In consideration of these fees and other payments to be made by the Employer and the Contractor in accordance with Clause 6 of the General Conditions of Dispute Adjudication Agreement, the Member undertakes to serve, as described in this Dispute Adjudication Agreement, as one of the three persons who are jointly to act as the DB.
4. The Employer and the Contractor jointly and severally undertake to pay the Member, in consideration of the carrying out of these services, in accordance with Clause 6 of the General Conditions of Dispute Adjudication Agreement.
5. This Dispute Adjudication Agreement shall be governed by the law of the Contract.

SIGNED by: SIGNED by: SIGNED by:

for and on behalf of the Employer in for and on behalf of the Contractor for the Member

Date: Date: Date:



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## Operation of DB - Acquaintance With the Project First Site Visit

- ❑ **Logistics**
  - Basis: the DB should be seen as a member of the project team
  - Introduction of DB members (The participation of the head office?)
  - Participants' roles in the DB meeting
  - Confirmation of contract documents
    - ❑ Contract Agreement/Conditions of Contract/Bills of Quantities/Drawings/Programme/other relevant documents
  - Secure contract documents for DB
    - ❑ One set of copies on the site
    - ❑ An A-5 subsized version for each DB individual
  - Building of communication network
  - Arrangements & Preparations (Arrangement of hotel, vehicles, meeting rooms and equipments)
  - Deciding the date of Site Visits (based on the expected progress of the project)



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## Operation of DB-Acquaintance With the Project First Site Visit (continued)

### Discovering potential disputes areas

- Seeds of problems planted at bidding, contract negotiation and signing stage
  - Incompletion in the changed or added terms
- Problems appear right after signing of the contract
  - Corporation registration
  - Work permit
  - Issues in relation to local labors or subcontractors
  - Problems of Importing and exporting materials and equipments
  - Delay of preceding construction
  - Delay of drawing issuance
  - Delay in mobilization

### Establishing Problem Solving Project Team

- for the project
- Documentations (Claims) come later



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## Operation of DB - Acquaintance With the Project Site Visits

- Frequency: Every 3~4 months
- Length-of-stay: No shorter than three days
  - Day 1: Site inspection
  - Day 2: Hearing
    - Employer, Contractor, Engineer
    - The persons concerned besides the parties (If necessary, the subcontractors, the designer etc. )
  - Day 3: Site Visit Report
    - Draft and Review/Correction
    - Signing and Distribution before leaving Site
    - Deciding the date of next Site Visit



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## Site Visit Agenda (6 – 10 July 2008)

Date	Time	Place	Contents	Responsible	Participants
Monday 7	08:00	Hotel	DB picked up to Site I Briefing & tour	Mr. X	DB, Emp, Cont. Eng
	12:30	Site Office	Lunch	Mr. Y	DB, Emp, Cont, Eng
	13:30		Tour to Site II & III	Mr. X	DB, Emp, Cont, Eng
Tuesday 8	18:30	Camp Canteen	Dinner & to Hotel	Mr. Y	DB, Emp, Cont, Eng
	09:00	Hotel	DB picked up to Site I Emp office for meeting	Mr. X	DB, Emp, Cont, Eng, Sub A&B
	12:30	Site Canteen	Lunch	Mr. Y	DB, Emp, Cont, Eng, Sub A&B
Wednesday 9	13:30		Afternoon session & to Hotel	Mr. X	DB, Emp, Cont, Eng, Sub A&B
	18:30				
	09:00	Hotel	DB picked up to Site office & prepare report		DB
	16:00		Deliver/review of report & to Hotel	DB	DB, Emp, Cont, Eng, Sub A&B



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## Operation of DB-Acquaintance With the Project Work Between Site Visits

- Sending of Documents
  - Monthly reports
  - Main Variations
  - Claim Notices/Submissions
  - Updated Programme
  - Important Letters other than claim related
- Methods of Sending
  - File sending service
  - Opening of ftp:// sites



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## Methods of Sending (Sample)

- ❑ Put on to the web site →



- ❑ Use file sending service such as [www.yousendit.com](http://www.yousendit.com) etc.

(Not expensive, free up to 100MB)



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## Effects of DB Dispute Resolution

- ❑ Disputes that cannot be solved among the parties and engineers are referred to DB (Referral)
- ❑ DB being well informed of progress/contractual issues
  - Taking advantage of regular Site Visits
  - Voluminous documents and formal presentation unnecessary (Simple Position Papers suffice)
  - Solves disputes at the site level
  - Legal representatives are unnecessary (Should lawyers be permitted to participate?)
  - Swift decisions
- ❑ Claims and disputes will not be left unsolved
  - The progress of construction will not be hindered
  - Disputes will not escalate
  - Collaborative relationship is established and maintained between the parties (for the project)



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## Effect of DB Prevention of Disputes

- ❑ Effects of Site Visits
  - The first Site Visit
    - ❑ Identifying, and efforts for solving, the problems appeared before and right after the signing of the contract
    - ❑ Discovering potential dispute areas and promoting dispute prevention
  - Site Visits
    - ❑ Discovering problems and efforts for dispute prevention
    - ❑ Sometimes technical advices are also available (sensitive to the parties' obligation)
    - ❑ Improvement of the relationships (individuals and groups) among the parties, the Engineer and other concerned persons
    - ❑ Make use of the influence to the third person (subcontract, designer, relevant government offices and others departments)
    - ❑ Helps maintaining parties' integrity



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## Effect of DB Prevention of Disputes (continued)

- ❑ DB to be kept informed between Site Visits
  - Sensing the parties' changes in attitude and provide advices about improvement
  - Improving understanding of the contract by Q&A
- ❑ Informal/advisory opinion
  - DB obtains the trust on neutrality and fairness through Site Visits etc.
  - Informal/advisory opinions are easy to be accepted.



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## Effect of DB Informal/advisory opinion

- **Informal/Advisory Opinion**
  - DB is not a consultant
  - But, DB may give advice under the parties' mutual agreement
  - No binding effect (neither on the two parties/Engineer nor on DB)
  - Can become base for negotiations between the parties
  - Disputes are settled before escalating
  - Is not equal to DRB's recommendation
- **For example**
  - Incompletion in the changed or added terms: Adjustment of interpretation and making of new draft
  - Advice on solution that involves the third party (such as the subcontractor)



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## The cost of DB FIDIC's Explanation

- **Retainer**
  - If required, a business trip to the Site within 28 days is possible
  - DB members are to be conversant with the situation of the site, and maintain the related documents.
  - Covers office expenditure and other costs
- **Daily Fee**
  - Daily fee for site visit
  - Days of stay + maximum two days for each way for travel
  - Days needed for documents reviewing for the referral
- **Reasonable expenses** such as airfare, hotel fee etc.



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## Cost of DB Difference Between FIDIC 1999&MDB Edition

- **About the Retainer Fee During the Warranty period**
  - 1999: "shall be reduced by 50%"
  - MDB: "shall be reduced by one third"
- **About the Retainer/Daily Fee, when no description in the contract, and agreement cannot be reached between the parties**
  - 1999: No description
  - MDB: the "appointing entity/official" may make the decision



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## Cost of DB: ICSID ([International Centre for Settlement of Investment Disputes](#))'s Rule

- **FIDIC: Fee by ICSID can be agreed**

**Adjudicators Fees**  
FIDIC does not recommend fees scales for either adjudicators or for the administration for adjudicators. An indication of acceptable terms and conditions is provided by the World Bank's International Center for Settlement of Disputes (ICSID) - see *Memorandum of Fees and Expenses for ICSID Arbitrators*, 8 March 2004 - that applies for members of Arbitral Tribunals constituted under the ICSID Convention.

- **ICSID's Rule: US\$3,000/day**

**Fees and Expenses of Conciliators, Arbitrators and *ad hoc* Committee Members**  
3. In addition to receiving reimbursement for any direct expenses reasonably incurred, conciliators, arbitrators and *ad hoc* Committee members are entitled to receive, unless otherwise agreed between them and the parties, a fee of US\$3,000 per day of meetings or other work performed in connection with the proceedings, as well as subsistence allowances and reimbursement of travel expenses within limits set forth in Administrative and Financial Regulation 14.



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## Cost of DB Payment to DB members

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- Retainer
  - Payment of three months in advance
  - If no special mutual agreement, no change for 24 months
- Daily Fee/Actual expenses such as the travel expenses
  - Right after the end of the Site Visit
- Methods of payment
  - The Contractor pays 100% at first
  - Reimbursement of 50% through progress payment
  - In other words, the Employer can pay by loans



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## Cost of DB Cost-effectiveness

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- Project without DB - 1
  - The exchange of letters is a heavy work, hindering problems from being solved
  - Each one pursues his own profit
  - The contracting parties/Engineer don't get along well with each other
  - Claims are left unsolved
  - Tiny disputes may also escalate (global claims, additional problems of interest and exchange rates)
  - Production and assessment of claim packages



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## Cost of DB Cost-effectiveness (continued)

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- Project without DB - 2
  - Production and assessment of claim packages
    - Additional costs for lawyers, experts and employees (for long time)
    - Enormous cost occurs even if there is no litigation or arbitration
    - Disputes arise between the Employer and the Consultant on the additional cost of claim assessment/evaluation work



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## Cost of DB Cost-effectiveness – (continued)

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- Project without DB - 3
  - More enormous cost occurs if disputes escalate into litigation and arbitration (lasts for years)
    - (Example) Japan:  
5 lawyers for each side
    - (Example) International:  
2 Barristers+3 Solicitors for each side  
2 Experts (1 geologist + 1 consulting firm)



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## Cost of DB Cost-effectiveness (Continued)

- Projects with DB
  - The cost of DB will be no more than the cost estimated by experienced Employer/Engineer and Contractor for production and assessment of claim packages
  - Prevention of gambling in contract management, improvement of certainty
    - Prevention of irrational assessment by the Employer/Engineer
    - Engineer acts fairly and reasonably
    - Prevention of the Contractor's unjustified claims
    - Helps maintaining integrity of the parties
    - Stability of bidding price



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## Cases of DB Cases of DAB, Example of wisdom

- Water-supply tunnel project in China
  - JBIC loans
  - 13 times of site visits from Mar 2003 to Mar 2007
  - The defect liability period ended in Feb 2008
  - **The DAB contract was extended from Mar 2008 to the end of final discharge of all obligation**
- Selecting of DAB members
  - The Employer: A Japanese engineer (FIDIC President's List, advised by Japanese consulting firm)
  - The Contractor: An American engineer (DRBF President)
  - The Chairman: International construction lawyer (FIDIC President's List, American)
    - Recommended by co-members' agreement
    - Chosen by the agreement between the parties



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## Cases of DB Cases of DRB, Example of wisdom

- Port construction project in Madagascar
  - World Bank (20%) and private co-financing
  - Site visits were discontinued after the third time
  - **However, retainer contract being maintained**
- Selecting of DB members
  - Parties agreed to select from FIDIC President List
  - The Employer and the Contractor agreed on the selection, with assistance by the Engineer



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## Cases of DB Cases of DRE (One-person DRB)

- Japan
  - A gas turbine plant operation and maintenance (o/m) contract for 15 years
  - Apply DRE (Dispute Review Expert) or One Person Dispute Review Board for the last 10 years
  - Meetings are held once every three months
  - No retainer fee, but documents review/drafting recommendation etc. will be paid by hourly rate
- Selecting of the Experts
  - A mediation was held on the fifth year of the contract under the ADR rule of ICC
  - **After the mediation concluded successfully, the Neutral was selected for the DRE**



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## Practice of Dispute Board

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Than you for your  
attention

# The End



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# *Dispute Boards*

## *Resolution and Avoidance of Disputes in Construction Contracts*

*Dr.Eng. Toshihiko Omoto\**

### **1. Concept and History**

Construction contracts are typical of incomplete contracts because it is not possible to describe all contingencies which may, or may not, occur during the course of construction. To cope with those contingencies, most standard forms of construction contracts provide rules for 1) Risk Sharing, 2) Variation (Change) and 3) Dispute Resolution. A mere difference of opinions of the parties in the interpretation of the contract documents often develops to a serious dispute. If the parties fail to settle the dispute by negotiation, they may go to arbitration or litigation. Every party wants to avoid arbitration or litigation because they know arbitration and/or litigation take time and need substantial expenditure. Moreover, in arbitration and litigation, the relationship between the parties gets worse and the project cannot be completed successfully (and someone will lose face in the end!).

The best way to resolve disagreement is to prevent it from becoming a formal dispute. The primary duty of a Dispute Board (“DB”) is to avoid disagreements becoming disputes. Making a decision or “Recommendation” is a secondary role of the DB.

A DB is made up of three (or one depending on the size and complexity of a project) members who are experienced in and knowledgeable about the type of the construction, interpretation of contract documents and the DB process and are absolutely independent and impartial. A DB is set up at the outset of a project and the DB Members are to be given the Contract Documents such as Conditions of Contract, Drawings, Specifications and Programme so that the Members can be conversant with the project. The DB visits the Site regularly, say quarterly, to meet the Site people and to observe the progress and problems, if any, of the project. Between the Site visits, the Engineer or the Parties send the DB Members the Monthly Progress Report, Claim Notices and other important correspondence to keep the Members informed. The DB is part of the construction team who assists the parties in avoiding claims and settling disputes by amicable negotiations. If the parties fail to settle disputes, they are referred to DB for determination. Since the DB members are familiar with the contract documents and the Site operation and progress of the project, it will not take much time to judge the

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\* Professor, Graduate School of Management, Kyoto University, Head of Center for Research in Business Administration, [omoto.toshihiko@nifty.com](mailto:omoto.toshihiko@nifty.com)



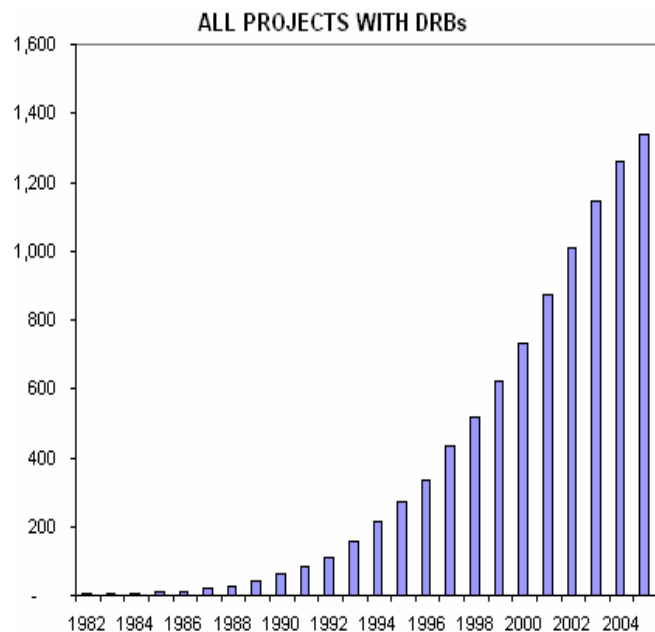
dispute. Even if the determination is rejected by one or both parties, it will be the basis for further negotiation in an amicable manner. Thus, the benefit of DB is prevention of disputes and early settlement of disputes without embedding adversarial attitudes.

The concept of DB was established during the use of “a four-person joint consulting board” in the Boundary Dam and Underground Powerhouse Complex Project in the mid-1960s in Washington State and the tunnelling industry first used the DRB (Dispute Review Board) process in 1975 during construction of the second bore of the Eisenhower Tunnel in Colorado. It was an overwhelming success; The DRB heard three disputes during construction and the DRB Recommendations were accepted. All parties were pleased at the end of the project. In 1980 World Bank promoted a DB (then called “Claims Board”) on El Cajon project in Honduras, which was also successful<sup>1</sup>. In 1995 World Bank Standard Bidding Document published modified FIDIC<sup>2</sup> conditions which deleted the usual provision of the “Engineer’s Decision”, giving this task to a DRB.

## 2. Statistics

The graph, **Fig-1**, shows the statistics of the use of DB from 1982 to 2004. The readers may recognize how DB process has grown over the last decade. Please note that the statistics was made mainly based on the reports from North America and it is assumed that more projects have used DB internationally under FIDIC Conditions of Contract.

In three mega projects, Channel Tunnel/Train/Terminal (UK-France), Hong Kong Airport (HK) and Ertan Hydro Project (PRC), DBs were used successfully.



**Fig-1**

<sup>1</sup> The late Mr. Al Mathews, who was involved in both Boundary Dam and Eisenhower Tunnel projects, persuaded the Contractor and the Government to use a DB in El Cajon project. He was the founder and the first Chairman of the Dispute Resolution Board Foundation (DRBF), Seattle, Washington, USA

<sup>2</sup> Fédération Internationale des Ingénieurs-Conseils (International Federation of Consulting Engineers)

### 3. DRB, DAB and CDB

There are three principal types of DBs, the Dispute Review Board (“DRB”), the Dispute Adjudication Board (“DAB”) and the Combined Dispute Board (“CDB”).

#### (1) DRB

The DRB has been, and is, used in the US widely for these three decades and the dominant form there. Internationally the World Bank also provided for DRBs in the January 1995 and subsequent editions of its Standard Bidding Document, *Procurement of Works*, and continued use until the May 2000 editions, when it adopted the DAB type. The DRB continues in use under ICC Dispute Board Rules. The DRB issues a Recommendation. Either party may express its dissatisfaction with the Recommendation by issuing a notice then the parties may continue negotiations or a party can invoke arbitration or go to court (arbitration is most commonly used in the international business transaction). If no party expresses dissatisfaction within a specified time, the Recommendation becomes binding. It is said that a Recommendation of DRB does not “dictate” to the parties and therefore, is more likely to be the basis for amicable settlement without jeopardizing the parties’ good relationship.

#### (2) DAB

The DAB issues a decision on the matter of dispute, which is binding on the parties as soon as it is issued. It currently is the most common form of DB used in international construction contracts. The parties must comply with it without delay notwithstanding a party’s expression of dissatisfaction. Depending on the DAB provisions in the conditions of contract, the parties may renegotiate the issues, or the unsatisfied party may invoke arbitration immediately. Even if objected to, the decision of the DAB is binding until and unless the parties agree otherwise or the arbitral tribunal decides differently. Some people argue that DAB is appropriate to the international projects which have multinational business cultures. Both *FIDIC 1999 Conditions of Contract* and *FIDIC MDB (Multilateral Development Banks) Harmonised Conditions of Contract* provide for DAB although a DAB is called simply DB” in the *MDB Edition*.

#### (3) CDB

The CDB is a unique Board which the ICC<sup>3</sup> introduced in 2004. As the name shows, it is a process combining DRB and DAB. The aim of the new creature is to combine the advantages of two basic types of DBs, i.e., DRB and DAB; DRB issues a Recommendation and DAB issues a decision.

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<sup>3</sup> International Chamber of Commerce, this rule was developed by ICC International Court of Arbitration.  
<http://www.iccwbo.org>

The CDB operates normally as DRB. However, a party may sometimes need to have a decision with which the parties will comply immediately even if they wish to challenge it in arbitration. What is such an occasion when a party requires an immediate decision? A party may go into bankruptcy if it does not receive claimed payment immediately. A party wants the other party to stop using its know-how illegally or not in accordance with their licensing agreement because the damage may become irreversible if compliance has to await a long arbitration. A party may be facing an imminent threat that the other party will call a performance bond for a large sum of money, to the immediate and severe detriment of the party which has given the bond.

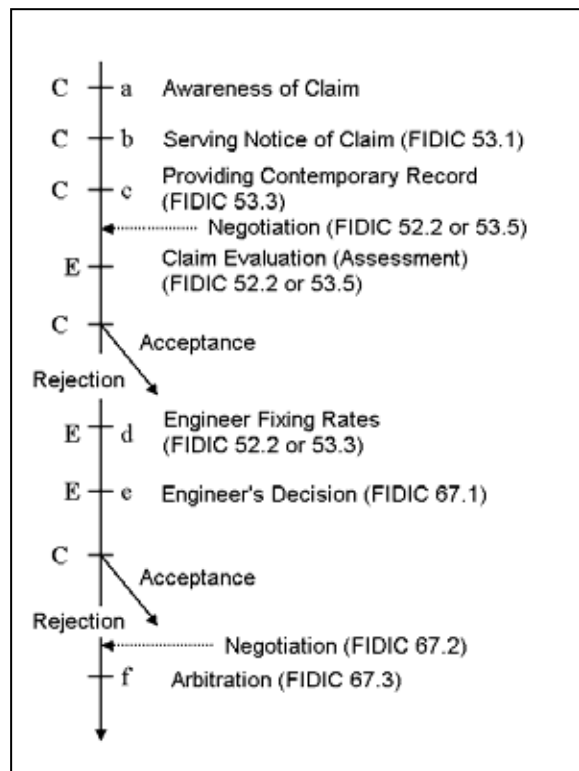
In deciding whether to use a DAB approach instead of a DRB approach, Sub-Article 6.3 of the ICC Rules provides that the CDB shall consider, without being limited to, the following factors:

- whether, due to the urgency of the situation or other relevant considerations, a Decision would facilitate the performance of the Contract or prevent substantial loss or harm to any Party;
- whether a Decision would prevent disruption of the Contract, and
- whether a Decision is necessary to preserve evidence.

Under the ICC Rules, when a party requests a decision by DAB and another party objects, the CDB has the power to determine whether the reference should be dealt with acting as a DRB or a DAB. The rule is silent as to any time limit by which the Board must determine which process, DRB or DAB, should be applied, but presumably it would be early in the formal dispute procedure.

The readers must have noticed that ICC DB Rules are quite suitable for any type of long term contract such as a licensing agreement, a sole agency agreement etc. because ICC Rules are “stand-alone”<sup>4</sup> In fact, it is reported that a few contracts in the IT industry have adopted this CDB.

Also, the ICC has adopted it for dispute resolution



**Fig-2: Claim and Dispute Procedure**

**Under FIDIC Red Book 4<sup>th</sup> Ed.**

<sup>4</sup> Christopher Koch in his presentation at the DRBF 8<sup>th</sup> Internat May 2008, used this terminology to compare ICC Rules and FIDIC Conditions of Contract, the latter incorporates DAB rules as integral part of the conditions.

under the ICC Model Form of Major Projects.

#### **4. Engineer's Decision and DAB in FIDIC Conditions of Contract**

The Engineer, stipulated in the FIDIC Red Book up to 4<sup>th</sup> edition 1987<sup>5</sup>, plays two roles (Dual Role); on the one hand he acts on behalf of the Employer as his agent to administer the contract, and supervise the Works, on the other hand, he certifies the progress, fixes the rates and prices of varied works and evaluates claims as an impartial professional (quasi-adjudicator). The Engineer is required to make an "Engineer's Decision"<sup>6</sup> on a dispute between the Contractor and the Engineer/Engineer's Representative or the Employer (see **Fig-2**). Thus he is expected to facilitate the dispute resolution effectively.

It is often observed in the operation of FIDIC contract that the latter role of the Engineer is not functioning properly and that a dispute goes on to arbitration. This is because the Engineer often is employed by the Employer throughout the project from the outset as a consultant to carry out the feasibility study, designing, preparation of the tender documents and evaluation of each tender to award the contract. It is quite understandable that it is very challenging for the Engineer to play the Dual Role properly; not only has to try to be objective in evaluating possible errors or omissions in the design phase, but also balance his duty to be "impartial" (under the 4<sup>th</sup> Ed of the Red Book) when acting as Engineer, he must judge his own actions or inactions. Even if his role as Engineer is not the basis of a claim, he nevertheless is in the uncomfortable position of trying to give judgment between two parties: (1) his valued client, the Employer, from whom he may hope to receive further work in the future; (2) the Contractor, who if his claim succeeds may cause delay or cost to that valued client, the Employer. In order to resolve this dilemma, FIDIC has restructured its Red Book as well as Yellow<sup>7</sup> and Silver<sup>8</sup> Books in 1999, by replacing the Engineer's Decision with the DAB process.

#### **5. Establishing and Operating a DB**

##### **5.1 Timing**

It is often the case that the land acquisition of the construction Site has not been finished, that the right of way to the Site has not been acquired, that the Drawings for construction have not been delivered to the Contractor timely, the mobilization of the construction equipment has not been

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<sup>5</sup> *Conditions of Contract for Works of Civil Engineering Construction*

<sup>6</sup> *Clause 67; Settlement of Disputes*

<sup>7</sup> *Conditions of Contract for Plant and Design-Build*

<sup>8</sup> *Conditions of Contract for EPC Turnkey Projects*

complete by the planned date and so on. Thus, problems and difficulties often occur from the very beginning of a project which have adverse effects to the progress of the contract and perhaps the entire project. The purpose of a DB is to prevent formal disputes from arising by helping to resolve disagreements before they escalate to formal disputes, if arise. Therefore, it is obvious that a DB should be established at the outset of a project to fulfil its purpose. Yet, FIDIC 1999 Yellow Book and FIDIC 1999 Silver Book provide for an “ad-hoc” DB, established after a dispute has arisen. From the author’s point of view, the “ad-hoc” DB loses the principal value of the DB concept.

## 5.2 Qualifications of DB Members

FIDIC Conditions of Contract, ICC Dispute Board Rules and the DRBF<sup>9</sup> Manual describe similar qualifications or required attributes of DB members. The following are the ones specified in DRBF Manual:

Quote:

When nominating prospective Board members, the contracting parties should recognize the following necessary attributes:

- Complete objectivity, neutrality, impartiality and freedom from bias and conflict of interest for the duration of the contract.
- Dedication to the objectives and principles of the DRB process.

In addition to these attributes, the parties must evaluate the experience and qualifications of the prospective members for the specific project, with respect to:

- Interpretation of contract documents
- Resolution of construction disputes
- The type of construction involved
- The specific construction methods to be used
- The dispute-prone facets of the work

Unquote

Each DB member warrants that he/she meets the requirements for the duration of the contract, and

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<sup>9</sup> *Dispute Resolution Board Foundation, Seattle, Washington, USA, <http://www.drb.org/>*

shall declare any change which may arise.

### **5.3 Selection of DB Members**

According to FIDIC 1999 Red Book, each of the parties shall nominate one member for the approval of the other party. The parties shall consult the selected two members and shall agree upon the third member who shall become the Chairperson. In addition to the required attributes described above, the Chairperson shall have the ability of running effective meetings in difficult situations.

Where to find a potential DB member? FIDIC provides for the List of President's Approved Dispute Adjudicators which is on its website<sup>10</sup>. Upon request, DRBF and ICC also will nominate or appoint DB members. The IDRC (International Dispute Resolution Centre) in Dublin, Ireland (part of the American Arbitration Association) has a list of persons suitable for DB work, as does the DBF (Dispute Board Federation). So, also, do the Institution of Engineers of Ireland and the UK ICE (Institution of Civil Engineers).

## **6. Cost of a DB**

The costs for the DB process consist of two parts, one of which is the remuneration and reasonable expenses of the DB members and these costs are to be shared equally by the parties. The remuneration consists of the Monthly Retainer and Daily Fee. According to the General Conditions of Dispute Board Agreement of the FIDIC Red Book, a Retainer Fee per calendar month shall be considered as payment in full for, (i) being available on 28 days' notice for all Site visits and hearings; (ii) becoming and remaining conversant with all project developments and maintaining relevant files; (iii) all office and overhead expenses including secretarial services, photocopying and office supplies incurred in connection with his duties. A Daily fee shall be considered as payment in full for, (i) each day or part of a day up to a maximum of two days' travel time in each direction for the journey between the Member's home and the Site, or other location of any other meeting with the other Members; (ii) each working day on Site visits, hearings or preparing decisions; and (iii) each day spent reading submissions in preparation for a hearing.

Also, typically the Contractor provides local transportation for the DB to the Site, and if the Site is remote, will provide the DB with Site accommodation and meals, and the cost of this shared with the Employer. Recovery of the Employer's share typically is accomplished by including it in the next monthly progress invoice, or if there are stage payments, then by a separate invoice.

The other part is the costs to be incurred by the parties themselves. The Contractor shall pay for the costs of travel and accommodation for the company's staff to participate in the DB Site visits. If a

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<sup>10</sup> <http://www.fidic.org/>

referral is made and hearing is to be held, the Contractor shall pay for costs for preparation of position papers, the costs for obtaining the experts' opinion, if necessary, costs for the travel and accommodation of their company's staff and their experts to participate in or attend the hearing to be held at the Site. (Normally, legal counsel do not participate in DB hearings.) The Employer shall pay for the similar costs of its participation in the process, including those relating to the Engineer, who typically has a large involvement, including drafting Employer written submissions, arranging to obtain experts' opinions, and assisting at any hearing.

## **7. Conclusion**

Too often, even though the contract calls for a DB, the parties see the DB as "too expensive" and because they have no disagreements at the beginning of the contract (the parties being "newly weds") so they postpone establishing the DB and say "We will establish the DB if we have a dispute which we cannot settle by friendly discussion." Or they establish the DB but insist that the DB Site visits be only annually, instead of quarterly, so they can "save money". These attitudes reflect lack of experience in use of DBs and lack of understanding that a properly established and maintained DB is one of the most valuable economies they can accomplish.

What happens if there is no DB? Typically when claims become serious disputes, both the Contractor and the Engineer begin exchanging elaborate claims documents, typically prepared with the help of consultants such as claims consultant companies, experts in delay analysis, independent specialists such as geologists or geophysicists, consulting quantity surveyors, and lawyers (both those internationally prominent and local lawyers of the country of the contract). All of these are expensive helpers! Those used by the Engineer of course are paid for ultimately by the Employer.

Preparation of these documents takes more than money, it takes a lot of time. Inevitably the documents must be reviewed by the parties' managements. Meetings to review and discuss the documents of both sides will be held, week after week, month after month, as the parties struggle with each other for victory without having to go on to the further expense and delay of arbitration. Typically, the struggle will continue even after construction has been completed. The Employer will have to keep staff of the Engineer working longer than the case if claims had been resolved by the time construction was complete. Similarly, instead of being able to release all staff to other projects, the Contractor has to keep its key Site staff involved, and if its camp has been demobilized, may have to find commercial office space, and may have to find rental accommodation locally for its claim staff. It is likely that some if not all of the experts who have assisted the parties in preparing the claims documents will be involved in these meetings. As with document preparation, if the

experts are from outside the project country, significant transportation and accommodation costs are involved in attendance at meetings. Further, if eventually success is obtained in negotiating an amicable settlement, a very large amount of senior management time will have to be devoted to those negotiations. Sometimes it is even necessary to employ a mediator to assist the parties, and to avoid arbitration.

Obviously, it is very difficult to budget for these costs. By contrast, a DB can be planned for and budgeted from the outset.

So let us turn to what happens if a DB is established at the outset and operated properly. The DB will be familiar with the contract from inception, and from its Site visits plus reading of regular written reports received between Site visits, the DB will be familiar with the progress of the construction. From experience on similar projects elsewhere, the DB will be alert to the principal areas of risk and potential problems. The DB will have the experience to assist the parties in avoiding conflict, and when disagreements do arise, in guiding the parties so that amicable settlement is achieved without elevating the disagreements into formal disputes. The most successful DBs are those which never have to deal with formal written submissions and hold hearings. Instead, using papers already in the hands of the persons doing the day-to-day management of the contract, and informal discussions, they can guide the parties to mutually acceptable resolutions. Typically, only the Site management staffs are involved with the DB, and the involvement of senior management of the parties is not required to reach resolution of disagreements on Site.

If for some reason a particular disagreement unavoidably becomes a formal dispute, the DB will be resolved to reach its own decision on the dispute quickly, and will control the production of documents to keep them to a minimum, keep any hearing to the minimum duration necessary to give each party a fair hearing, and then will prepare its decision under a time limit to which they are bound by their contracts with the parties. They will seek to give a unanimous opinion, and even if it is not fully acceptable to both parties, it very often forms the basis for further discussions and negotiations between the parties and leads to a settlement without either party initiating arbitration. Also, typically in contracts with DBs, all disagreements arising during construction will be resolved by the time construction is complete.

Clearly, the cost of a DB is a *saving* compared to the traditional end-of-the-contract battles over massive claims documents (and counter-claim documents!) dragging on many months after construction is complete.



## Japan International Cooperation Agency(JICA)

DAB (Dispute Adjudication Board) Seminar  
Colombo, Sri Lanka

### Adjudication/ DAB practice in Sri Lanka

Speaker:

**Tilak P. Kolonne**

B.Sc (Hons), DipArb, FRICS, FIQSSS, ACI Arb  
Chartered Quantity Surveyor, Arbitrator, Adjudicator

Director  
VFORM Consultants Private Limited  
23/1, 5th Lane, Nawala, SRI LANKA.

Email: tpk@vformconsultants.com  
tilakkolonne@yahoo.com

Telephonne : 00 94 777 957 288  
00 94 114 895 500

1/02/2010

## ADJUDICATION/DAB PRACTICE IN SRI LANKA

### Generally

- Presentation is generally based on ICTAD/SBD/02 (January 2007) and FIDIC 1999 Conditions of Contract (Construction) unless otherwise mentioned.
- ICTAD/SBD/02 is based on FIDIC 1999 Conditions of Contract (Construction).
- Adjudicator
- DAB
- ANB (Adjudicator Nominating Body)
- Referring Party/ Claimant
- Responding Party/ Respondent

## ADJUDICATION/DAB PRACTICE IN SRI LANKA

### Current Practice

- ❏ Contractual Provisions
- ❏ Appointment of Adjudicator
- ❏ Practical experience as Adjudicator/ DAB member/ consultant to party
  - ❏ Disagreement of parties in appointment
  - ❏ Reluctant party
  - ❏ Parties' inability to meet deadlines
  - ❏ Lack of proper records/Dispute not apparent or crystallized
  - ❏ Giving immediate effect to the decision
  - ❏ Negotiated settlement
  - ❏ Employers' positive attitude
- ❏ Future trends

## ADJUDICATION/DAB PRACTICE IN SRI LANKA

### Contractual Provisions

ICTAD Conditions of Contract- SCA/1 (Now superseded)

➡ Engineer 's decision

➡ Arbitration

Note: There is no a provision for 'amicable settlement'



## ADJUDICATION/DAB PRACTICE IN SRI LANKA

ICTAD Conditions of Contract – ICTAD/SBD/02 (January 2007)

➔ Engineer's Determination (Sub-Clause 3.4)

➔ Adjudication (Sub-Clause 19.2 to 19.4)

➔ Amicable settlement ?

FIDIC

SBD 2

➔ Arbitration (Sub-Clause 19.5)



## ADJUDICATION/DAB PRACTICE IN SRI LANKA

ICTAD/SBD/02

Contract Data

Clause 19.4

Within 84 Days after receiving such reference, or within such other period as may be proposed by the DAB and approved by both Parties, the DAB shall give its decision, which shall be reasoned and shall state that it is given under this Sub-Clause. The decision shall be binding on both Parties, who shall promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitral award as described below. Unless the Contract has already been abandoned, repudiated or terminated, the Contractor shall continue to proceed with the Works in accordance with the Contract.

Provision for amicable settlement not given  
Omission??

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## ADJUDICATION/DAB PRACTICE IN SRI LANKA

FIDIC 1999 (Construction)

20.5

**Amicable Settlement**

Where notice of dissatisfaction has been given under Sub-Clause 20.4 above, both Parties shall attempt to settle the dispute amicably before the commencement of arbitration. However, unless both Parties agree otherwise, arbitration may be commenced on or after the fifty-sixth day after the day on which notice of dissatisfaction was given, even if no attempt at amicable settlement has been made.

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## ADJUDICATION/DAB PRACTICE IN SRI LANKA

### Appointment of Adjudicator

- Reference to adjudicator giving 7 days notice to other party
- The Adjudicator shall be appointed by agreement between parties
- If not appointed by Parties within 14 day then either party can request ICTAD to appoint
- ICTAD shall appoint Adjudicator



## ADJUDICATION/DAB PRACTICE IN SRI LANKA

### Appointment of Adjudicator

- ICTAD acts as ANB (Adjudicator Nominating Body)
- ICTAD being a State body acting as ANB
- Use of professional bodies as ANB , ie. IESL, SLIA, IQSSL



## ADJUDICATION/DAB PRACTICE IN SRI LANKA

### Practical experience as Adjudicator/ DAB member/ Consultant to party

➔ Disagreement of parties in appointment/ reluctant party

**Case 1** – Dispute related to termination of contract by employer  
**Speaker's role:** consultant to contractor

- Road project
- Employer is a body in Southern Province
- Contractor is a private contractor
- Employer agreed with Adjudicator named by contractor
- But Employer reluctant to sign DAB agreement
- Claimant wants to proceed even in the absence of the other party, claimant ready to pay full fee



## ADJUDICATION/DAB PRACTICE IN SRI LANKA

➔ Disagreement of parties in appointment/ reluctant party

### Case 1

- Adjudicator is of the view that he will be seen bias if he proceeds with one party
- Adjudicator resigned as there is no provision in the Contract to proceed with one Party

New SBD 02 provides...

- Claimant proposed second Adjudicator
- Employer again agreed in principle, but again reluctant to sign Adjudication agreement
- Then, Claimant gave 21 day notice of Arbitration nominating the Arbitrator



## ADJUDICATION/DAB PRACTICE IN SRI LANKA

### ICTAD/SBD/02

#### Contract Data

#### Procedural Rules (Clause 7)

7. Except as otherwise agreed in writing by the Employer and the Contractor, the DAB shall have power to adopt an inquisitorial procedure, to refuse admission to hearings or audience at hearings to any persons other than representatives of the Employer, the Contractor and the Engineer, and to proceed in the absence of any party who the DAB is satisfied received notice of the hearing, but shall have discretion to decide whether and to what extent this power may be exercised.

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## ADJUDICATION/DAB PRACTICE IN SRI LANKA

➔ Disagreement of parties in appointment/ reluctant party

### Case 1

- > Also gave notice if Employer fail to appoint their Arbitrator, application will be made to High Court for suitable appointment as per Arbitration Act
- > Then Employer sent a letter and cooperated with Adjudication proceeding
- > Reference to Adjudication was made in January 2009
- > Decision is expected in January 2010



## ADJUDICATION/DAB PRACTICE IN SRI LANKA

➔ Parties' inability to meet deadlines/ lack of proper records/ dispute not apparent or crystallized / negotiated settlement

**Case 2** – Dispute related to unpaid amounts on variation and claims

**Speaker's role:** Consultant to Contractor

- > Project is a Stadium
- > Employer is a State body related to Sports
- > Contractor is a private Contractor
- > Dispute was related to variation and disruption claim
- > In preliminary hearing Claimant agreed to submit Statement of Claim by a certain date



## ADJUDICATION/DAB PRACTICE IN SRI LANKA

➔ Parties' inability to meet deadlines/ lack of proper records/ dispute not apparent or crystallized / negotiated settlement

### Case 2

- > When preparing the Statement of Claim he found records insufficient or records were not in order, difficulty to establish the "dispute" by records
- > Statement of Claim was submitted 2 days late knowing it is not complete
- > Adjudicator sent a list of queries to reply with a deadline
- > Claimant was struggling to find the records and requested one week extension
- > Claimant himself could not meet deadline
- > Arrived at a negotiated settlement



## ADJUDICATION/DAB PRACTICE IN SRI LANKA

### Conditions of Contract for Design, Build and operate projects (Gold Book) First Edition 2008 Sub-Clause 1.1.3.1

"Dispute" means any situation where (a) one Party makes a claim against the other Party; (b) the other Party rejects the claim in whole or in part; and (c) the first Party does not acquiesce, provided however that a failure by the other Party to oppose or respond to the claim, in whole or in part, may constitute a rejection if, in the circumstances, the DAB or the arbitrator(s), as the case may be, deem it reasonable for it to do so.

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## ADJUDICATION/DAB PRACTICE IN SRI LANKA

➔ Lack of proper records

**Case 3-**Dispute as to whether there is a variation to the contract  
**Speaker's role:** Adjudicator

- Road project funded by a Japanese Bank
- Employer is a body in Uva Province
- Contractor is a private Contractor
- Claimant's claim is additional cost due to the variation
- Employer defended by saying no instruction given for variation, but maintained the position that change was allowed at requested of the Claimant for his convenience
- Claimant failed to provide evidence of an instruction due to lack of proper records



## ADJUDICATION/DAB PRACTICE IN SRI LANKA

➔ Giving immediate effect to the decision

**Case 4-**Various disputes  
**Speaker's role:** DAB member

- Road project funded by a Japanese Bank
- Employer is a State body
- Foreign Contractor
- Full term DAB
- Up to now DAB has decided on five disputes
- Employer used to seek legal advice before giving effect to the decision



## ADJUDICATION/DAB PRACTICE IN SRI LANKA

### Future trends

- Standard form of sub contract with Adjudication provisions
- Construction Industry Development Act with Adjudication provisions
- Mediation (as an option) prior to Adjudication
- Training and Research



# Thank You

## Q &amp; A at the DAB Seminar (Cambodia)

1. Time: 14:00 – 17:15, 19 November 2009
2. Place: Phnom Penh Hotel, Cambodia
3. Participants: 77
4. Q&A (Q: Question, A: Answer, C: Comment)

Q1: How many percentages of the contract price will a DB cost?

A1: The cost of DB varies greatly according to the contents and scope of the work, which makes it difficult to tell the percentage in general.

Q2: What's the difference between arbitration, mediation, conciliation, litigation and DB?

A2: Usually in mediation or conciliation, a recommendation is given. On the other hand, in arbitration an enforceable award is given. Whilst the validity of a litigation judgment may not be recognized by other countries' courts, the arbitral award will be enforceable within the signatories of the New York Convention (144 countries in total). The DB also gives a decision, which will be enforceable unless either of the contracting parties gives a notice of dissatisfaction and invokes arbitration.

Q3: Does it mean that the decision of DB has a comparatively weaker enforceability than an arbitral award?

A3: As is mentioned just now, the DB's decision is temporarily binding, which means its enforceability is weaker.

Q4: What are the requirements for becoming an adjudicator?

A4: Experiences of a dispute resolver as an independent neutral are necessary. Currently about 50 adjudicators have been registered on the FIDIC President's List of Approved Adjudicators. However such number turns out to be insufficient. In order to increase the number of adjudicators, FIDIC is now recommending its Member Associations to develop a registration system of adjudicators.

Q5: What are the usual causes of claims and disputes?

A5: Though claims and disputes can be caused by various reasons, such problems as delay in Site Possession, Unforeseen Physical Condition (especially geological problems during underground construction works) and Changes in Legislation during the construction are typical causes. Construction contract, which is also defined as a typical incomplete contract,

has a high level of uncertainty during its execution. Therefore, it is difficult to prevent claims from taking place.

Q6 : Is JICA prepared to provide any kind of support for the introduction of DAB?

A6 : Though it is not possible to commit now, by this investigation we will try to find out what kind of support is possible.

## Q &amp; A at the DAB Seminar (Vietnam)

1. Time: 14:00 – 16:10, 24 November 2009
  2. Place: Daewoo Hotel, Hanoi, Vietnam
  3. Participants: 140
  4. Q&A (Q: Question, A: Answer, C: Comment)
- C: It was well explained by the presentation that DB assists the contracting parties in preventing disputes as well as in resolving disputes (JICA)
- C: Adoption of DB in a construction contract is mandatory for domestic projects as well as for ODA projects in Sri Lanka. The average Daily Fee for a Sri Lankan adjudicator is around US\$300.
- Q1: The governmental authority as an Employer of a project may not be allowed to share the cost of DB adjudicators.
- A1: The remuneration of the arbitrators and the administration fee of the arbitral institution are to be shared by the parties in Japan and the USA. Likewise, the costs of DB operation can be shared by the contracting parties. In UK (England and Wales), the loser of the case shall pay the cost of the other party.
- Q2: What can be done to help proper DB operation when one of the parties is not cooperative?
- A 2: A DB cannot be operated properly without mutual cooperation. If the Employer is the one who is not cooperative, he should not have adopt the DB process into the project contract in the first place.
- Q3: Is the Engineer's decision unnecessary if a DB is adopted in a construction contract?
- A3: The Engineer shall make a determination first as shown in the flowchart included in the seminar materials. The determination shall be fair. If either or both parties are dissatisfied with the determination, the dissatisfaction becomes a dispute which will be referred to DB for decision. Therefore, the Engineer is still required to make a determination as before.
- Q4: DB concept is not accepted in the Vietnam legal framework.
- A4: In most countries, the arbitral award and the judgment of a court are final and binding on the parties. DB process gives a binding decision under the contractual mechanism and also gives a choice to the parties, if unsatisfied with the decision, to invoke arbitration or go to court. Therefore, DB does not have a conflict with the legal system.



## Q &amp; A at the DAB Seminar (Bangladesh)

1. Time: 14:00 – 17:00, 28 January 2010
2. Place: Pan Pacific Sonargaon, Dhaka, Bangladesh
3. Participants: 57
4. Q&A (Q: Question, A: Answer, C: Comment)

Q1: As for the 84-day time limit for DAB's decision making, isn't it necessary for such time limit to be adjusted according to the size of the project?

A1: Rather than the time period, we believe it is the number of DAB members that should be concerned according to the project size. In projects with small scales, the DAB can be composed of only one adjudicator. However, it can be easily assumed that the contracting parties may be unwilling to obey such decisions that were made by only one adjudicator. Therefore, in such cases rather than a one-person DAB, a one-person DRB is recommended so that rooms are left for the contracting parties to decide whether to accept the DRB's recommendations.

Q2: Since the remuneration of DAB is first to be paid by the Contractor for full (100%), will such fact result in any bias in the DAB's decisions?

A2: Since 50% of the amount of payment to the DAB will be charged to the Employer ultimately, such bias is considered impossible to take place.

Q3: Disputes are increasing also in Bangladesh because of strongly one-sided contracts. This suggests the necessity of training and education of adjudicators should be carried out by such international cooperation institutions as the JICA for the success of DAB.

A3: Hosted by the JICA, today's seminar is exactly such a chance for us to deepen the understanding of DAB. What's more, the JICA is also planning to carry out FIDIC contract trainings for the staffs from execution agencies of JICA ODA loan projects in Asian countries, such trainings are planned to be carried out over several times in the future.

C1 : In Bangladesh the CPTU (Central Procurement technical Unit) is now taking up the duty of drafting and publishing standard forms of contract. In order to promote the adoption of DAB in Bangladesh, to introduce the DAB process into the CPTU's standard forms of contract might be a good way of promotion.

Q4: Actually, as for the selection of DAB members, isn't it necessary to set up more specific criteria?

A4: The selection of DAB members can be left to the contracting party's discretion, and such matter is preferable to be decided according to the features of the project.

Q5: In case of any objection against the DAB's decision, is it possible to refer the dispute to litigation?

A5: First of all, in international contracts, it is usually provided that disputes should be finally settled by arbitration rather than litigation. Such arbitral awards are enforceable within the signatories of New York Convention. On the other hand, the litigation judgments will not be enforceable in other countries, which is the reason why arbitration is the general method of dispute resolution in international business. When arbitration is provided by the contract, whether it is possible to skip arbitration and refer the dispute directly from DAB process to litigation, depends on the law of that country. For example, when such a dispute is referred to litigation in Japan, the court will possibly answer that it has no jurisdiction and the dispute shall be settled by arbitration.

Q6 : As for the 84-day time limit for DAB's decision making, is it possible for this period to be shortened?

A6 : In UK (England and Wales), it is not possible to directly refer a dispute to arbitration without the decision of a statutory adjudication (which differs from a normal DAB concept and is similar to an one-person ad-hoc DAB) and the adjudicator shall decide within 28 days. Decisions given under such condition are often called as "rough justice", because detailed examinations into the cases can hardly be carried out within such a short period as 28 days. Nevertheless, this system functions well in UK and the number of arbitration cases turns out to be greatly decreasing. Therefore, the 84-day time limit might be shortened to some degree.

## Q &amp; A at the DAB Seminar (Sri Lanka)

1. Time: 14:00 – 17:10, 1 February 2010
2. Place: Hilton Colombo Residence, Colombo, Sri Lanka
3. Participants: 105
4. Q&A (Q: Question, A: Answer, C: Comment)

Q1: A DB process similar to the one mentioned in today's seminar is also provided for in the local conditions of contract for construction of Sri Lanka. However, it is often experienced that the expected advantages cannot be achieved in the adoption of ad-hoc DB.

A1: The maximum advantages of DB can be fully brought out only by adopting a standing DB. While other ADR processes are established after a dispute has taken place, a standing DB is established from the beginning of the construction so that it has a preventive effect against disputes. Though in the FIDIC Yellow Book and the Silver Book ad-hoc DB is provided for, in the FIDIC Gold Book (Design, Build and Operate) published in 2008, a standing DB has been introduced. What's more, it is said that the FIDIC is now considering the modification from ad-hoc DB to standing DB in the revisions of the Yellow Book and the Silver Book.

Q2: In Sri Lanka, the adjudicator's decision has no validity at court. Is there any remedy for this situation?

A 2: Precisely as you have mentioned, the adjudicator's decision is only contractually binding but is not enforceable at court. However, if the Construction Industry Development Act that being deliberated now comes into effect, the adjudicator's decision might also be legally enforceable.

Q3: According to Article 67.2, the timing of beginning arbitration is 56 days after declaring the intention of arbitration. Such time period seems too long even if the parties do not conduct negotiations for amicable settlement,

A3: I quite agree with you. Under such situation that there is no negotiation for amicable settlement, this time period of 56 days may possibly be wasted. If there is a chance, I hope to discuss this matter with the contract committee of FIDIC. On the other hand, negotiation for amicable settlement can be conducted by the parties at any time, for instance, an amicable settlement can be achieved by negotiation which is held abreast with the arbitration.

Q4: Is it possible for the DB to give decisions beyond the conditions of contract? For example, when there are no rules concerning about price fluctuations, is it possible for the DB to lay down such rules?

A4: The decisions of the DB should be based upon the contract and facts to the end, and such decisions that go beyond the contract shall not be given. However, for the sake of promoting the contracting party's mutual agreement, it is also considered possible that the DB can give recommendation that is beyond the scope of the contract if requested by both parties.

C1 : It is important for the resolution of disputes that all the stakeholders act with the spirit of impartiality during the process of DB. We feel it very meaningful for JICA to hold such a seminar today.

Q5: In case that one party makes an objection to the DB's decision, how should the other party act?

A5: Both of the contracting parties shall keep in mind that the DB's decision has binding power upon them. Refusing compliance with such decision can be seen as bad business practice and is breach of contract. In such a case the other side can even refer such neglect of compliance to arbitration.

Meeting with Implementing Agencies of  
JICA ODA Loan Projects (PAS)

1. Date and time: 19th November 2009, 17:30 - 18:15
2. Venue: Phnom Penh Hotel, Cambodia
3. Participants:
  - PAS (Port Authority of Sihanoukville)
    - Mr. Lou Kim Chhun (President)
    - Mr. Souk Kol Chenda (Project Administrator of PMU)
    - Mr. Sam Sopheap (Project Accountant of PMU)
  - JICA
    - Ms. Fuyuko Oki (Loan Procurement Policy and Supervision Division)
  - JICA Study Team
    - Prof. Toshihiko Omoto (Kyoto University), Mr. Yukinobu Hayashi (Nippon Koei)
4. Summary of the Meeting
  - 1) Does PAS have experience in contract disputes in the past? (Study Team)
  - 2) There were cases of unsatisfactory conditions, however, they were not developed into large disputes. (PAS)
  - 3) We value Japanese consultants and contractors' efforts for trying to resolve problems amicably. In this connection, we do not find necessity of introducing DB, however, it may function well on contractor's projects in a certain country in Asia. (PAS)
  - 4) In the projects of about 1.5 billion Japanese yen, service fee for consultant is generally 8% to 9% of the total cost. If the cost of DB is that of 1.2% to 1.3%, it may be reasonable. In such a case, we may reduce service fee of consultant to allocate DB cost. (PAS)
  - 5) In general, contractors file claims or disputes. We feel it is not reasonable if employers have to pay half of the DB cost for dispute resolution. (PAS)
  - 6) Currently on-going SEZ development project in Sihanoukville prescribes establishment of DB and has started October 2009, however, DB is not yet established. A scenario of introducing DB in future projects such as Multi-purpose Terminal Construction Project may be possible in which all DB cost is granted in trial basis. (PAS)
  - 7) As DB is a new system in Cambodia, agreement by MOEF (Ministry of Economy and Finance) will be required before its realization. (PAS)

Meeting with Implementing Agencies of  
JICA ODA Loan Projects (PPWSA)

1. Date and time: 20<sup>th</sup> November 2009, 8:15 - 9:30
2. Venue: PPWSA office, Phnom Penh
3. Participants:
  - PPWSA (Phnom Penh Water Supply Authority)
    - Mr. Samreth Sovithia (Director of Planning and Technical Department)
  - JICA
    - Ms. Fuyuko Oki (Loan Procurement Policy and Supervision Division)
  - JICA Study Team
    - Prof. Toshihiko Omoto (Kyoto University) , Mr. Yukinobu Hayashi (Nippon Koei)
4. Summary of the Meeting
  - 1) Currently we are executing Nirot Water Supply Project. Intake facility and water supply pipeline are covered by France aid whereas water purification facility, pumping station, water distribution pipelines are covered by JICA ODA Loan. (PPWSA)
  - 2) Construction contract covered by JICA is currently under bidding. Therefore, it cannot be a subject to DB. World Bank's contract documents for design-build is likely to be used in this project. In the provision of the contract, dispute resolution is referred to adjudicators. (PPWSA)
 

Remarks by Study Team: This adjudication system is similar to that of England's Statutory Adjudication) .
  - 3) Though DB is not familiar in Cambodia, Alternative Dispute Resolution (ADR) is recommended by government. Similar provisions are integrated in the local government's procurement documents. Support and understanding of the MOEF (Ministry of Economy and Finance) is deemed necessary for dissemination of DB. (PPWSA)
  - 4) Teamwork between employer, contractor and consultant is important for smooth implementation of a project. If concerned parties have a will to resolve disputes amicably, half of disputes will be avoided. There may have no dispute problems as long as we implement projects with Japanese contractors or consultants. We may need DB when those from Europe, Korea or China enter into a project. (PPWSA)

Meeting with Implementing Agencies of  
JICA ODA Loan Projects (EdC)

1. Date and time: 20<sup>th</sup> November 2009 , 10:15 - 11:30
2. Venue: EdC office, Phnom Penh
3. Participants:
  - EdC (Electricite du Cambodge)
    - Mr. Chan Sodavath (Deputy Managing Director, Planning and Techniques )
    - Mr. Chhim Man (Head of PMO)
    - Mr. Im Songtech (Deputy Chief of High Voltage Section
  - JICA
    - Ms. Fuyuko Oki (Loan Procurement Policy and Supervision Division)
  - JICA Study Team
    - Prof. Toshihiko Omoto (Kyoto University) , Mr. Yukinobu Hayashi (Nippon Koei)
4. Summary of the Meeting
  - 1) DB is not recognized in Cambodia yet. There may be cases that lawyers or National Audit Authority involve in dispute resolutions. (EdC)
 

DB Process is different from legal dispute resolution process such as arbitration or litigation. As DB is contract procedure, we believe that DB could be accepted in majority of law-governed countries. (Study Team)
  - 2) As the projects implemented by EdC are small-scale, DB may not fit in our projects from the standpoint of budget allocation. Engineer's decision is considered sufficient. DB may function well in large-scale projects. (EdC)
 

Agree with the above comments. (Study Team)
  - 3) As large-scale hydropower projects have executed on BOT basis, introduction of DB is subject to decision by each SPC. (EdC)
 

DB can be used in contacts between SPC and contractors. (Study Team)
  - 4) In order to rationalize DB cost, it may be considered that one DB team handle multiple projects at the same time or introduce one-person DB/DRB. (Study Team)

Meeting with Implementing Agencies of  
JICA ODA Loan Projects (MPMU)

1. Date and time: 23<sup>rd</sup> November 2009, 9:30 - 11:00

2. Venue: MPMU (Major Project Management Unit), Hanoi

3. Participants:

MPMU

Mr. Nguyen Sy Bao (Director)

Mr. Pham Dinh Tuan (Vice Director)

Mrs. Hien (Deputy Head of General Planning Dept.)

JICA

Mr. Mamoru Sakai (JICA Vietnam Office) ,

Ms. Fuyuko Oki (Loan Procurement Policy and Supervision Division)

JICA Study Team

Prof. Toshihiko Omoto (Kyoto University) , Mr. Yukinobu Hayashi (Nippon Koei)

4. Summary of the Meeting

1) As DB is a new system of dispute resolution, employer's merits have to be clarified. (MPMU)

It is difficult to quantify employer's merits on DB. Hypothetical arguments could be made, however, it is just hypothetical. However, DB is disseminated as effective means in Europe and U.S.A. where many disputes arise. Merit of DB is to resolve disputes before completion of projects in short period. JICA would welcome DB for enhancement of disbursement. Should a dispute develop into arbitration or litigation, it requires time-consuming process before resolution. As a consequence, employer has to pay large cost. (Study Team)

2) As a method of paying employer's DB cost, it may be included as a provisional sum in BoQ of a construction contract. In this case, employer needs not allocate additional budget. Contractor's expected DB cost could be included in contract amount. As a consequences, all the DB cost would be born by employer. (Study Team)

DB cost should be covered by ODA loan if it is introduced. Contractors file majority of claims. As a result, employers have to pay all the DB cost. Therefore, it is important that merits for employers have to be clarified. (MPMU)

3) Legal framework in Vietnam is different from that of developed countries. Therefore, establishment of legal framework is necessary for adoption of DB. DB is not prescribed in Law on Construction in Vietnam. (MPMU)



Arbitration law and litigation rules are laid down in many countries. DB would not be incompatible nor conflict with these regulations. Validity of DB decision is based on contract agreement. If parties disagree with DB decision and files the issue to arbitration or litigation, DB decision has no final binding power. (Study Team)

4) MPMU is under the Hanoi Peoples Committee, thus can't decide adoption of DB by themselves. At present, there are cases that the Hanoi Peoples Committee intervene in the process of dispute resolution, or do not approve engineer's decisions. (MPMU)

5) What is the difference between Engineer's decision and DB decision? (MPMU)

In the 4th edition of FIDIC Red Book, Engineers play a role of employer's agent as well as impartial position. This condition sometimes create obstructs for engineers to make impartial decision. In contrary, DB is formed by agreement between employer and contractor and Both parties also make payment. Perfect impartiality is secured in DB. (Study Team)

6) What about nationality of Dbmember? (MPMU)

FIDIC does not specify nationality of DB member in provisions or guidelines. In general, employer and contractor nominate adjudicators from the respective countries and the third person (chairman) is selected from other nations. Or all of the 3 adjudicators are selected from other countries. The nomination is free. Regarding professional considerations, it is quite common that 2 persons are nominated from engineering discipline and chairman is selected from lawyers. In the process of DB selection, it should be noted that none of the members are advocate of employer and contractor. (Study Team)

Meeting with Implementing Agencies of  
JICA ODA Loan Projects (MPI)

1. Date and time: 23<sup>rd</sup> November 2009, 13:30 - 15:00

2. Venue: MPI (Ministry of Planning and Investment), Hanoi

3. Participants:

MPI

Mr. Dang Huy Dong (Vice Minister)

Mr. Le Van Tang (Director General, Public Procurement Agency)

Mr. Nguyen Xuan Dao (Deputy Director, Public Procurement Agency)

Ms. Vu Quynh Le (Director, Center for Procurement Support)

Mr. Nguen Hoang Linh (Foreign Economic Relations Dept.)

JICA

Mr. Mamoru Sakai (JICA Vietnam Office) ,

Ms. Fuyuko Oki (Loan Procurement Policy and Supervision Division

JICA Study Team

Prof. Toshihiko Omoto (Kyoto University) , Mr. Yukinobu Hayashi (Nippon Koei)

4. Summary of the Meeting

- 1) Some of PMI staffs participated in DB seminar in HCMC organized by DBF (Dispute Board Foundation) in this May. DB is beneficial to employers, as it not only provides function of dispute resolution but also that of. dispute prevention. In China, we heard that effectiveness of DB is acknowledged. DB has disseminated from Hong Kong to all over China. (Vice Minister)
- 2) As the next step, we would like to launch pilot projects and learn & demonstrate DB process. Selection of pilot projects has to be carefully examined, as there are cases like Hanoi TV Station Construction Project that DB did not function as expected. At the same time, project implementing agencies such as MOT (Ministry of Transportation), MOC (Ministry of Construction) and MOJ (Ministry of Justice) have to understand DB process. (Vice Minister)

We share the same understanding of necessity of launching pilot projects. Present study has implemented as a part of this objective. (JICA)

- 3) Adjudicator selection is another problem. Establishment of DB selection process having high transparency system is essential condition. Regarding capacity building of adjudicators in Vietnam, we have to rely on foreign adjudicators for the time being. However, in the future, we would like to foster local adjudicators. To cope with these challenges, PPA (Public Procurement Agent) and CPS

(Center for Procurement Support) can play leading role in MPI. (Vice Minister)

- 4) Despite of launching DB at the outset of a project, what kind of measures should be taken if it can't be launched by some reasons? (MPI)

It is possible if both parties (employer and contractor) agree. In FIDIC Yellow Book (Plant and Design-Build) and Silver Book (EPC/Turnkey), ad-hoc DB is launched when dispute arise. However, we recommend establishing DB at the outset of projects as the great merit lies on prevention of dispute. (Study Team)

- 5) Are there enough number of adjudicators? (MPI)

There exist highly qualified people in Asian countries/ economies such as Hong Kong and Singapore. We may relegate selection of adjudicators to organizations such as FIDIC, ICC (International Chamber of Commerce) and BRBF (Dispute Resolution Board Foundation). (Study Team)

- 6) Do contractors continue construction works until decision is made by DB? (MPI)

Contractors are responsible for continuing works. This is same in arbitration. (Study Team)

- 7) How about DB dissemination in Japan? (MPI)

DB is not acknowledged in Japan at present. (Study Team)

- 8) How about immunity of DB members? (MPI)

Immunity of DB members should be guaranteed, however, it is subject to legal frame of the subject country. (Study Team)

Meeting with Implementing Agencies of  
JICA ODA Loan Projects (MOC)

1. Date and time: 23<sup>rd</sup> November 2009, 15:30 - 17:00

2. Venue: MOC (Ministry of Construction), Hanoi

3. Participants:

MOC

Dr. Pham Van Khanh (Head, Department of Construction Economics)

Mr. Pham Khanh Toan (Deputy Director General, International Cooperation Dept.)

Mr. Nguyen Thanh Tung (Official)

JICA

Mr. Mamoru Sakai (JICA Vietnam Office) ,

Ms. Fuyuko Oki (Loan Procurement Policy and Supervision Division

JICA Study Team

Prof. Toshihiko Omoto (Kyoto University) , Mr. Yukinobu Hayashi (Nippon Koei)

4. Summary of the Meeting

1) Is employment of DB obligatory in JICA projects? (MOC)

DB is a part of standard procedures in the JICA's new Sample Bidding Documents, however, it is not obligatory. In the old Sample Bidding Document, DB was one of the options. Therefore, implication of DB is different in the new Sample Bidding Document. (Study Team)

2) What are the benefit of employers by launching DB? (MOC)

Largest benefit of DB system is to resolve disputes before the completion of works. Arbitration requires considerable amount of time and dispute cost become expensive. Another benefit of DB lies on preventive function of dispute. DB submits informal advice/opinion upon receipt of request from both parties. In most of the cases that informal advices prevent the case to be escalated to disputes. (Study Team)

3) Explain briefly about DB cost (MOC)

DB cost is composed of ① retainer, ② daily fee, and ③ reasonable expenses. FIDIC does not have fee standard, however, agrees with the fee proposed by ICSID (International Center for Settlement of Dispute). It proposes daily fee of USD\$3,000 for a site visit. Monthly retainer is equivalent to 3 days of daily fee. At present, there are cases that of 1 day equivalent. It may be reasonable to extend interval of site visits to reduce expenses. Whatever the case may be, cost

should be negotiated with adjudicators. (Study Team)

Majority of projects in Vietnam are small size and their budget are also small. In addition, income level of Vietnamese is low. These factors build up higher hurdle against DB employment. DB cost is considerably higher than that of the Engineer. Could DB cost be cut in half? It is considered necessary to implement DB in large-scale projects in trial basis, and then prove effectiveness of DB accordingly. (MOC)

Meeting with Implementing Agencies of  
JICA ODA Loan Projects (PLN)

1. Date and time: 26 January, 2010 14:00-14:45
2. Venue: PT PLN Offices
3. Participants
  - PT PLN
    - Mr. N. Setiawan (Deputy Director for Construction Procurement Supervision),
    - Mr. Dansnulma, Mr. Suriawan S., Mr. Reisal R. H., Mr. Alland Asqolani, Mr. Christyono, Mr. Peter Cunningham
  - JICA Indonesia Office
    - Mr. Strisuno
  - JICA Study Team
    - Prof. Toshihiko Omoto (Kyoto University), Mr. Yukinobu Hayashi (Nippon Koei)
4. Summary of the Meeting
  - 1) PLN has no construction projects that introduced DB. Therefore, PLN's understanding about DB is little.
  - 2) What kind of persons is available as adjudicators? (PLN)
  - 3) FIDIC has announced approximately 50 president's list of adjudicators to the public. However, numbers of adjudicators are not enough. FIDIC recommends that each national Member Association (MA; INKINDO in Indonesia) implements assessment for adjudicators after which each MA registers National List of adjudicators and promotes its development. In the present study, Training Kit and Qualification Procedure will be drafted after which these materials could be introduced in Indonesia. (Study Team)
  - 4) Is it possible to introduce DB in on-going projects? (PLN)
  - 5) We find no problems in introducing DB as long as contract parties agree. It should be noted that the advantage of DB is to prevent dispute. Therefore, establishment of standing DB at the outset of a project is most desirable. (Study Team)
  - 6) Is the decision by DB valid in arbitration? (PLN)
  - 7) Of course. This is a reason why DB's decision is accepted. It is referred as the proof in arbitration or litigation.(Study Team)
  - 8) As DB cost could be considerable, burden share by JICA seems encouraging. (PLN)

- 9) DB will be gradually integrated in JICA ODA Loan projects. For example, Peusangan Hydraulic Power Project, currently in the process of bidding stage introduces JICA's Sample Bidding Document (2009 version) as well as DB. (PLN)

Meeting with Implementing Agencies of  
JICA ODA Loan Projects (RDA)

1. Date and time: 1<sup>st</sup> February, 2010 9:00 - 10:00
2. Venue: RDA Office, Colombo
3. Participants
  - RDA (Road Development Authority)
    - Mr. S. Meihandan (Project Director, Southern Transport Development Project)
  - JICA
    - Ms. Fuyuko Oki (Loan Procurement Policy and Supervision Division) ,
    - Ms. Namal Ralapanawe (JICA Sri Lanka Office)
  - JICA Study Team
    - Prof. Toshihiko Omoto (Kyoto University) , Mr. Yukinobu Hayashi (Nippon Koei)
4. Summary of the Meeting
  - 1) Southern Transport Development Project is composed of 4 construction packages in which Red Book (revised 4<sup>th</sup> edition) including DB is used. The project introduces 3-persons DB and all of them are Sri Lankan adjudicators. Two packages employ Japanese contractors. One of two packages has been in arbitration (ICC) though the DB decision was made. Employer has not put DB's decision in execution. In other packages, DB's decisions that are advantageous or disadvantageous for contractors and employers were made on 5 to 6 claims, however, employers have not accepted all of the DB's decision. In these cases, employers neglect executing DB's decision that are disadvantageous to them, including payment to contractors. Employers express dissatisfaction and attempt to re-negotiate with contractors. (RDA)
  - 2) DB's decision is binding unless otherwise overruled by arbitration or litigation. Therefore, attention should be paid on duly compliance with DBs' decision. (Study Team)
  - 3) In Sri Lanka, opinion of the Attorney General is required regarding the approval of tender documents or agreement on dispute resolution. In general, the Attorney General gives many comments of which JICA ODA implementing agencies should respect. (RDA)
  - 4) Is the written opinion by Attorney General reported to contractors? (Study Team)
  - 5) Dialogues between the Attorney General and the implementing agencies (employer) are internal procedures, thus we find no necessity of reporting them to contractors. (RDA)
  - 6) Daily remuneration for Sri Lankan adjudicators is USD\$300 to \$500. This is regarded considerably



higher than wages of government officials. We feel the employment of foreign adjudicators is not affordable. (RDA)

- 7) Based on our experience, we have doubt about effectiveness of DB. In many cases, adjudicators start their actions after disputes have occurred, thus prevention of dispute is not functioning enough. In addition, experience and impartiality of Sri Lankan adjudicators are in question.(RDA)

Meeting with Implementing Agencies of  
JICA ODA Loan Projects (DER)

1. Date and time: 1<sup>st</sup> February, 2010, 11:00 - 11:30
2. Venue: Department of External Resources (DER), Colombo
3. Participants:
  - DER, Ministry of Finance and Planning
    - Mr. K. T. I. Premarante (Assistant Director)
    - Ms. Ajitha Batagota (Assistant Director)
  - JICA
    - Mr. Masasige Yanagiuti (JICA Sri Lanka Office) ,
    - Ms. Fuyuko Oki (Loan Procurement Policy and Supervision Division)
  - JICA Study Team
    - Prof. Toshihiko Omoto(Kyoto University), Yukinobu Hayashi (Nippon Koei)
4. Summary of the Meeting
  - 1) DER is in charge of the procedures and procurement stages of JICA ODA Loan Projects, thus we are not familiar with DB and its operation. Regarding construction disputes on JICA ODA Loan projects, assessment committee established by government authority issued recommendation on Candi water supply projects, completed in 2007. Dispute on variation works has not resolved for a long time. Considerable amount of time has passed since the recommendation, however, still under the examination of cabinet decision. (DER)
  - 2) Do we consider DB cost to be eligible under JICA ODA Loan projects? (DER)
  - 3) JICA's Sample Bidding Document (2009 edition) introduces DB as standard process, thus DB cost can be considered as legitimate expense. Therefore, we consider DB cost to be eligible. (Study Team)
  - 4) We think DB system is reasonable. However, it is necessary to justify whether it is effective for employers by comparative study of cost simulations, namely projects with and without DBs, based on past projects. If the DB is not effective, daily service fee of USD\$3,000 is considered quite expensive. (DER)

Meeting with Implementing Agencies of  
JICA ODA Loan Projects (CEB)

1. Date and time: 1<sup>st</sup> February, 2010, 14:00 - 14:30
2. Venue: Ceylon Electricity Board (CEB), Colombo
3. Participants:
  - CEB (Transmission Projects Branch)
    - Mr. G. S. P. Mendis (Deputy General manager, Transmission Projects)
    - Mr. Palitha L. G. Kariyawasam (Project Manager, Karewaplapitiya Kotugita Transmission Project)
  - JICA
    - Ms. Fuyuko Oki (Loan Procurement Policy and Supervision Division)
    - Mr. Pyiyantha Senasinghe
  - JICA Study Team
    - Prof. Toshihiko Omoto (Kyoto University), Mr. Yukinobu Hayashi (Nippon Koei)
4. Summary of the Meeting
  - 1) At present, there have no serious construction disputes on projects undertaken by CEB (CEB) .
  - 2) We understand the concept of DB. There are no projects that we introduced DB. In case we introduce DB, ad-hoc DB is considered sufficient. We fear that Sri Lankan adjudicators in Sri Lanka have not enough experience. There seems no conflict between DB and legal framework of Sri Lanka. (CEB)
  - 3) Arbitration is widely used in Sri Lanka. Arbitration Center of Sri Lanka has been providing 4 months of week-end trainings. Two participants in today's meeting have completed this training course. (CEB)
  - 4) In the process of dispute resolution, legal matters are subject to lawyer's judgment whereas technical matters are subject to expert's judgment. (CEB)
  - 5) There exist arguments whether adjudicators should be engineers or lawyers. In case of 3-person DB, it is well balanced if chairman is selected from lawyer, other 2 are from engineering background. Among experts on international construction disputes, considerable number of lawyers have sufficient technical knowledge. (Study Team)

Meeting with Implementing Agencies of  
JICA ODA Loan Projects (NWSDB)

1. Date and time: 1<sup>st</sup> February, 2010 16:00 - 17:00
2. Venue: National Water Supply & Drainage Board (NWSDB), Latmalana
3. Participants
  - NWSDB
    - Mr. H. G. Tilakaratna (Additional General Manager, Water Supply Projects)
    - Mr. M. K. Hapuarachchi (Project Director, Secondary Town & Rural Community Based Water Supply and Sanitation Project)
    - Mr. M. M. Umarlebbe (Assistant General Manager, Japanese Projects Unit)
  - JICA
    - Ms. Fuyuko Oki (Loan Procurement Policy and Supervision Division),
    - Mr. S. arinda I. Elapata (JICA Sri LankaOffice)
  - JICA Study Team
    - Prof. Toshihiko Omoto (Kyoto University) , Mr. Yukinobu Hayashi (Nippon Koei)
4. Summary of the Meeting
  - 1) Secondary Town & Rural Community Based Water Supply and Sanitation Project (ADB loan) under construction stage is composed of 16 contract package. The project adopted FIDIC MDB edition as the contract document in which 3-person ad-hoc DB is used. All of the adjudicators are Sri Lankan. Engineer is selected from employer's staff. One case of claim on price fluctuation was referred to DB, however, it was carried over to arbitration. (NWSDB)
  - 2) We understand the concept of DB. The issue is choice of standing or ad-hoc DB. Many of projects in charge of NWSDB are small-scale. Therefore, we are hesitant in employing standing DB. We consider difficult to find out effectiveness of standing DB for small-size projects. (NWSDB)
  - 3) FIDIC Yellow Book (Plant and Design-Build) introduces ad-hoc DB. However, standing DB is advantageous in order to effectively utilize function of DB. Railway tunnel project in Turkey employed FIDIC Silver Book (EPC and Turnkey). At outset of the project, ad-hoc DB was used., however, standing DB was finally introduced by agreement of both parties. (Study Team)
  - 4) Regarding nationality of adjudicators, if contractor is from foreign country, it is reasonable to select adjudicator from the third country. However, cost may be problem.(NWSDB)

## DAB Questionnaire

Study Team of JICA DAB Promoting Project

**Q1. Which entity do you belong to?**

- Government / Government-owned company
- Contractor
- Consultant
- University / Research institute
- Others ( )

Name of organization ( )

**Q2. How was today's presentation? (Please check *all* that apply)**

- (1) Interesting?:  extremely  very much  fair  not very much  not at all
- (2) Useful?  extremely  very much  fair  not very much  not at all
- (3) Clear and easy to understand?  extremely  very much  fair  not very much  not at all
- (4) Others ( )

**Q3. Are you willing to adopt DAB for the project you are / will be concerned?**

- Yes, I want to adopt DAB. —————> Go to Q4.
- No, I don't want to adopt DAB. \_\_\_\_\_> Go to Q5.
- No, I will adopt DAB if certain issues, which I am concerned about, are cleared. —> Go to Q5.

**Q4. (For the persons who have selected "Yes" in Q3)****4-1 Why do you think you want to adopt DAB? (Please check *all* that apply)**

- (1) I know well about benefit of DAB.
- (2) I think it works well in my country.
- (3) DAB cost is reasonable.
- (4) I think disputes / conflicts likely to happen in the project.
- (5) Settlement of disputes / conflicts by ourselves is difficult without DAB.
- (6) DAB most likely make fair decision.
- (7) Though there are few adjudicators now, it can be promoted through proper training and monitoring program/ system in my country.
- (8) Others ( )

**4-2 Which is the BIGGEST reason among those above?**Choose *one* reason and fill in the number: ( )**Q5. (For the persons who have selected "No" in Q3)****5-1 Why do you think you don't want to adopt DAB? (Please check *all* that apply)**

- (1) I don't know well about DAB.
- (2) I doubt the effect. / I don't think it works well in my country.
- (3) DAB costs high.
- (4) I think disputes / conflicts are not likely to happen in the project.
- (5) We can settle disputes / conflicts by ourselves without DAB.
- (6) I'm afraid DAB might make unfair decision.
- (7) It's difficult to find adequate adjudicators. / There are few certified adjudicators.
- (8) Others ( )

**5-2 Which is the BIGGEST reason among those above?**Choose *one* reason and fill in the number: ( )

**Q6. How much are you willing to pay for the adjudicators?**

About US \$ ( ) / month for the Retainer/Adjudicator

About US \$ ( ) / day for the Daily Fee/Adjudicator

Any other payment method for remuneration?

( )

**Q7. Have you ever made or dealt with claims in the projects financed by JICA / JBIC / Multilateral Banks including ADB / World Bank?**

Yes, I have. —→ Go to Q8.

No, I have not. —→ Go to Q9.

**Q8. (For the persons who have selected “Yes” in Q7)****8-1 What is a typical claim experienced during construction? (Please check *all* that apply)**

Possession of the Site

Unforeseeable physical condition

Late notice/instruction by the Engineer

Delay in payment

Price escalation

Variation

Others ( )

**8-2 How were those claims settled? (If claims were more than one, please check *all* that apply)**

Engineer's decision

They were settled by negotiations among Employer, Engineer and Contractor.

They were settled by DAB.

They were settled by arbitration.

They were settled by litigation.

**8-3 Please describe the difficulties you thought in making /dealing with the claims.**

(Technical issues, negotiations, costs, time, documents, languages, etc.)

[ ]

**Q9. Regarding the growing importance of DAB, JICA is now considering supporting schemes of DAB.**

**What kind of supports do you think are necessary for you to adopt a DAB in your project/ or to promote DAB process in your country?**

[ ]

**Q10. Any other opinions / comments on today's seminar or to JICA will be appreciated.**

[ ]

THANK YOU very much for taking your time!

## Result of Questionnaire Survey (Cambodia)

		Nos.	Rate									
Nos. of participants		77										
Total nos. of the answer		44	57%									
Q1	Title	(1) Government	33 75%									
		(2) Contractor	2 5%									
		(3) Consultant	7 16%									
		(4) University / Research institute	0 0%									
		(5) Others	2 5%									
Q2	Impression		extremely	very much	fair	not very	not at all	Average <sup>a</sup>				
		(1) Interesting	6	26	9			3.93				
		(2) Useful	3	30	7			3.90				
		(3) Clear and easy to understand	4	14	14	1		3.64				
		(4) Others						1				
Q3	Willingness to adopt DAB		Gov.	Contractor	Consul.	Others	Total					
		(1) Yes, I want to adopt DAB.	10 (30%)	2 (100%)	6 (86%)	1 (50%)	19 (43%)					
		(2) No, I don't want to adopt DAB.	3 (9%)	0 (0%)	0 (0%)	0 (0%)	3 (7%)					
		(3) No, I will adopt DAB if certain issues are cleared.	18 (55%)	0 (0%)	1 (14%)	1 (50%)	20 (45%)					
Q4	The reason to adopt DAB	Reason					Biggest reason					
			Gov.	Contractor	Consul.	Others	Total	Gov.	Contractor	Consul.	Others	Total
		(1) I know well about benefit of DAB.	3 (30%)		2 (33%)		5 (26%)			1 (17%)		1 (5%)
		(2) I think it works well in my country.	5 (50%)	2 (100%)			7 (37%)	1 (50%)				1 (5%)
		(3) DAB cost is reasonable.	2 (20%)				2 (11%)					0 (0%)
		(4) I think disputes / conflicts likely to happen in the project.	5 (50%)	1 (50%)	5 (83%)	1 (100%)	12 (63%)	2 (20%)	1 (50%)	2 (33%)	1 (100%)	6 (32%)
		(5) Settlement of disputes / conflicts by ourselves is difficult w/o DB.	4 (40%)		1 (17%)	1 (100%)	6 (32%)	2			1 (100%)	3 (16%)
		(6) DAB most likely make fair decision	3 (30%)		2 (33%)	1 (100%)	6 (32%)	1 (10%)		1 (17%)	1 (100%)	3 (16%)
		(7) Though there are few adjudicators now, it can be promoted...	2 (20%)		3 (50%)		5 (26%)			2 (33%)		2 (11%)
(8) Others			1 (17%)		1 (5%)					0 (0%)		
Q5	The reason not to adopt DAB	Reason					Biggest reason					
			Gov.	Contractor	Consul.	Others	Total	Gov.	Contractor	Consul.	Others	Total
		(1) I don't know well about DAB.	8 (38%)		1 (100%)		9 (39%)	2 (10%)				2 (9%)
		(2) I doubt the effect. / I don't think it works well in my country	5 (24%)			1 (100%)	6 (26%)	2 (10%)			1 (100%)	3 (13%)
		(3) DAB costs high.	14 (67%)			1 (100%)	15 (65%)	6 (29%)			1 (100%)	7 (30%)
		(4) I think disputes / conflicts are not likely to happen in the project.	6 (29%)				6 (26%)	3 (14%)				3 (13%)
		(5) We can settle disputes / conflicts by ourselves without DAB.	3 (14%)				3 (13%)	2 (10%)				2 (9%)
		(6) I'm afraid DAB might make unfair decision.	5 (24%)				5 (22%)	1 (5%)				1 (4%)
		(7) It's difficult to find adequate adjudicators. / There are few certified adjudicators.	9 (43%)			1 (100%)	10 (43%)	3 (14%)			1 (100%)	4 (17%)
(8) Others	3 (14%)				3 (13%)	1 (5%)				1 (4%)		
Q6	Payment	Retainer fee (US\$) ( Average 2,740 )	500	1			1					
			900	1		1						
			2,000	2		2						
			3,000	4		4						
			5,000	2				1		1		
		Daily fee (US\$) ( Average 1,061 )	30	1		1						
			100	2		2						
			200	1		1						
	1,000	1		1								
	3,000	2				1		1				
Q7	Experience of claims	(1) Yes.	9 (27%)	1 (50%)	4 (57%)	1 (50%)	15 (34%)					
		(2) No.	21 (64%)	1 (50%)	2 (29%)		24 (55%)					
		No answer	3	0	1	1	5					
Q8	8-1 Type of claims	(1) Possession of the site	1 (11%)		1 (25%)		2 (13%)					
		(2) Unforeseeable physical condition	3 (33%)	1 (100%)	4 (100%)		8 (53%)					
		(3) Late notice / instruction by the Engineer			1 (25%)	1 (100%)	2 (13%)					
		(4) Delay in payment	2 (22%)		1 (25%)	1 (100%)	4 (27%)					
		(5) Price escalation	5 (56%)		4 (100%)	1 (100%)	10 (67%)					
		(6) Variation	6 (67%)	1 (100%)	4 (100%)		11 (73%)					
		(7) Others					0 (0%)					
	8-2 Settlement	(1) Engineer's decision	4 (44%)		1 (25%)		5 (33%)					
		(2) Negotiation	6 (67%)		4 (100%)	1 (100%)	11 (73%)					
		(3) DAB	1 (11%)				1 (7%)					
		(4) Arbitration	1 (11%)	1 (100%)			2 (13%)					
		(5) Litigation	1 (11%)				1 (7%)					

<sup>a</sup>Average points are calculated by giving "extremely" 5 points, "very much" 4 points, ... and "not at all" 1 points.

## Commented answer

DAB Seminar Cambodia

Q2	Impression	(4)	Should be more activity	Government
Q4-1	The reason to adopt DAB	(8)	DAB seems to have function of judgement. Game with judge is more proper for the project.	Consultant
Q5-1	The reason not to adopt DAB	(8)	The probabilities of the dispute is not much. We can establish other mechanism rather than DAB by taking advantages of the DAB function and methods.	Government (NBC)
			No experiences with DAB.	Government (MPWT)
			We do not have big project.	Government (DPWT / MPP)
Q6	Payment		Should follow market rate.	Government
			I am not clear, but as you know the borrower wouldn't have much that's why they borrow so they don't really want to pay more.	Government (NBC)
			Payment should depend on the contract amount.	Contractor (Daiho)
Q8-1	Claim / Dispute			
Q8-3	Difficulties about claim		Technical issues	8 answers
			Time	7 answers
			Cost	9 answers
			Document	3 answers
			Negotiation	6 answers
			Cost (variation)	Government
			Design document is not clear, additional payment by increase of quantities and so on	Government (MPWT)
			Following Engineer's decision, we will discuss with the contractor and the presence of MEF and try to solve it amicably.	Government (DPWT / MPP)
			If we have any problem, we may negotiate with contractor and consultant	Government (PAS)
			Negotiations: In making / dealing with the claims, negotiation is one of the most difficulties because base for negotiations before the parties it might have advisory opinion from the parties mutual agreement.	Others (Public enterprise)
			Costs: Cost-effectiveness, disputes arise the employer and consultant on the additional cost of claim assessment / evaluation work.	
			Documents: Documents is also difficult thing for DAB, because without these, incompleting document may occur or bad judgement, review drafting recommendation etc. will be paid by hourly rate	
			For the time being with claims it look like dealing some problem that cannot predict as we want to proceed.	Government (NBC)
			About negotiations it seem very important action to attract and solve problem that need to be solve soon, but it look hard to find final solution.	
			About technical issues, it also cause complicate for finding one resolution.	
Q9	Support for DAB promotion		JICA shall be responsible for the expense for DAB. / support financing.	4 answers (from Government)
			Training, education and technical support.	5 answers (2 from government, 3 from consultant)
			System / form a board in the country	2 answers (Consultant)
			It is depending on project scale and cost (with complexity of work).	Government
			Pay ??? DAB might not be affordable.	Government (DPWT / MPP)
			In my opinion, it might be good to have DAB to monitor the other dispute in construction. However, the consultant selection may be recommended by JICA. Following guideline by JICA should not be worried and no need to have DAB.	Government
			Execute about DAB program.	Government
			Introduce FIDIC concept or clauses that play important role in my project.	
			DAB is very essential for solving disputes.	Government (Telecom Cambodia, MPTC)
			I think for this moment in our country can't adopt DAB, may in next 10 years. The way for solving the dispute by compromising between Employer and Contractor.	Government (EDC)
			Who guarantee the decision of DB is correct?	Consultant
			Who warrant independency of DB member? Self warrant is not safe.	
			JICA should promote and monitor DAB in different ministries.	Consultant (KCEC)
			It's good to have a DB in the project with a cost as low as possible. Higher DB cost will make the project cost increase, therefore the funding agency has to pay for.	Consultant (KCEC)
			All projects must be needed adjudicators (by employed local DAB).	Consultant (KCEC)
			In cambodia, we meet many of disputes, e.g. by land acquisition and land settlement for the project. So it would be better if JICA able to promote DAB process, especially before the new project will be started.	Others (Public enterprise)
			If the cost is reasonable, we should adopt DAB in the project.	Government (NBC)
			Communication with all concerning parties in issues need during working or process.	Government (NBC)
			Cooperation among are relevants in activities to be smooth.	
			Deep studying matter behind target to be implement to be going on	
			To believe of DAB activity	Government (FTB)
Q10	Other comment		The study tour to the site visit for the operation of DAB.	Government (PAS)
			The concerned Yen-loan officials shall be invited to attend the seminar on "The position of DAB in FIDIC and Practice of Dispute Board" in neighboring countries.	
			I think it's better to find other means other than DAB. For instance, JICA can suggest the borrower to have other external site inspector which can do on site visit and report to the borrower, that will be spend less. At the same time JICA can come up with other procedures or guidelines which can be as effective as DAB by applying or adopt the good points of DAB. By the way the probabilities of the dispute is not much. So it's better to prepare other solutions or prevention rather than DAB.	Government (NBC)
			(continue) In my opinion, it's better to reinforce the criterion in the contract and force the contractor to pay more attention by putting some other condition and pressure on them to reduce the possibilities of dispute. The criterion in the contract have to be more clear and the cost of the dispute should be paid by the side who breach the contract or fail to achieve.	Government (NBC)
			Very good.	Government
			Very important seminar and 1st time conducted in cambodia. Especially DAB project cycle (implementation and disbursement).	Government (MPWT)
			JICA should help cambodia for DAB when Japan ODA loan provided to cambodia in future.	Government
			I am appreciated to join this comprehensive seminar today. However, the seminar text will be more and more useful for participant.	Government
			The seminar provide the solutions to solve problem appearance after signed the contract.	Government (Telecom Cambodia, MPTC)
			The seminar has given us the new approach for including in our planning in next project with the quality result and transparency.	Government (EDC)
			I think JICA should bring some expert that could bring over good idea or knew knowledge and could apply to cambodia situation, such as arbitration. Moreover, should bring something that similar to cambodia law and environment.	Government



## Commented answer

DAB Seminar Cambodia

Q10	Other comment (Continue)	It is more understandable if the presentation compare arbitration (such as chamber of commerce in Paris) method and DB. Time consuming, cost shall be different between them. I want to know more merits of DB. Also comparison is necessary between average number of DRB reference of the project with DB and without DB. If DB can't find seeds of problem even they had several site visits, DB will be penalized?	Consultant
		More seminar is better.	Consultant (KCEC)
		It good. New information in cambodia.	Contractor (Daiho)
		It is ????? for us to participate in this seminar today. It gives us the awareness of the pfocess of ODA loans and how to solve the problems arising among employers, engineers and contractors DAB process. Thank JICA for this seminar.	Government (NBC)
		It will held this seminar next time.	Government (FTB)

## Result of Questionnaire Survey (Vietnam)

		Nos.	Rate												
Nos. of participants		157													
Total nos. of the answer		52	33%												
Q1	Title	(1) Government	38	73%											
		(2) Contractor	1	2%											
		(3) Consultant	5	10%											
		(4) University / Research institute	2	4%											
		(5) Others	6	12%											
Q2	Impression		extremely	very much	fair	not very	not at all	Average							
		(1) Interesting	2	23	16	2	1	3.52							
		(2) Useful	4	20	21			3.62							
		(3) Clear and easy to understand	3	18	21	1		3.53							
		(4) Others						1							
Q3	Willingness to adopt DAB		Gov.	Contractor	Consul.	Univ.	Others	Total							
		(1) Yes, I want to adopt DAB.	9 (24%)	1 (100%)	4 (80%)	1 (50%)	3 (50%)	18 (35%)							
		(2) No, I don't want to adopt DAB.	8 (21%)	0 (0%)	0 (0%)	0 (0%)	1 (17%)	9 (17%)							
		(3) No, I will adopt DAB if certain issues are cleared.	22 (58%)	0 (0%)	1 (20%)	1 (50%)	2 (33%)	26 (50%)							
Q4	The reason to adopt DAB	Reason						Biggest reason							
			Gov.	Contractor	Consul.	Univ.	Others	Total	Gov.	Contractor	Consul.	Univ.	Others	Total	
		(1) I know well about benefit of DAB.	6 (67%)	1 (100%)	1 (25%)	1 (100%)	2 (67%)	11 (61%)	3 (33%)				1 (100%)		3 (17%)
		(2) I think it works well in my country.	4 (44%)		2 (50%)		1 (33%)	7 (39%)	1 (11%)		1 (25%)				2 (11%)
		(3) DAB cost is reasonable.	3 (33%)		2 (50%)		1 (33%)	6 (33%)			1 (25%)				1 (6%)
		(4) I think disputes / conflicts likely to happen in the project.	9 (100%)	1 (100%)	3 (75%)		3 (100%)	16 (89%)	6 (67%)	1 (100%)	1 (25%)			2 (67%)	10 (56%)
		(5) Settlement of disputes / conflicts by ourselves is difficult w/o DB.	9 (100%)	1 (100%)	2 (50%)		2 (67%)	14 (78%)	2 (22%)		1 (25%)			1 (33%)	4 (22%)
		(6) DAB most likely make fair decision	7 (78%)		1 (25%)		3 (100%)	11 (61%)	2 (22%)					1 (33%)	3 (17%)
		(7) Though there are few adjudicators now, it can be promoted...	4 (44%)	1 (100%)	3 (75%)	1 (100%)	1 (33%)	10 (56%)	1 (11%)		3 (75%)			1 (33%)	5 (28%)
(8) Others													0 (0%)		
Q5	The reason not to adopt DAB	Reason						Biggest reason							
			Gov.	Contractor	Consul.	Univ.	Others	Total	Gov.	Contractor	Consul.	Univ.	Others	Total	
		(1) I don't know well about DAB.	3 (10%)					3 (9%)							0 (0%)
		(2) I doubt the effect. / I don't think it works well in my country	17 (57%)		1 (100%)	1 (100%)	2 (67%)	21 (60%)	10 (33%)		1 (25%)	1 (100%)	2 (67%)	14 (78%)	
		(3) DAB costs high.	20 (67%)		1 (100%)	1 (100%)	1 (33%)	23 (66%)	4 (13%)				1 (33%)	5 (28%)	
		(4) I think disputes / conflicts are not likely to happen in the project.	1 (3%)					1 (3%)						0 (0%)	
		(5) We can settle disputes / conflicts by ourselves without DAB.	9 (30%)			1 (100%)	1 (33%)	11 (31%)	3 (10%)				1 (33%)	4 (22%)	
		(6) I'm afraid DAB might make unfair decision.	6 (20%)			1 (100%)	1 (33%)	8 (23%)	1 (3%)					1 (6%)	
		(7) It's difficult to find adequate adjudicators. / There are few certified adjudicators.	15 (50%)		1 (100%)	1 (100%)	3 (100%)	20 (57%)	3 (10%)					3 (17%)	
(8) Others	7 (23%)					7 (20%)	7 (23%)					7 (39%)			
Q6	Payment	Retainer fee (US\$)		( Average 13,500 )		1,000	1						1		
						3,000	1	1							
						5,000	1	1							
						10,000	1	1							
						12,000	1	1							
						50,000	1	1							
		Daily fee (US\$)		( Average 1,350 )		200	2	2						2	
				2,500	2	2						2			
Q7	Experience of claims		Gov.	Contractor	Consul.	Univ.	Others	Total							
		(1) Yes.	16 (42%)	1 (100%)	2 (40%)	1 (50%)	0 (0%)	20 (38%)							
		(2) No.	21 (55%)	0 (0%)	3 (60%)	1 (50%)	6 (100%)	31 (60%)							
Q8	8-1 Type of claims	(1) Possession of the site	11 (69%)	1 (100%)	1 (50%)	1 (100%)		14 (70%)							
		(2) Unforeseeable physical condition	9 (56%)	1 (100%)		1 (100%)		11 (55%)							
		(3) Late notice / instruction by the Engineer	4 (25%)			1 (100%)		5 (25%)							
		(4) Delay in payment	7 (44%)	1 (100%)	1 (50%)			9 (45%)							
		(5) Price escalation	9 (56%)	1 (100%)	2 (100%)			12 (60%)							
		(6) Variation	4 (25%)	1 (100%)				5 (25%)							
		(7) Others	3 (19%)					3 (15%)							
	8-2 Settlement	(1) Engineer's decision	1 (6%)		1 (50%)			2 (10%)							
		(2) Negotiation	15 (94%)	1 (100%)	2 (100%)	1 (100%)		19 (95%)							
		(3) DAB						0 (0%)							
(4) Arbitration							0 (0%)								
(5) Litigation		1 (6%)	1 (100%)				2 (10%)								

\*Average points are calculated by giving "extremely" 5 points, "very much" 4 points, ... and "not at all" 1 points.



## Result of Questionnaire Survey (Bangladesh)

		Nos.	Rate				
Nos. of participants		53					
Total nos. of the answer		44	83%				
Q1	Title	(1) Government	43 98%				
		(2) Contractor	0 0%				
		(3) Consultant	1 2%				
		(4) University / Research institute	0 0%				
		(5) Others	0 0%				
Q2	Impression		extremely very much fair not very not at all Average*				
		(1) Interesting	5 23 12 1 3.83				
		(2) Useful	5 20 13 1 3.74				
		(3) Clear and easy to understand	6 16 16 1 3.69				
		(4) Others	1 1				
Q3	Willingness to adopt DAB		Gov. Consul. Total				
	(1) Yes, I want to adopt DAB.		14 0 14 (33%) (0%) (32%)				
	(2) No, I don't want to adopt DAB.		7 1 8 (16%) (100%) (18%)				
	(3) No, I will adopt DAB if certain issues are cleared.		15 0 15 (35%) (0%) (34%)				
Q4	The reason to adopt DAB		Reason Biggest reason				
			Gov. Consul. Total Gov. Consul. Total				
	(1) I know well about benefit of DAB.		4 4 4 0 (29%) (29%) (0%)				
	(2) I think it works well in my country.		7 7 1 1 (50%) (50%) (7%) (7%)				
	(3) DAB cost is reasonable.		4 4 1 1 (29%) (29%) (7%) (7%)				
	(4) I think disputes / conflicts likely to happen in the project.		7 7 3 3 (50%) (50%) (21%) (21%)				
	(5) Settlement of disputes / conflicts by ourselves is difficult w/o DB.		4 4 2 2 (29%) (29%) (14%) (14%)				
	(6) DAB most likely make fair decision		4 4 2 2 (29%) (29%) (14%) (14%)				
	(7) Though there are few adjudicators now, it can be promoted...		5 5 2 2 (36%) (36%) (14%) (14%)				
(8) Others		1 1 0 0 (7%) (7%) (0%) (0%)					
Q5	The reason not to adopt DAB		Reason Biggest reason				
			Gov. Consul. Total Gov. Consul. Total				
	(1) I don't know well about DAB.		5 5 1 1 (23%) (22%) (5%) (7%)				
	(2) I doubt the effect. / I don't think it works well in my country		12 12 3 3 (55%) (52%) (14%) (21%)				
	(3) DAB costs high.		16 16 9 9 (73%) (70%) (41%) (64%)				
	(4) I think disputes / conflicts are not likely to happen in the project.		9 9 2 2 (41%) (39%) (9%) (14%)				
	(5) We can settle disputes / conflicts by ourselves without DAB.		10 10 3 3 (45%) (43%) (14%) (21%)				
	(6) I'm afraid DAB might make unfair decision.		5 1 6 2 (23%) (100%) (26%) (9%)				
	(7) It's difficult to find adequate adjudicators. / There are few certified adjudicators.		6 1 7 2 1 3 (27%) (100%) (30%) (9%) (100%) (21%)				
(8) Others		7 7 0 0 (32%) (30%) (0%) (0%)					
Q6	Payment	Retainer fee (US\$) (Average 9,922)		Daily fee (US\$) (Average 1,912)			
			Total Gov. Consul.	Total Gov. Consul.			
		700	1 1	50	1 1		
		800	1 1	100	2 2		
		1,000	2 2	160	1 1		
		1,100	1 1	200	1 1		
		1,500	2 2	250	1 1		
		2,000	3 2 1	300	1 1		
		2,500	2 2	400	1 1		
		5,000	2 2	1,000	3 3		
		30,000	1 1	1,250	1 1		
		35,000	1 1	1,500	1 1		
		40,000	1 1	2,000	2 2		
		45,000	1 1	3,100	1 1		
		5,000	1 1				
		15,000	1 1				

\*Average points are calculated by giving "extremely" 5 points, "very much" 4 points, ... and "not at all" 1 points.

## Result of Questionnaire Survey (Bangladesh)

Q7	Experience of claims	Gov.	Consul.	Total
	(1) Yes.	14 (33%)	1 (100%)	15 (34%)
	(2) No.	27 (63%)	0 (0%)	27 (61%)
Q8	8-1 Type of claims	Gov.	Consul.	Total
	(1) Possession of the site	4 (29%)	1 (100%)	5 (33%)
	(2) Unforeseeable physical condition	1 (7%)	1 (100%)	2 (13%)
	(3) Late notice / instruction by the Engineer	3 (21%)		3 (20%)
	(4) Delay in payment	2 (14%)		2 (13%)
	(5) Price escalation	10 (71%)	1 (100%)	11 (73%)
	(6) Variation	7 (50%)	1 (100%)	8 (53%)
	(7) Others			0 (0%)
	8-2 Settlement			
	(1) Engineer's decision	4 (29%)		4 (27%)
	(2) Negotiation	6 (43%)	1 (100%)	7 (47%)
	(3) DAB		1 (100%)	1 (7%)
	(4) Arbitration	3 (21%)	1 (100%)	4 (27%)
	(5) Litigation	3 (21%)		3 (20%)

## Commented answer

DAB Seminar Bangladesh

Q2	Impression	(4)	Rarely useful -> fair	Gov. (Local government engineering department)
Q4-1	The reason to adopt DAB	(8)	To avoid civil court.	Government
Q5-1	The reason not to adopt DAB	(8)	As a employee of Govt. org., it is difficult for me to think to adopt DAB if it is not mentioned in the agreement.	Gov. (Bangladesh Telecommunications Company Ltd.)
			To solve dispute by amicable settlement is the best.	Gov. (Local government engineering department)
			The contracts in my project are small size.	Gov. (Local government engineering department)
			"Procurement of goods" is our project.	Gov. (Bangladesh Railway)
			No provision in procurement policy.	3 Gov. (Bangladesh Telecommunications Company Ltd.)
Q6	Payment		Through discussion & negotiation with the adjudicator	2 Governments
Q8-1	Claim / Dispute		Tax reimbursement	Consul. (BCL Association)
Q8-3	Difficulties about claim		Time, because time is to short most of the project in our country.	3 Governments
			Cost	2 Governments
			Negotiations	2 Governments
			Lack of understanding by the contractor of conditions of contract.	Gov. (Local government engineering department)
			It depends on impartial role of the members of the DAB.	Gov. (Electricity Generation Company of Bangladesh)
			Due to variation of price of the material, contractor claims more payment than the contract amount.	Gov. (Chittagong water supply and sewerage authority)
			Lack of contractual rules or regulation as well as contractgor management.	Gov. (Roads & highways department)
			Lack of appropriate documentation.	Gov. (Roads & highways department)
			Documentation / Technical issues	Consul. (BCL Association)
			Q9	Support for DAB promotion
			DAB cost should be less.	2 Governments
			Training / seminar to aware / promote DAB, contract management, etc. for both Contractor, Employer and Engineer.	12 Governments
			Training for adjudicator	Gov. (Local government engineering department)
			involve DAB into procurement policies / contract agreements etc.	5 Governments
			Rules / Regulations / guidelines / to adopt DAB in Bangladesh	2 Governments
			I think JICA take a plior project for this DAB. In our country so that it is more popular in Bangladesh.	Gov. (Chittagong Development Authority)
			Initially should a list of Adjudicators in every financial partners like WB, JICA, ADB, etc.	Gov. (Electricity Generation Company of Bangladesh)
			Involve local experts in training / seminar, it will help to understand the critical issue more easily to the participant.	Gov. (Chittagong Development Authority)
			DAB revier committee.	Gov. (Powergrid company of Bangladesh Ltd.)
			Yes, it is important for our country. It require more publicity to the both parties (employer & contractor) It also require support both from donor agencies & the government of the country and also require <u>willnqness of the contractor.</u>	Gov. (Electricity Generation Company of Bangladesh)
			JICA can form different DAB for different sector with the local and foreign expert of particular sector.	Government
			Policy maker of the government or procuring entity is to be acknowledged about the importance of DAB requirement.	Gov. (Roads & highways department)
			Convince the parties about the advantage of DAB	Government
			Training of a body of ??? will be recognised as neutral and fair.	Consul. (BCL Association)
			Q10	Other comment
			Longer workshop / seminar should be held for making the whole thing clear & participatory & effective.	2 Governments
			Even some training program may be chalked out to make the concept more popular & acceptable also.	Gov. (BBA)
			Good./ Helpful / Nice presentations./ Thank JICA.	8 Governments
			Only in large value and complex civil works the DAB may be used.	3 Governments
			Seminar will be helpful to assure problem that may arise in project implementation & the ways to solve with the help of experts or others.	3 Governments
			In the middle of the project implementation or already finished the loan agreement between JICA & ADB how we accomodated it's fund raise as well as in the DPP of the project which have already made by GOB.	Gov. (Electricity Generation Company of Bangladesh)
			If the tender / bid document will prepared clearly containing the condition then without any dispute.	Gov. (North-west power generation Co., Ltd.)
			JICA will take initiative to promote person those are involved in implementation or contract in contractual rules.	Gov. (Roads & highways department)
			Address of an employer's vies will assist to understanding the issue effectively.	Government

## Result of Questionnaire Survey (Sri Lanka)

				Nos.	Rate										
Nos. of participants				105											
Total nos. of the answer				79	75%										
Q1	Title	(1) Government		43	54%										
		(2) Contractor		14	18%										
		(3) Consultant		12	15%										
		(4) University / Research institute		1	1%										
		(5) Others		9	11%										
Q2	Impression			extremely	very much	fair	not very	not at all	Average*						
		(1) Interesting		8	53	15			3.91						
		(2) Useful		10	56	9	1		3.99						
		(3) Clear and easy to understand		14	50	11			4.04						
		(4) Others							2						
Q3	Willingness to adopt DAB			Gov.	Contractor	Consul.	Univ.	Others	Total						
		(1) Yes, I want to adopt DAB.		27 (63%)	13 (93%)	10 (83%)	1 (100%)	8 (89%)	59 (75%)						
		(2) No, I don't want to adopt DAB.		7 (16%)	0 (0%)	0 (0%)	0 (0%)	0 (0%)	7 (9%)						
		(3) No, I will adopt DAB if certain issues are cleared.		7 (16%)	1 (7%)	2 (17%)	0 (0%)	0 (0%)	10 (13%)						
Q4	The reason to adopt DAB	Reason						Biggest reason							
			Gov.	Contractor	Consul.	Univ.	Others	Total	Gov.	Contractor	Consul.	Univ.	Others	Total	
		(1) I know well about benefit of DAB.	10 (37%)	4 (31%)	7 (70%)	1 (100%)	4 (50%)	26 (44%)	3 (11%)	1 (8%)				2 (25%)	6 (10%)
		(2) I think it works well in my country.	7 (26%)	3 (23%)	4 (40%)		5 (63%)	19 (32%)			1 (10%)			1 (13%)	2 (3%)
		(3) DAB cost is reasonable.	8 (30%)	3 (23%)	4 (40%)	1 (100%)	2 (25%)	18 (31%)	2 (7%)	1 (8%)					3 (5%)
		(4) I think disputes / conflicts likely to happen in the project.	15 (56%)	10 (77%)	5 (50%)	1 (100%)	2 (25%)	33 (56%)	6 (22%)	3 (23%)	2 (20%)			1 (13%)	12 (20%)
		(5) Settlement of disputes / conflicts by ourselves is difficult w/o DB.	8 (30%)	9 (69%)	3 (30%)		4 (50%)	24 (41%)	2 (7%)	2 (15%)	1 (10%)			1 (13%)	6 (10%)
		(6) DAB most likely make fair decision	16 (59%)	8 (62%)	5 (50%)	1 (100%)	2 (25%)	32 (54%)	7 (26%)	2 (15%)	4 (40%)			1 (13%)	14 (24%)
		(7) Though there are few adjudicators now, it can be promoted...	13 (48%)	3 (23%)	6 (60%)	1 (100%)	1 (13%)	24 (41%)	4 (15%)		1 (10%)				5 (8%)
		(8) Others	2 (7%)	3 (23%)	1 (10%)			6 (10%)		2 (15%)					2 (3%)
Q5	The reason not to adopt DAB	Reason						Biggest reason							
			Gov.	Contractor	Consul.	Univ.	Others	Total	Gov.	Contractor	Consul.	Univ.	Others	Total	
		(1) I don't know well about DAB.	3 (21%)	1 (100%)				4 (24%)	2 (14%)	1 (100%)					3 (18%)
		(2) I doubt the effect. / I don't think it works well in my country	6 (43%)					6 (35%)	1 (7%)						1 (6%)
		(3) DAB costs high.	6 (43%)		1 (50%)			7 (41%)	4 (29%)						4 (24%)
		(4) I think disputes / conflicts are not likely to happen in the project.	1 (7%)		1 (50%)			2 (12%)							0 (0%)
		(5) We can settle disputes / conflicts by ourselves without DAB.	1 (7%)		1 (50%)			2 (12%)	1 (7%)						1 (6%)
		(6) I'm afraid DAB might make unfair decision.	4 (29%)					4 (24%)							0 (0%)
		(7) It's difficult to find adequate adjudicators...	6 (43%)					6 (35%)	1 (7%)						1 (6%)
(8) Others	5 (36%)		1 (50%)			6 (35%)	2 (14%)		1 (50%)				3 (18%)		
Q6	Payment	Retainer fee (US\$) (Average 2,168)						Daily fee (US\$) (Average 491)							
			Total	Gov.	Contractor	Consul.	Univ.	Others	Total	Gov.	Contractor	Consul.	Univ.	Others	
		150	1			1			15	1					
		200	1			1			30	1			1		
		250	1					1	40	1	1				
		300	1	1					50	3	2		1		
		350	1			1			100	1	1				
		400	2		1	1			150	2		1	1		
		500	2	1		1			200	1	1				
		1,000	5	4	1				250	1				1	
		1,500	3	1	2				300	4	2	1	1		
		2,000	3	1	1			1	400	2		1	1		
		2,500	1					1	500	1	1				
		5,000	1		1				1,000	6	1	2	1	2	
		10,000	3	1		2			1,500	1	1				
250 - 500	1	1					2,000	1		1					
							100 - 250	1	1						

\*Average points are calculated by giving "extremely" 5 points, "very much" 4 points, ... and "not at all" 1 points.

Q7	Experience of claims	Gov.	Contractor	Consul.	Univ.	Others	Total
	(1) Yes.	23 (53%)	8 (57%)	7 (58%)	0 (0%)	5 (56%)	43 (54%)
	(2) No.	18 (42%)	5 (36%)	4 (33%)	1 (100%)	2 (22%)	30 (38%)
Q8	8-1 Type of claims	Gov.	Contractor	Consul.	Univ.	Others	Total
	(1) Possession of the site	10 (43%)	2 (25%)	3 (43%)		3 (60%)	18 (42%)
	(2) Unforeseeable physical condition	16 (70%)	7 (88%)	3 (43%)		2 (40%)	28 (65%)
	(3) Late notice / instruction by the Engineer	6 (26%)	4 (50%)	4 (57%)		1 (20%)	15 (35%)
	(4) Delay in payment	7 (30%)	4 (50%)	4 (57%)		2 (40%)	17 (40%)
	(5) Price escalation	10 (43%)	4 (50%)	3 (43%)		3 (60%)	20 (47%)
	(6) Variation	14 (61%)	7 (88%)	4 (57%)		4 (80%)	29 (67%)
	(7) Others	4 (17%)		4 (57%)			8 (19%)
	8-2 Settlement	11 (48%)	3 (38%)	3 (43%)		3 (60%)	20 (47%)
	(1) Engineer's decision	16 (70%)	6 (75%)	4 (57%)		1 (20%)	27 (63%)
	(2) Negotiation	2 (9%)	3 (38%)	5 (71%)		2 (40%)	12 (28%)
	(3) DAB	5 (22%)		2 (29%)		1 (20%)	8 (19%)
	(4) Arbitration	1 (4%)		1 (14%)			2 (5%)
	(5) Litigation						



## Commented answer

Q2	Impression	(4)	Seminars to be in the morning. 2pm is traffic-jam time Dr. Omoto's presentation is very much interesting.	Government (PEACE) Cont. (Shin nippon Air technologies Co., Ltd)
Q4-1	The reason to adopt DAB	(8)	To complete a job at a reasonable cost for both parties  More training sessions are useful for those inpleasant the project and for those who prepare documents / standard bidding documents The Engineer does not stand in a fear position in many cases. In construction indursty, there can't be project without small dispute. Time and financial efficiency plus preventive function. Adjudicator is necessary as the Engineer role is now different.	Gov. (NWSDB) Gov. (National Watersupply & Drainage Boards) 2 Contractors Cont (Vshydro (PV) Ltd.) Consultant Other (Fundinf Agency)
Q5-1	The reason not to adopt DAB	(8)	Politician can deny DAB's Decision acceptance. Contract may give bribes to DAB members and get fevarable decision. May be depending on the contract. I would prefer. All contracts are finalized (done) and on-going, now we cant increase something this. It is necessary to take a decision at on case by case basis.	Gov. (KDA) Government Government Government Consul (M. A. consultants for TRIP)
Q6	Payment		hourly payment and not the day payment. A payment for the full completion of the process would be better. should be based on the salaries of the professionals plus facilities to compensate.  A percentage of a claim  Based on the volume of the project.  For expert people should pay international rate applicable. not known as it depends on the case. A pool of adjudicators maintained by Bank / Government. Paying 50 % of cost each not in fact happening. Contractor will include this cost to prelims or overhead and finally paid by the Bank. More for an independent authority maintaining a pool by paying retainer fee would work.	Gov. (NWSDB) Government Gov. (National Watersupply & Drainage Boards) Gov. (Road Development Authority) Consul (M. A. consultants for TRIP) Consultant Consul. (V Form consultant) Univ. (University of Moratuwa)
Q8-1	Claim / Dispute		Suspension of work Design issues Poor performance of contractor Delay of construction by contractor which lead to termination of contract Ambiguous conditions of particular application  Interpretation of contract for payment issues. Termination	2 Governments Governement Government Government Consul. (Applo Hospitals Enterprise Ltd. / Archimede consultants Lanka Ltd.) Coonsultant Consultant
Q8-3	Difficulties about claim		Document (improper documents, lack of documents / records, etc.) Time Negotiations Technical issues Unclear contract documents or discrepancy within contract document / Different contract understanding between contractor and employer The parties involved are not obey with the DAB decisions. So there are lot of doubts about DAB. And no good experiences in Sri Lanka. Lack of knowledge of the contract / laws. Government offices are to settle big claims. Design changes and as a result additional cost. Make the cost of DAB "eligible" In most cases claims are not genuine and exaggerated or bogus in nature. -Agreements on rates for new variation items.  Poor Estimation Some of the acontract documents are not fair to contractor. Engineer's authority is limited. Fundamental is very different. There's no specified time period for the Engineer or the Employer to reply against contractor's claim. Consultant is expected to abide by the employer's interest. The inflexibility of the Engineer. Languate Contractor's / Engineer's lack of knowledge in submissions to DAB.	10 (4 Gov. 1 Cont. 5 Consul.) 4 (2 Gov. 1 Cont. 1 Consul.) 2 Governments 4 Governments 4 (3 Cont. 1 Consul.) 3 (1 Gov. 1 Cont. 1 Other) Government 3 Contractors Gov. (KDA) Government Government Government Gov. (National Water Supply & Drainage Board) Gov. (PEACE) Cont. (MAEDA Corp.) Cont. (TAISEI Corp.) Cont. (Wakachiku Cont. (TAISEI) Consultant Consultant Consultant Consultant
Q9	Support for DAB promotion		More seminars / trainings / workshops to understand DAB process accurately, or to aware DAB. Training for DAB adjudicators / There should be more experienced / competent adjudicators. Financial support to pay for DAB. More reasonable DAB rate Include DAB clauses in bidding documents, contract documents, guidelines, etc. of JICA. DAB decision should be enforced more strictly. Prepare a bit DAB to be appointed before advertising of tender notice (to be given in the design) of contract, which let him pay bid for the ???? If we understand practically that adoption of DAB is effective, yes, we have to. To select DAB member I would like to study about DAB's further and perhaps same illustratinos of disputes settled with the costs involved, may be of same help. Implementation to be done as a part of progress monitoring.  Have simplified procedures to be adopted to promote DAB process. Technical issues Need to study further  All parties should respect the contract document as far as they sign the contract. The Engineer should be more fair. We appreciate the involvement by JICA especially for settlement of the claims. The price forecast shall be adjusted in contract. DAB sample case data base will be useful on the web site or so to know more merit of it.	20 (11 Gov. 2 Cont. 4 Consul. 1 Univ. 2 Other) 11 (6 Gov. 1 Cont. 1 Consul. 1 Univ. 2 Other) 4 (2 Gov. 1 Consul. 1 Other) 2 Governments 4 (3 Gov. 1 Consul.) 3 (1 Gov. 1 Cont. 1 Other) Gov. (NWSDB) Government Government Government Gov. (National Watersupply & Drainage Board) Government Government Cont. (Shin nippon Air technology Co., Ltd) Cont. (TAISEI Corp.) Cont. (Mitsubishi Corp.) Cont. (MAEDA Corp.)

## Commented answer

Q9	Support for DAB promotion (continued)	<p>There is a need of having legal recognition by Act of parliament urgent to DAB.</p> <p>There is no proper training and DAB practice to be adopted uniformly. In Sri Lanka, It is very useful to establish the Body of DAB consutitute unit to help the adhudicators decision to be common and aware its uniformity.</p> <p>1) An adjudication centre must be established.</p> <p>2) Assist ICTAD to set up the centre &amp; assist to conduct training coursed through ICTAD</p>	<p>Cont. (VS Hydro (PV) Ltd.)</p> <p>Consul. (V Form Consultant)</p> <p>Consultant</p>
Q10	Other comment	<p>The necessary chances should be discussed with the Sri Lankan government as it should be in line with the law of the country, bofore brought in to effect.</p> <p>JICA should organize similar seminars regulary.</p> <p>More seminars with more practical experience, in-depth examples will be appreciated.</p> <p>Seminars on construction claims / Arbitration may be arranged in the future.</p> <p>Valuable / helpful / thank JICA.</p> <p>Local experessence related DAB process (JCTARD Document as the G.C.)</p> <p>Payment to DAB member.</p> <p>DAB procedure can be gazefford by the government as an acceptable preliminary diopnde negotiation procedure.</p> <p>Assitance to create suitably infrastructure for the DAB's</p> <p>Bank need why DAB's are more effective compared to other means - costs must be compared on actual cases.</p> <p>JICA is approached for conducting the program benefit to on going projects in Sri Lanka.</p> <p>More case studies with illustrations of costs involved in order to convince the audience about the cost effectiveness of DAB's could have been helpful in my opinion.</p> <p>Government roll is very important as most of the contractors are government awarded.</p> <p>It is too early to predict the implementation of DAB in Sri Lanka It has to come as an act of parliament.</p> <p>Tea / coffe servers were too small to serve the participants, within the designated time.</p> <p>I have an experience only for FIDIC 1987. It was really new for me, I will study on.</p> <p>Seminar conducted time shoud be evening session rather than afternoon session.</p> <p>Specific issues related to public sector employees &amp; Gov. audit mocedaros with regard to DAB decision implementation should be addressed.</p> <p>1/2 day is insufficient.</p> <p>(If not yet) JICA should clearly mention that the cost of adjudicator to be paid by JICA loan.</p> <p>World Bank Road projects experienced problem on DAB decisions relating to price adjustment Indices - Pradeep 0773960213 (will be happy to share)</p>	<p>Government (Plantationh Reform Project II)</p> <p>4 (3 Gov. 1 Consul.)</p> <p>3 (2 Gov. 1 Other)</p> <p>Government</p> <p>7 (5 Gov. 1 Consul. 1 Other)</p> <p>Government</p> <p>Government</p> <p>Gov. (GCWRD)</p> <p>Government</p> <p>Government</p> <p>Government</p> <p>Gov. (National Watersupply &amp; Drainage Board)</p> <p>Gov. (PEACE)</p> <p>Government</p> <p>Cont. (MAEDA Corp.)</p> <p>Cont. (VS Hydro (PV) Ltd.)</p> <p>Consultant</p> <p>Consultant</p> <p>Consultant</p> <p>Other (WB)</p>

DAB Seminar Photographs (Phnom Penh)



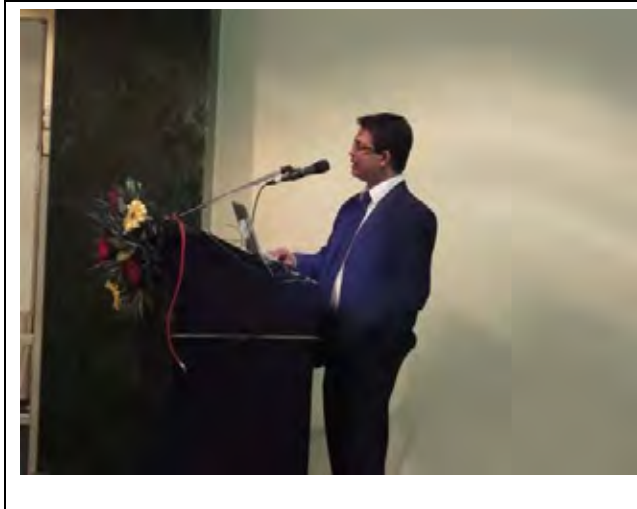
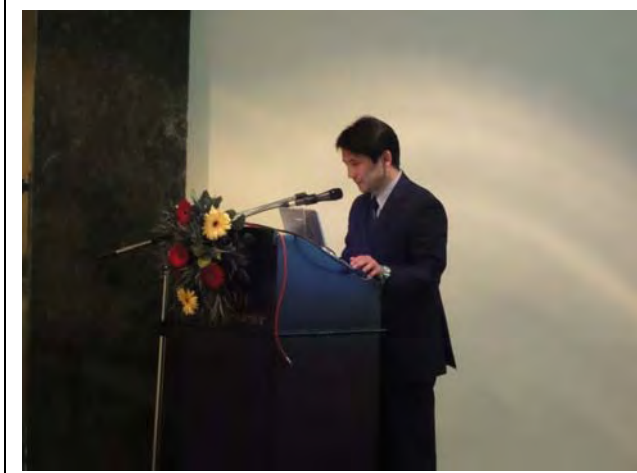
DAB Seminar Photographs (Hanoi)



DAB Seminar Photographs (Dhaka)



DAB Seminar Photographs (Colombo)



## DAB/Adjudicators Promotion Seminar

### - Prospects and Issues on DAB in JICA Projects -

#### PROGRAM

##### 【Session 1】

- 14 : 00~14 : 05      Opening Remarks  
                            Shigenari Koga, Director General, Financing Facilitation and  
                            Procurement Supervision Dept., JICA
- 14 : 05~14 : 10      Outline of Study on the Introduction and Dissemination of  
                            DAB/Adjudicators in the Asian Region  
                            Takashi Ito, Director, Loan Procurement Policy and Supervision  
                            Division, JICA
- 14 : 15~14 : 45      System and Practice of DAB  
                            Toshihiko Omoto, Gratitude School of Management, Kyoto  
                            University
- 14 : 50~15 : 20      Result of Overseas Survey (in Vietnam, Cambodia, Sri Lanka, etc.)  
                            Yukinobu Hayashi, General Manager, PPP Projects Department,  
                            Nippon Koei Co., Ltd.
- 15 : 20~15 : 35      Coffee Break

##### 【Session 2】

- 15 : 35~16 : 05      Growing –up of Adjudicators  
                            Toshihiko Omoto, Gratitude School of Management, Kyoto  
                            University
- 16 : 05~16 : 50      Open Discussion
- 16 : 50~17 : 00      Closing Remarks  
                            Takashi Ito, Director, Loan Procurement Policy and Supervision  
                            Division, JICA



## DAB Process Promotion Seminar

# Practice of Dispute Boards

JICA  
(Japan International Cooperation Agency)

Professor Toshihiko Omoto, Dr.Eng.  
Graduate School of Management,  
Kyoto University

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## Today's Topics: Dispute Boards

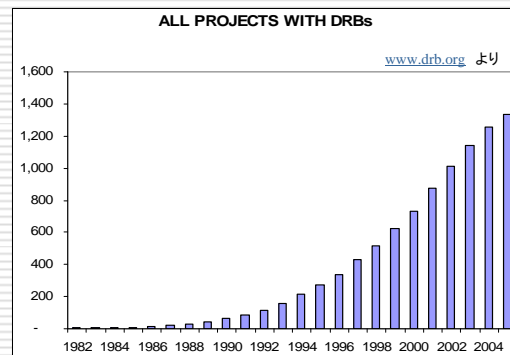
- Present State of DB's Dissemination
- Operation of DB
- Effects of DB
- Costs of DB
- Examples of DB



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## Present State of DB's Dissemination DRBF's Report



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## The Present State of DB's Dissemination DRBF's Report

- Reported projects are almost in USA
- DB is widely used in public sectors
  - California: The authority of transportation
  - Florida: The authority of transportation
  - Seattle: Metro
  - Alaska: The authority of electricity
  - Federal government: The ministry of energy
- DRB used in 1,200 projects in 2005
  - 1.2 references/ project to DRB
  - 2% of references to arbitration/litigation
  - 1% of above resolved before award/judgment



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## The Present State of DB's Dissemination outside the USA

- ❑ **Urtan Hydropower Project (China)**
  - US\$2 billion: 3,300 MW
  - 40 references to DAB, no claim to arbitration
- ❑ **Hong Kong International Airport**
  - US\$ 15billion
  - 6 references to DAB, 1 to arbitration, upheld
- ❑ **Katse Dam (South Arfica)**
  - US\$2.5 billion
  - 12 references to DAB, 1 to arbitration, upheld
- ❑ **Docklands Light Railway, UK**
  - US\$500 million
  - No reference to DAB
- ❑ **Saltend Private Gas Turbine Power Plant, UK**
  - US\$200 million
  - No reference to DAB
- ❑ **Many, Many more!**



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## Operation of DB

### Difference Between Other Means of Dispute Resolution

- ❑ DB is established before disputes take place
- ❑ Selection of DB members is agreed by both parties
- ❑ DB provides on-site dispute resolution
- ❑ Preventing disputes from taking place or escalating to formal disputes
- ❑ Early settlement of disputes
- ❑ DB provides regular Site visits and documents review to remain conversant with project development
- ❑ DB is more like part of project management, rather than means of dispute resolution
- ❑ Key to a successful DB; DB members to gain trust and regards for their neutrality, impartiality and capability



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## Operation of DB Qualifications of DB members

- ❑ **FIDIC/MDB Harmonized Edition Rules**
  - Language ability
  - experience in the kind of Work
  - experience in interpreting contract documents
  - Availability for site visits
  - Impartial and independent of contracting parties and Engineer
  - no interest financial or otherwise with contracting parties and Engineer and with the contract itself
  - Nationality
- ❑ **Engineers or lawyers?**



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## Operation of DB

### Selection of DB Members/Establishment of DB

- ❑ Each party nominate one for the other party's approval, two members nominate the third member for both parties' approval  
→ Chairperson  
(The chairperson should be of different nationality from the two contracting parties.)
- ❑ The parties can make the selection together with the Engineer.
- ❑ DB members can be selected from a ballot of several candidates.
- ❑ Qualifications can be set down in advance (Example)
  - Selecting from FIDIC President's List
  - 2 Engineers + 1 Lawyer (chairperson)
  - 1 member shall be experienced in TBM tunneling work



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## The Operation of DB

### Information to be disclosed in making DB contracts

- ❑ Records of any professional or personal relationships with any director, officer or employee of the Employer, the Contractor or the Engineer, and any previous involvement in the overall project of which the contract forms part
- ❑ Records of any employment as a consultant or otherwise by the Employer, the Contractor or the Engineer
- ❑ Besides, information about the warranty on the impartiality and independence from the Employer, the Contractor and the Engineer



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## Operation of DB

### Example of Disclosure

- ❑ In this case, the candidate had been employed by one of the parties until 10 years ago for 7 years then no involvement since then
- ❑ The candidate warrants his independence on the party

Vice President  
Company Ltd.

Dear Sir,

To  
Project  
B  
Appointment of DAB

Thank you for your letter dated [ ] inviting me to provide a statement of availability to serve on a DAB to be constituted under this Contract.

I have reviewed the your letter and am pleased to advise you of my availability to serve on a DAB for this Contract and that, on the basis of the Project information contained in that letter,

1. I have no financial interests with, and am independent of the Parties and the Engineer.
2. I am familiar with the Conditions of Contract.
3. I am fluent in the language of the Contract.
4. I have extensive experience in the type of work that is being undertaken.

I understand that you have obtained my CV from the list of approved adjudicators published by FIDIC.

As a matter of disclosure, the Parties and the Engineer should be made aware that between the years 1990 and 1997 I was employed in [ ] as the position of Contracts Manager for the Far east. As part of the duties in that position I prepared Joint Venture Agreements and Subcontracts for projects on which I was involved, often tendered for contracts in joint venture with [ ] and on at least one occasion subcontracted work to this Company. The last involvement of this nature was 13 years ago in 1995 in connection with the [ ] Hydroelectric Project in [ ] I left the employment in 1997 have not had contact with [ ] since that time and consider that any previous involvement with this Company will not affect my independence should I be selected to serve as a member of the DAB for this Project.

Thank you for this consideration and I look forward to hearing back from you.



JICA  
Sincerely,  
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## Operation of DB

### Three-Party Agreement

- ❑ **Three-Party Agreement**
  - Signatures of the 3 parties
    - ❑ Each Member
    - ❑ Two Parties
  - Assignment of DAB procedures
    - ❑ Retainer Fee
    - ❑ Daily Fee

DISPUTE BOARD AGREEMENT PROJECT

Employer: Contractor: Member:

Whereas the Employer and the Contractor have entered into a contract (Specifically the "Contract Documents" for the " )

herein after referred to as the "Contract") and desire jointly to appoint the Member to act as one of the three persons who are jointly called the "DB";

The Employer, Contractor and Member jointly agree as follows:

1. The conditions of this Dispute Adjudication Agreement comprise the "General Conditions of Dispute Adjudication Agreement" and "Procedural Rules" that are in Volume 1, Section VII, pages 106 to 114 of the Contract, all other terms of the Contract that apply to the work of the DB, and the following provisions. In those provisions words and expressions shall have the same meanings as are assigned to them in the General Conditions of Dispute Adjudication Agreement.
2. In accordance with Clause 6 of the General Conditions of Dispute Adjudication Agreement, the Member shall be paid as follows:
  - A retainer fee of [ ] per month,
  - plus a daily fee of [ ] per day.
3. In consideration of these fees and other payments to be made by the Employer and the Contractor in accordance with Clause 6 of the General Conditions of Dispute Adjudication Agreement, the Member undertakes to serve, as described in this Dispute Adjudication Agreement, as one of the three persons who are jointly to act as the DB.
4. The Employer and the Contractor jointly and severally undertake to pay the Member, in consideration of the carrying out of these services, in accordance with Clause 6 of the General Conditions of Dispute Adjudication Agreement.
5. This Dispute Adjudication Agreement shall be governed by the law of the Contract.

SIGNED by: SIGNED by: SIGNED by:

for and on behalf of the Employer in for and on behalf of the Contractor for the Member

Date: Date: Date:



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## Operation of DB - Acquaintance With the Project

### First Site Visit

- ❑ **Logistics**
  - Basis: the DB should be seen as a member of the project team
  - Introduction of DB members (The participation of the head office?)
  - Participants' roles in the DB meeting
  - Confirmation of contract documents
    - ❑ Contract Agreement/Conditions of Contract/Bills of Quantities/Drawings/Programme/other relevant documents
  - Secure contract documents for DB
    - ❑ One set of copies on the site
    - ❑ An A-5 subsized version for each DB individual
  - Building of communication network
  - Arrangements & Preparations (Arrangement of hotel, vehicles, meeting rooms and equipments)
  - Deciding the date of Site Visits (based on the expected progress of the project)



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## Operation of DB-Acquaintance With the Project First Site Visit (continued)

### Discovering potential disputes areas

- Seeds of problems planted at bidding, contract negotiation and signing stage
  - Incompletion in the changed or added terms
- Problems appear right after signing of the contract
  - Corporation registration
  - Work permit
  - Issues in relation to local labors or subcontractors
  - Problems of Importing and exporting materials and equipments
  - Delay of preceding construction
  - Delay of drawing issuance
  - Delay in mobilization

### Establishing Problem Solving Project Team

- for the project
- Documentations (Claims) come later



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## Operation of DB - Acquaintance With the Project Site Visits

- Frequency: Every 3~4 months
- Length-of-stay: No shorter than three days
  - Day 1: Site inspection
  - Day 2: Hearing
    - Employer, Contractor, Engineer
    - The persons concerned besides the parties (If necessary, the subcontractors, the designer etc. )
  - Day 3: Site Visit Report
    - Draft and Review/Correction
    - Signing and Distribution before leaving Site
    - Deciding the date of next Site Visit



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## Site Visit Agenda (6 – 10 July 2008)

Date	Time	Place	Contents	Responsible	Participants
Monday 7	08:00	Hotel	DB picked up to Site I Briefing & tour	Mr. X	DB, Emp, Cont, Eng
	12:30	Site Office	Lunch	Mr. Y	DB, Emp, Cont, Eng
	13:30		Tour to Site II & III	Mr. X	DB, Emp, Cont, Eng
Tuesday 8	18:30	Camp Canteen	Dinner & to Hotel	Mr. Y	DB, Emp, Cont, Eng
	09:00	Hotel	DB picked up to Site I Emp office for meeting	Mr. X	DB, Emp, Cont, Eng, Sub A&B
	12:30	Site Canteen	Lunch	Mr. Y	DB, Emp, Cont, Eng, Sub A&B
Wednesday 9	13:30		Afternoon session & to Hotel	Mr. X	DB, Emp, Cont, Eng, Sub A&B
	18:30				
	09:00	Hotel	DB picked up to Site office & prepare report		DB
	16:00		Deliver/review of report & to Hotel	DB	DB, Emp, Cont, Eng, Sub A&B



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## Operation of DB-Acquaintance With the Project Work Between Site Visits

- Sending of Documents
  - Monthly reports
  - Main Variations
  - Claim Notices/Submissions
  - Updated Programme
  - Important Letters other than claim related
- Methods of Sending
  - File sending service
  - Opening of ftp:// sites



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## Methods of Sending (Sample)

- ❑ Put on to the web site →



- ❑ Use file sending service such as [www.yousendit.com](http://www.yousendit.com) etc.

(Not expensive, free up to 100MB)



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## Effects of DB Dispute Resolution

- ❑ Disputes that cannot be solved among the parties and engineers are referred to DB (Referral)
- ❑ DB being well informed of progress/contractual issues
  - Taking advantage of regular Site Visits
  - Voluminous documents and formal presentation unnecessary (Simple Position Papers suffice)
  - Solves disputes at the site level
  - Legal representatives are unnecessary (Should lawyers be permitted to participate?)
  - Swift decisions
- ❑ Claims and disputes will not be left unsolved
  - The progress of construction will not be hindered
  - Disputes will not escalate
  - Collaborative relationship is established and maintained between the parties (for the project)



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## Effect of DB Prevention of Disputes

- ❑ Effects of Site Visits
  - The first Site Visit
    - ❑ Identifying, and efforts for solving, the problems appeared before and right after the signing of the contract
    - ❑ Discovering potential dispute areas and promoting dispute prevention
  - Site Visits
    - ❑ Discovering problems and efforts for dispute prevention
    - ❑ Sometimes technical advices are also available (sensitive to the parties' obligation)
    - ❑ Improvement of the relationships (individuals and groups) among the parties, the Engineer and other concerned persons
    - ❑ Make use of the influence to the third person (subcontract, designer, relevant government offices and others departments)
    - ❑ Helps maintaining parties' integrity



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## Effect of DB Prevention of Disputes (continued)

- ❑ DB to be kept informed between Site Visits
  - Sensing the parties' changes in attitude and provide advices about improvement
  - Improving understanding of the contract by Q&A
- ❑ Informal/advisory opinion
  - DB obtains the trust on neutrality and fairness through Site Visits etc.
  - Informal/advisory opinions are easy to be accepted.



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## Effect of DB Informal/advisory opinion

- **Informal/Advisory Opinion**
  - DB is not a consultant
  - But, DB may give advice under the parties' mutual agreement
  - No binding effect (neither on the two parties/Engineer nor on DB)
  - Can become base for negotiations between the parties
  - Disputes are settled before escalating
  - Is not equal to DRB's recommendation
- **For example**
  - Incompletion in the changed or added terms: Adjustment of interpretation and making of new draft
  - Advice on solution that involves the third party (such as the subcontractor)



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## The cost of DB FIDIC's Explanation

- **Retainer**
  - If required, a business trip to the Site within 28 days is possible
  - DB members are to be conversant with the situation of the site, and maintain the related documents.
  - Covers office expenditure and other costs
- **Daily Fee**
  - Daily fee for site visit
  - Days of stay + maximum two days for each way for travel
  - Days needed for documents reviewing for the referral
- **Reasonable expenses** such as airfare, hotel fee etc.



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## Cost of DB Difference Between FIDIC 1999&MDB Edition

- **About the Retainer Fee During the Warranty period**
  - 1999: "shall be reduced by 50%"
  - MDB: "shall be reduced by one third"
- **About the Retainer/Daily Fee, when no description in the contract, and agreement cannot be reached between the parties**
  - 1999: No description
  - MDB: the "appointing entity/official" may make the decision



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## Cost of DB: ICSID ([International Centre for Settlement of Investment Disputes](#))'s Rule

- **FIDIC: Fee by ICSID can be agreed**

**Adjudicators Fees**  
FIDIC does not recommend fees scales for either adjudicators or for the administration for adjudicators. An indication of acceptable terms and conditions is provided by the World Bank's International Center for Settlement of Disputes (ICSID) - see *Memorandum of Fees and Expenses for ICSID Arbitrators*, 8 March 2004 - that applies for members of Arbitral Tribunals constituted under the ICSID Convention.

- **ICSID's Rule: US\$3,000/day**

**Fees and Expenses of Conciliators, Arbitrators and *ad hoc* Committee Members**  
3. In addition to receiving reimbursement for any direct expenses reasonably incurred, conciliators, arbitrators and *ad hoc* Committee members are entitled to receive, unless otherwise agreed between them and the parties, a fee of US\$3,000 per day of meetings or other work performed in connection with the proceedings, as well as subsistence allowances and reimbursement of travel expenses within limits set forth in Administrative and Financial Regulation 14.



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## Cost of DB Payment to DB members

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- Retainer
  - Payment of three months in advance
  - If no special mutual agreement, no change for 24 months
- Daily Fee/Actual expenses such as the travel expenses
  - Right after the end of the Site Visit
- Methods of payment
  - The Contractor pays 100% at first
  - Reimbursement of 50% through progress payment
  - In other words, the Employer can pay by loans



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## Cost of DB Cost-effectiveness

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- Project without DB - 1
  - The exchange of letters is a heavy work, hindering problems from being solved
  - Each one pursues his own profit
  - The contracting parties/Engineer don't get along well with each other
  - Claims are left unsolved
  - Tiny disputes may also escalate (global claims, additional problems of interest and exchange rates)
  - Production and assessment of claim packages



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## Cost of DB Cost-effectiveness (continued)

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- Project without DB - 2
  - Production and assessment of claim packages
    - Additional costs for lawyers, experts and employees (for long time)
    - Enormous cost occurs even if there is no litigation or arbitration
    - Disputes arise between the Employer and the Consultant on the additional cost of claim assessment/evaluation work



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## Cost of DB Cost-effectiveness – (continued)

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- Project without DB - 3
  - More enormous cost occurs if disputes escalate into litigation and arbitration (lasts for years)
    - (Example) Japan:  
5 lawyers for each side
    - (Example) International:  
2 Barristers+3 Solicitors for each side  
2 Experts (1 geologist + 1 consulting firm)



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## Cost of DB Cost-effectiveness (Continued)

- Projects with DB
  - The cost of DB will be no more than the cost estimated by experienced Employer/Engineer and Contractor for production and assessment of claim packages
  - Prevention of gambling in contract management, improvement of certainty
    - Prevention of irrational assessment by the Employer/Engineer
    - Engineer acts fairly and reasonably
    - Prevention of the Contractor's unjustified claims
    - Helps maintaining integrity of the parties
    - Stability of bidding price



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## Cases of DB Cases of DAB, Example of wisdom

- Water-supply tunnel project in China
  - JBIC loans
  - 13 times of site visits from Mar 2003 to Mar 2007
  - The defect liability period ended in Feb 2008
  - **The DAB contract was extended from Mar 2008 to the end of final discharge of all obligation**
- Selecting of DAB members
  - The Employer: A Japanese engineer (FIDIC President's List, advised by Japanese consulting firm)
  - The Contractor: An American engineer (DRBF President)
  - The Chairman: International construction lawyer (FIDIC President's List, American)
    - Recommended by co-members' agreement
    - Chosen by the agreement between the parties



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## Cases of DB Cases of DRB, Example of wisdom

- Port construction project in Madagascar
  - World Bank (20%) and private co-financing
  - Site visits were discontinued after the third time
  - **However, retainer contract being maintained**
- Selecting of DB members
  - Parties agreed to select from FIDIC President List
  - The Employer and the Contractor agreed on the selection, with assistance by the Engineer



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## Cases of DB Cases of DRE (One-person DRB)

- Japan
  - A gas turbine plant operation and maintenance (o/m) contract for 15 years
  - Apply DRE (Dispute Review Expert) or One Person Dispute Review Board for the last 10 years
  - Meetings are held once every three months
  - No retainer fee, but documents review/drafting recommendation etc. will be paid by hourly rate
- Selecting of the Experts
  - A mediation was held on the fifth year of the contract under the ADR rule of ICC
  - **After the mediation concluded successfully, the Neutral was selected for the DRE**



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## DB裁定の執行性

- DAB (1999 Red Book)  
DB (2005 MDB Harmonised Edition)
  - 裁定は下されたら即、効力を持つ。
  - 不服申し立てを行っても、裁定は実行しなければならない。
  - 裁定を実行しなし場合、クレームの内容を争うのではなく、裁定に実行の命令を仲裁に申立てることが出来る。(Mr. Christopher Seppäläの記事参照)



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## Amicable Settlement

- DBの裁定後、不服申し立て
- 仲裁前に“Amicable Settlement”の努力が要求されている。
  
- この条項は不服申し立てによって、裁定の実行を猶予しているわけではない。



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## Mr. Christopher Seppäläの記事

### An Engineer's/Dispute Adjudication Board's Decision is Enforceable by An Arbitral Award

Contrary to widespread belief, a “binding” but not “final” decision of an Engineer under the FIDIC Conditions is enforceable by an arbitral award, in appropriate circumstances. This has been established for the first time by the interim award in ICC Case No. 10619. By analogy, a “binding” but not “final” decision of a FIDIC Dispute Adjudication Board should also be enforceable by an arbitral award in such circumstances.

(There should be no issue that a “final and binding” decision of an Engineer or Dispute Adjudication Board is enforceable by an arbitral award)



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## Practice of Dispute Board

Than you for your  
attention

The End



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アジア地域におけるDAB・アジュディケーター導入・普及セミナー

## 現地調査(ベトナム、カンボジア、スリランカ等)の報告

2010年2月18日

日本工営株式会社  
林 幸伸

JICA DAB Seminar 2010

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## 調査の目的

- DABプロモーションセミナーの開催
- 援助窓口機関及び円借款案件実施機関との協議・意見交換
- JICA現地事務所との協議・意見交換



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## 調査の工程

	国名	調査期間
1)	カンボジア	2009年11月19日-20日
2)	ベトナム	2009年11月22日-23日
3)	インドネシア	2010年1月26日
4)	バングラディシュ	2010年1月28日
5)	スリランカ	2010年2月1日-2日



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## DABプロモーションセミナー

### 1. プログラム

- 1) FIDIC契約約款におけるDABの位置付け
- 2) DABの実際
- 3) 質疑応答

### 2. 参加者数

	国名	参加者数
1)	カンボジア	77名
2)	ベトナム	157名
3)	バングラディシュ	53名
4)	スリランカ	105名



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## 円借款案件実施機関との協議 (カンボジア)

1. 調査対象機関: シアヌークビル港湾局(PSA)、プノンペン上水道局(PPWSA)、カンボジア電力公社(EdC)
2. 聴取された主な意見・確認内容
  - DAB費用については割高感があり、特に発注者側の負担について疑問ある。
  - 公的資金援助が得られるなら前向きに導入も考える。
  - 最近の円借案件で、adjudicationが取り入れられている契約もある。
  - カ政府はADR(裁判外紛争解決)を推奨しており、ローカル契約では導入が始まっている。



## 円借款案件実施機関との協議 (ベトナム)

1. 調査対象機関: MPMU、計画投資省(MPI)、建設省(MOC)
2. 聴取された主な意見・確認内容
  - MPIでは、DABは発注者にとっても大きな便益をもたらす制度であると認識。パイロットプロジェクトによりDABを経験し、その効果を実証したい。アジュディケーター選定プロセスには透明性確保が必要。
  - 他方、DAB普及のためには発注者にとっての便益を明確化すべき、との意見もあり。
  - 現状のクレーム処理・紛争解決プロセスにおいて上位機関からの介入があり、ADB導入にも上位機関の合意を要する。
  - ベ国の法的枠組みとの整合性を懸念する意見あり。
  - 割高感を払しょくするためにもパイロットプロジェクトにより検証したい。



## 円借款案件実施機関との協議 (インドネシア)

1. 調査対象機関: 国有電力公社(PLN)
2. 聴取された主な意見・確認内容
  - PLNではDABを導入し建設を実施した事例はない。従って、DABについては未だあまりよく理解されていない状況にある。
  - しかしながら、今後の円借案件では、DABが導入されてゆくことになるだろう。例えば、これから建設が開始される水力発電計画では、JICA Sample Bidding Document(2009年版)を採用しDABも導入される予定である。



## 円借款案件実施機関との協議 (スリランカ)

1. 調査対象機関: 道路開発局(RDA)、外部リソース部(DER)、セイロン電力公社(CEB)、国家給水排水公社(NWSDB)
2. 聴取された主な意見・確認内容
  - カンボジアでは、国内プロジェクトで使用される標準契約書(ICTAD調達書)にadjudicationが採用されており、adjudicationの普及度についてはアジア諸国の中では最も高いと考えられる。
  - 但し、円借案件における導入事例はまだあまり多くはない。
  - 円借款道路案件において、2つの契約パッケージにおいてDABが導入されている。3人制DABでアジュディケーターはスリランカ人が務めている。DABの決定が合意されず仲裁に発展しているケースがある。また、DABの決定に対する不服表明は出されたが、次のステップ



## 円借款案件実施機関との協議 (スリランカ)

### 2. 聴取された主な意見・確認内容(続き)

(即ち仲裁)の開始意図がなされず、紛争が膠着しているケースも見られた。

- 入札図書の承認や契約紛争の合意に当たりAttorney General の意見を求める政府内手続きがあり、プロジェクト実施機関としてこれを尊重する必要がある。
- スリランカ人のアジュディケーターの報酬日額は300~500米ドルであるが、国家公務員の給与レベルに比べても高いと感ずる。外人アジュディケーターの雇用はアフォーダブルではないと感ずる。
- 紛争が発生してからアジュディケーターが行動を始めるケースが多く、紛争の予防機能が十分に果たされていないと感ずる時がある。



## 円借款案件実施機関との協議 (スリランカ)

### 2. 聴取された主な意見・確認内容(続き)

- DABのシステム自体は良いものと考えているが、その費用を正当化するには、過去の事例からDABがない場合とある場合のコスト・シミュレーションを行い、DABが発注者にとって優位なものであることを確認する必要があると考える。
- 電力案件では、現時点で深刻な建設紛争は発生していないと理解している。またDABの導入については未経験である。
- DABの費用はプロジェクトコストとなるので、DABの導入に当たっては、DAB費用と紛争が長期化することによる負担コストを比較検討する必要があるのではないかと考える。



## 円借款案件実施機関との協議 (スリランカ)

### 2. 聴取された主な意見・確認内容(続き)

- 紛争の裁定に当たり、法的な解釈については法律家の判断が必要となるが、技術的側面の判断については専門家の参加が必要である。
- 上水道案件(ADB融資)で、契約書にMDB版が使用され、3人制ad-hoc DABが導入されている事例がある。アジュディケーターは全てスリランカ人である。これまで1件の紛争がDABに付託され、物価変動に関わるクレームであったが、最終的には仲裁に行った。
- DAB のコンセプトは理解するが、問題はstanding かad-hoc か、の選択である。



## アンケート調査

### 1. アンケート内容

- セミナーの評価
- DAB導入についての意見
- クレームの種類と処理経験

### 2. 回答者数

	国名	回答者数 (回答率)	政府	コントラクター	コンサルタント	その他
1)	カンボジア	77名(60%)	74%	5%	16%	5%
2)	ベトナム	52名(33%)	71%	4%	8%	17%
3)	バングラディッシュ	44名(83%)	98%		2%	
4)	スリランカ	79名(75%)	55%	18%	15%	12%



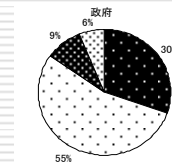
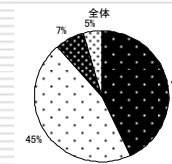
### アンケート調査(セミナーの評価)

(評点:5点満点)

	国名	興味深い	役に立った	わかりやすい
1)	カンボジア	3.9	3.9	3.6
2)	ベトナム	3.5	3.6	3.5
3)	バングラディシュ	3.8	3.7	3.7
4)	スリランカ	3.9	4.0	4.0



### アンケート調査(カンボジア)



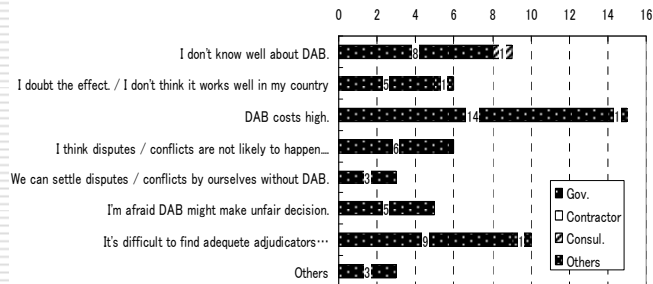
凡例

- Yes, I want to adopt DAB.
- No, I will adopt DAB if certain issues, which I am concerned about, are cleared.
- ▨ No, I don't want to adopt DAB.
- 無回答



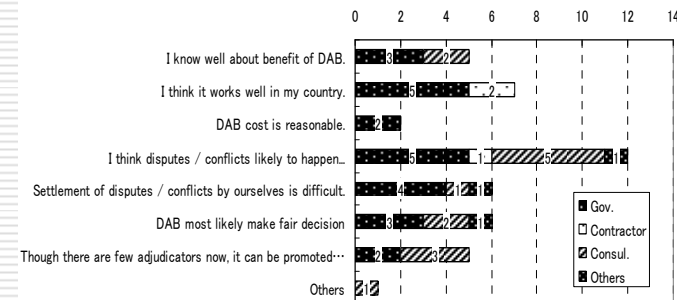
### アンケート調査(カンボジア)

DABを導入したくない理由

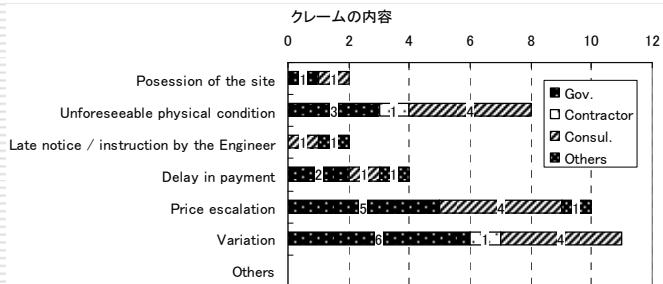


### アンケート調査(カンボジア)

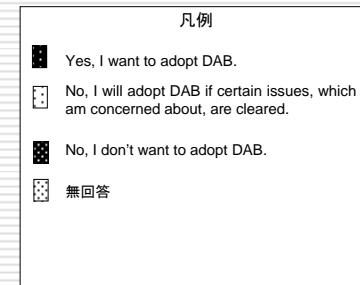
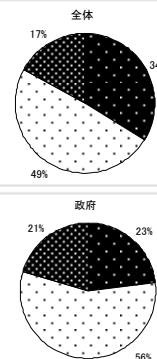
DABを導入したい理由



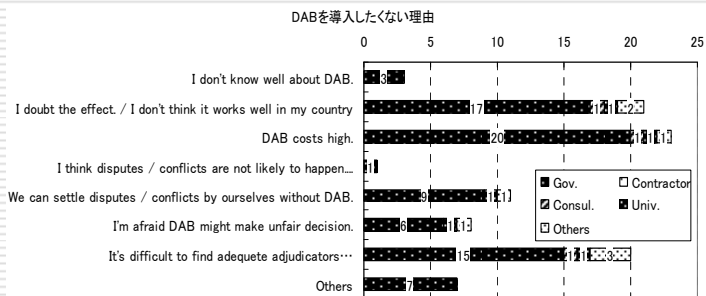
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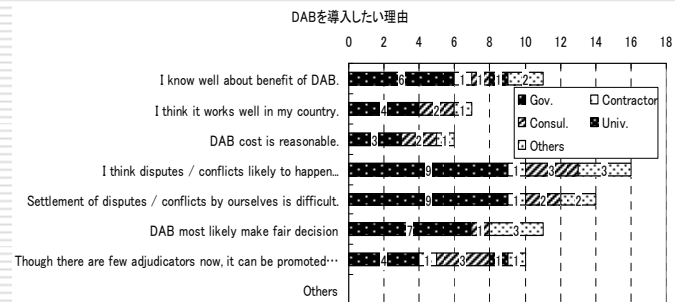
### アンケート調査 (ベトナム)



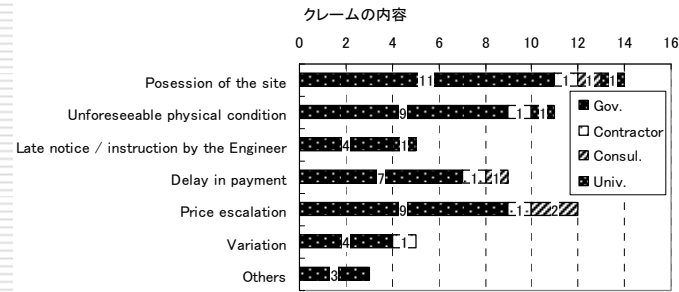
### アンケート調査 (ベトナム)



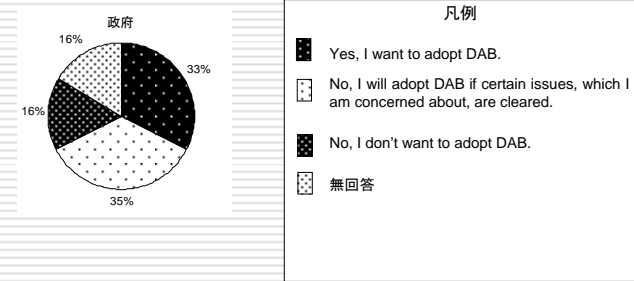
### アンケート調査 (ベトナム)



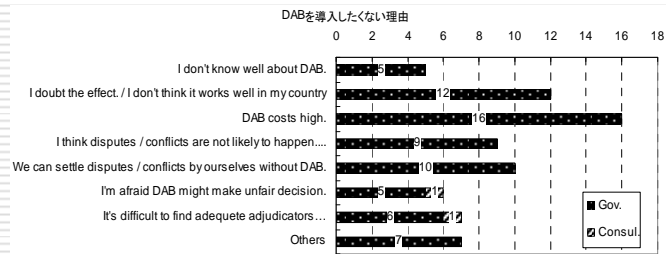
### アンケート調査 (ベトナム)



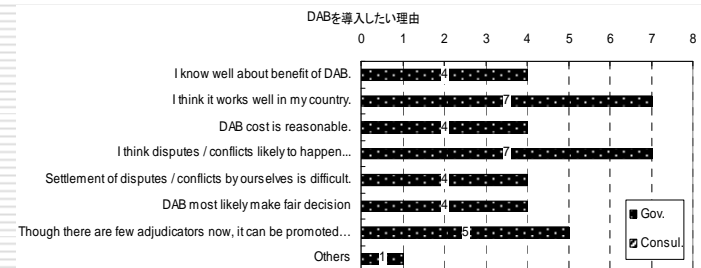
### アンケート調査 (バングラデシュ)



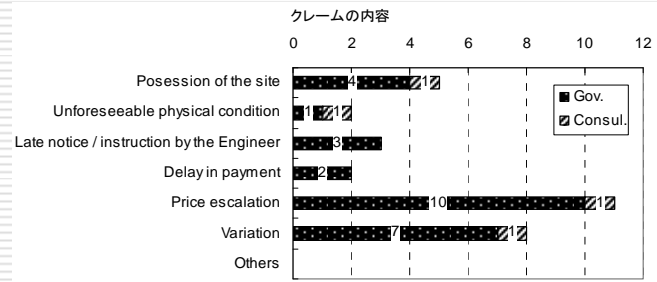
### アンケート調査 (バングラデシュ)



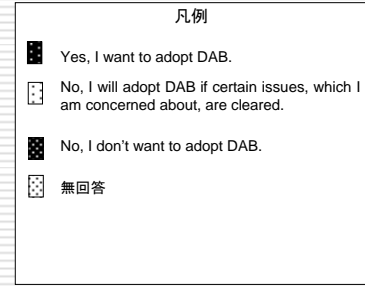
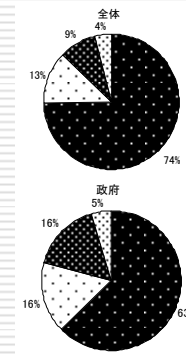
### アンケート調査 (バングラデシュ)



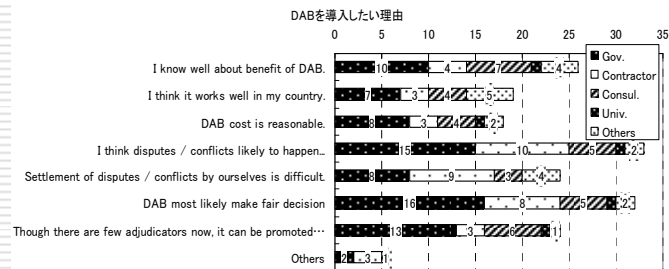
### アンケート調査 (バングラデシュ)



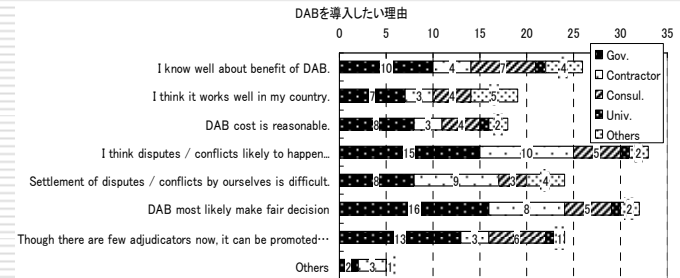
### アンケート調査 (スリランカ)



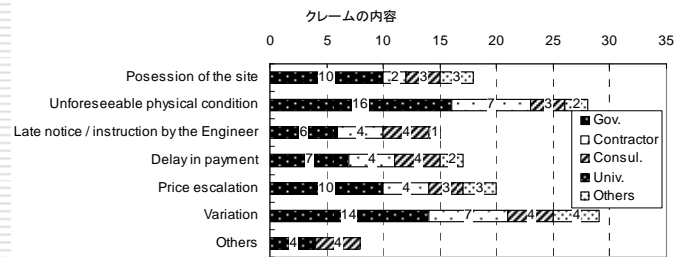
### アンケート調査 (スリランカ)



### アンケート調査 (スリランカ)



## アンケート調査 (スリランカ)



## まとめ

1. 各国ともに、DABは殆ど未経験の新しい制度であり、その導入に対してまだ戸惑いを表明する意見が多い。
2. DABの費用については、多くの実施機関が割高感を有している。DABの合理性は理解するものの、費用負担が最大の懸案事項であり、低額でのDAB導入を実現したい、との意見が多く聞かれた。
3. DAB導入がもたらす発注者の便益を実証するために、パイロットプロジェクト実施が有効である、との意見がしばしば聞かれた。



## まとめ (続き)

4. 適任のアジュディケーターを探すことに対して不安を感じる意見も聞かれた。
5. クレーム・紛争の原因としては、1)現場の引渡し遅れ、2)予見不可能な物理的条件、3)物価変動調整、4)支払遅延、5)変更、が多い。
6. JICAに期待する事項として、DABの理解促進を図るためのセミナー、ワークショップの開催や、アジュディケーター育成のための支援を求める意見が多く聞かれた。



## まとめ (続き)

7. 契約運用上の問題点として以下が確認された。
  - ① Engineer's Decision/DAB's Decisionの拘束力が遵守されていないケースが散見された。
  - ② 契約でstanding DABが規定されているのに関わらず、その後の契約当事者間の協議により、設置が引き延ばされている事例がみられた。
  - ③ 発注者側の内部部局がEngineerを兼任している事例がみられる。このようなプロジェクトでは特にDABの導入が有効と考えられる。
8. DABの普及には、発注者となる実施機関のみならず政府内の調達担当部局、財政部局、法務部局、の十分な理解が必要と考えられる。







アジア地域におけるDAB・アジュディケーター導入・普及セミナー

## 今後のアジュディケーター育成について

2010年2月18日

京都大学 経営管理大学院  
教授 大本 俊彦

JICA DAB Seminar 2010

## DB Member Training Kit

- 今回の調査業務の1つの成果物
- 構成
  - テキスト
    - MDB版(JICA Sample Bidding Documents)をベースに
    - I. Introduction
    - II. Selection of DB Member
    - III. Operation of a Dispute Board
    - IV. Financial Aspect of the DB
    - V. After the DB Decision
  - 付録
    - FIDIC MDB Harmonised Edition
    - FIDIC 1999 Red Book 抜粋



JICA DAB Seminar 2010

## DB Member Training Kit

- Trainer's Version/Trainee's Version
- 4～5日間コース
- 英語
- Interactive
  - Case Study
  - Moc DB Referral
  - Assignment – Decision Writing



JICA DAB Seminar 2010

## Training Courseの実施(案)

- JICA主催
- アジア各地
- アジュディケーター資格試験の要件
- アジュディケーターにならなくとも有意義
- 対象者
  - コンサルタント
  - コントラクター
  - 弁護士
  - QS
  - 融資機関



JICA DAB Seminar 2010

## Training Courseの実施(案)

### □ 講師

- FIDICの修了証書を出す場合
  - FIDICの認定講師
  
- FIDICの修了証書を出さない場合
  - FIDIC APAのメンバー
  - FIDIC President's List



JICA DAB Seminar 2010

## Training Courseの実施(案)

### □ 東京で開催したら

- 参加しますか?
  
- 費用は?



JICA DAB Seminar 2010

## DB メンバー資格審査プロセス(案)

### □ FIDIC MAによるNational List

### □ 資格審査

- FIDIC MDB HE Training
- DB Member Training (JICA Training Kit)
- Assessment (資格審査)とMAへの推薦
- MA National List への登録

### □ 定期的(3年毎)レビュー



JICA DAB Seminar 2010

## DB メンバー資格審査

### FIDIC's guideline criteria for DB members on National Lists

- be an employer or a retired employer of a member firm;
- possess appropriate academic and/or professional qualifications as an engineer in any of the principal disciplines of engineering, or equivalent professional qualifications;
- has at least 10 years' experience as an engineer within a consulting engineering or engineering firm operating within the built and natural environment;
- possess detailed knowledge of FIDIC consultant-client agreements and FIDIC works contracts;
- possess good interpersonal and communication skills;
- is committed to and available as an adjudicator;
- has the ability to be partial and objective;
- maintains adequate professional indemnity insurance;
- has excellent spoken and written language capabilities in the language of the country;
- provides evidence of and ongoing commitment to the requirements of a continuing education programme;
- selected candidates must attend a Member Association adjudication assessment workshop followed by an interview with the association's dispute resolution committee or similar body.



JICA DAB Seminar 2010

## Q & A at the DAB Seminar (Tokyo)

1. Time: 14:00 – 17:00, 18 January 2010
2. Place: Kosai-Kaikan, Tokyo
3. Participants: 73
4. Q&A (Q: Question, A: Answer, C: Comment)

Q1: It is reported that the DB decisions have not been complied with by one of the parties. Is it a correct understanding under the ICC rules that the aggrieved party can go to arbitration to ask for an award which directs the other party to comply with the decision if there was no notice of dissatisfaction?

A1: Yes it is.

Q2: What can you do with the completion certificate of a DB training workshop? Is a person with the completion certificate eligible to register at the JICA list of approved adjudicators, if exists?

A2: The training is very useful to everybody even if he does not aim at becoming a DB adjudicator. It is planned that each FIDIC Member Association (MA) will prepare and maintain its National List of approved adjudicators, and the completion of the training workshop will be one of the prerequisites for the DB adjudicators' assessment.

Such a list will not be prepared or maintained by any official funding agencies but by a FIDIC MA. Official agencies or MAs will not take any responsibility as to the quality and the conduct of listed adjudicators while it is sole responsibility of the parties to select adjudicators from the list or elsewhere.

Q3: DB decision may not be enforceable in most of the Asian countries where DB process is not defined in their legal framework. It is, therefore, important to establish the DB process as one of the ADR measures.

A3: DB process under FIDIC MDB Edition is a contractual mechanism for dispute resolution and the contracting parties agree to be bound by the process. The parties have a right to go to arbitration as the last resort of dispute resolution. Therefore, DB process does not have a conflict with the existing legal framework of a country. The fact is that the problem is the intervention by a higher authority which force the lower authority (i.e. the Employer) not to comply with the decision.

DB is not defined as an ADR under the law of Japan. But the freedom of agreement is assured

and once the parties agree have a DB in their contract, they are bound by the process and the consequences. For example, there is no law for mediation in Japan, but the settlement by mediation becomes binding on the parties as a contract.

If it is thought that DB is hard to recognized because there is no law for it, more education and trainings are necessary.

C1: Not only the Employers of the developing countries but also international contractors are concerned about the cost of DB. Bidders have to provide the budget for the cost of DB in their bid prices. In order to achieve a fair bid evaluation, the Employer should insert certain numbers for DB fees as provisional sums. It may be necessary for JICA to regulate such systems in the Guideline.

Q4: Is it not a good practice to select a Japanese adjudicator for a one-person DB for a project in which a Japanese contractor is one party.

A4: FIDIC's guideline suggests that a sole member of a one-person DB and a chair of a three-person DB should be of a national different from the nationalities of the parties and the Engineer. A Japanese adjudicator can be a co-member of a three-person DB when the contractor is a Japanese company.

Q5: One of the requirements for an DB adjudicator to be on a national list is that a candidate has a professional indemnity insurance. As a matter of fact, it seems to be hard for an individual to purchase such an insurance. Or, is the job of a DB member so risky?

A5: It is not understandable to have such a requirement for a national list because there is no such a requirement for the adjudicators of the FIDIC President's List. As to the professional liability of a DB adjudicator, it is widely accepted that he/she is immune from any liability

Q6: What professions do FIDIC approved adjudicators have?

A6: Very rare that an adjudicator belongs to a big company. Most of them are self-employed or run a personal office. A person belongs to a big corporation often should have a conflict of interest in a case or with people.

Q7: There are still few contracts which are using FIDIC MDB Edition and it will take some more time for disseminating DB concept and practice. Is there concrete plans for quick promotion?

- A7: JICA is promoting the use of MDB Edition to the executing agencies. There are those who are not very positive to use of it because they are not familiar with it. Although JICA is trying to promote the use of MDB Edition taking chances of the Loan Procurement Policy and Supervision seminars, it looks that it take some time for the promotion of the MDB Edition. JICA would like to ask the Japanese consultants to consider the MDB Edition be the starting point when they prepare bid documents.
- Q8: It is important for the promotion of DB to disseminate the concept that the DB cost is part of the project cost.
- A8: Although there was no pay item in the bill of quantities in the Chinese project which adopted DAB, there was no problem for the payment through the monthly statements. The JICA ODA projects in Turkey and in Romania have the same situation but they have no problem in paying DB costs under loan money. JICA considers that the costs for DB is part of project costs.

### DABに関するアンケート

問1. あなたの所属先について教えてください。

- (1)  コントラクター                      (2)  コンサルタント  
(3)  その他 (                      )

問2. 今後の JICA 融資の国際プロジェクトに対する DAB の導入について、現在の業種・業務上からのご意見をお聞かせ下さい。

- (1)  原則的に導入すべきと考える。

理由 :

- (2)  ある条件を満たす案件について導入すべきである。

条件 :

- (3)  導入は歓迎しない。

理由 :

問3. DABメンバーの人数について、ご意見をお聞かせ下さい。

- (1)  原則的に3人制とすべきと考える。

理由 :

- (2)  以下の場合には1人制とすべきと考える。

条件 :

問4. その他、DAB の導入についてご意見をお聞かせ下さい。(期待する点、克服すべき課題、不明な点、等)。

問5～7は個人的関心をお聞かせください。

問5. 本日のセミナーに参加して、アジュディケーターについてどのようにお感じになりましたか？

- (1)  アジュディケーターの業務をやってみたい、または興味がある。
- (2)  アジュディケーターの業務をやってみたいとは思わない。

問6. 日本で DAB Training Course が開催されたら、参加したいと思えますか？

- (3)  すぐにでも参加したい。
- (4)  条件付きで参加したい。

条件：

- (5)  参加したいとは思わない。

問7. 日本で Adjudicator's Assessment Workshop (資格審査ワークショップ) が開催されたら、参加したいと思えますか？

- (1)  すぐにでも参加したい。
- (2)  条件付きで参加したい。

条件：

- (3)  参加したいとは思わない。

問8. その他、本日のセミナーに関するご意見、ご感想等ありましたらお聞かせ下さい。

ご協力ありがとうございました。

## Result of Questionnaire Survey (Tokyo)

			Nos.	Job				
				Contractor	Consultant	Other/Null		
Nos. of Respondents			58	32 ( 55.2% )	19 ( 32.8% )	7 ( 12.1% )		
Q2	Adoption of DAB	(1) Should be adopted essentially	38 ( 65.5% )	21 ( 65.6% )	10 ( 52.6% )	7 ( 100.0% )		
		(Reason) Effective resolution / prevention of the dispute, low cost,	12	6	2	4		
		Securing fairness	3	3				
		Decrease the cost/time to deal with claims	2	1	1			
		Others	12	6	2	4		
		(2) Should be adopted in a certain condition	20 ( 34.5% )	11 ( 34.4% )	9 ( 47.4% )	0 ( 0.0% )		
		(When) Size / contract value of the project	5	2	3			
		Characteristics of the Work	4	3	1			
		The Employer's assuring to bear the cost	4	1	3			
		Parties' mutual consensus	2	1	1			
Others	12	7	5					
(3) Don't want to adopt	0 ( 0.0% )	0 ( 0.0% )	0 ( 0.0% )	0 ( 0.0% )				
Q3	Numbers of the DAB Member	(1) Should be 3 persons essentially	38 ( 65.5% )	23 ( 71.9% )	10 ( 52.6% )	5 ( 71.4% )		
		(Reason) Securing impartiality	21	12	6	3		
		To reflect both parties' opinion	3	1	2			
		Should be plural	2	1	1			
		Easier for the parties to accept	2	2				
		Need both lawyer and engineer	2	2				
		Others	6	4	1	1		
		(2) Should be 1 person in a certain condition	14 ( 24.1% )	8 ( 25.0% )	5 ( 26.3% )	1 ( 14.3% )		
		(When) Size / contract value of the project	12	6	5	1		
		Characteristics of the Work	5	2	3			
Others	5	3		2				
No answer	6 ( 10.3% )	1 ( 3.1% )	4 ( 21.1% )	1 ( 14.3% )				
Q5	Interst in serving as an adjudicator	(1) Want to serve / interested in serving as an adjudicator	33 ( 56.9% )	20 ( 62.5% )	13 ( 68.4% )	0 ( 0.0% )		
		(2) Don't want to serve	19 ( 32.8% )	11 ( 34.4% )	5 ( 26.3% )	3 ( 42.9% )		
		No answer	6 ( 10.3% )	1 ( 3.1% )	1 ( 5.3% )	4 ( 57.1% )		
		(3) Don't want to attend	17 ( 29.3% )	8 ( 25.0% )	6 ( 31.6% )	3 ( 42.9% )		
Q6	Interst in DAB Training Course	(1) Want to attend immediately	15 ( 25.9% )	7 ( 21.9% )	7 ( 36.8% )	1 ( 14.3% )		
		(2) Want to attend in a certain condition	21 ( 36.2% )	16 ( 50.0% )	5 ( 26.3% )	0 ( 0.0% )		
		(When) Cost	8	6	2			
		Time, timing	4	2	2			
		With the company's order	2		2			
		Others	8	8				
		(3) Don't want to attend	17 ( 29.3% )	8 ( 25.0% )	6 ( 31.6% )	3 ( 42.9% )		
		No answer	5 ( 8.6% )	1 ( 3.1% )	1 ( 5.3% )	3 ( 42.9% )		
		Q7	Interest in Assessment	(1) Want to apply immediately	13 ( 22.4% )	6 ( 18.8% )	6 ( 31.6% )	1 ( 14.3% )
				(2) Want to apply in a certain condition	20 ( 34.5% )	13 ( 40.6% )	7 ( 36.8% )	0 ( 0.0% )
(When) Time, timing	2			1	1			
Others	11			7	4			
(3) Don't want to apply	19 ( 32.8% )			11 ( 34.4% )	5 ( 26.3% )	3 ( 42.9% )		
No answer	6 ( 10.3% )			2 ( 6.3% )	1 ( 5.3% )	3 ( 42.9% )		



Commented Answer

DAB Seminar Tokyo

Q2 Adoption of DAB			
(1) Reason to adopt DAB	Prevention of disputes / effective resolution of disputes / low cost etc.	6 Cont., 2 Consul., 4 Others	
	Securing fairness in conducting the contract / the project	3 Contractor	
	Decrease the time, work, cost to deal with the claims	1 Cont., 1 Consul.	
	The more opportunity the Contractor can express its opinion, the better. It can ease the Engineer's responsibility because 3rd party (not the Employer) makes the decision.	Contractor	
	As a contractor, if claims and disputes remain and payment is sustained even after the project has finished, it's better that the trouble is settled in the early stage because it makes it easier to control the business. It also benefits the Employer and the donor therefore I want to adopt DAB as soon as possible.	Contractor	
	Prevention of disputes, although it may be difficult to agree on DAB before disputes occur.	Contractor	
	As the contractor, if the merit of the DAB is secured in the project, it should be adopted.	Contractor	
	The best solution is to share the problem by the parties.	Contractor	
	Because the Contractor can claim the Employer with the cost of the Employer	Contractor	
	It can ease the Engineer's burden	Consul.	
	Adoption of DAB will be global standard	Consul.	
	Although there is some anxiety about the cost bearing by the Employer, to prevent and resolve the problem in the early stage is effective to operation of the project. Which organization shall employ DAB? Can local government employ?	Consul.	
	It is preferable in view of effective operation of the project. However, documentation will be required when the contract is agreed, and it's necessary to confirm them. Confirmation by DB member before commencement of the project and preliminary confirmation among the parties. Engineer (consultant) can not be impartial between the Employer and the Contractor	Consul.	
	In the on-going project in Vietnam, there are troubles such as suspension of the disbursement, delayed possession of the site, etc. The situation would be different if there were DAB.	Others	
	In Vietnam, contractor's claims are hardly responded. Generally speaking, the conflict between the Employer and the Contractor can not be easily solved and 3rd party's opinion is necessary. At the beginning of the project / contract, there is no foreseeing what disputes will happen in the future (expect no or little dispute). So they are not willing to adopt DAB which increases the initial cost -> It must be mandatory.	Others	
	(2) Condition to adopt DAB	Contract value, size of the project (large project, contract value is more than certain amount, etc.)	2 Cont., 3 Consul.
		Characteristics of the Work (expect difficulty in technically, financially, etc.)	3 Cont., 1 Consul.
When the Employer can bear the cost.		1 Cont., 3 Consul.	
When the parties (the Employer, the Contractor and the Engineer) have intention to solve the troubles using DAB.		1 Cont., 1 Consul.	
When other ADR is not introduced.		Contractor	
Intentional bidding, enforce DB's decision.		Contractor	
Introducing DAB is effective for fair and smooth dispute resolution, however, it seems difficult without the employer's understanding and coordinating with relating laws. It is doubtful whether the cost is accurately imposed for both parties.		Contractor	
When the decision is enforceable in the country.		Contractor	
If JICA bears the cost.		Contractor	
According to the country or area etc.		Contractor	
It is not suitable for the developing country (Vietnam, Cambodia etc.) for it is non-binding.		Contractor	
When JICA Sample Bidding Document is adopted.		Consul.	
According to the relationship between JICA and the Employer.		Consul.	
The Engineer's decision should be prior, unless in a particular condition e.g. the Contractor and the Engineer are the same nationality. They should include the ability of contract management into the requirements for the Engineer, or assign Quantity Surveyor on the Engineer's side.		Consul.	
To secure availability of the certified adjudicators.		Consul.	
It's better to introduce DAB step by step.		Consul.	
The position of the adjudicator is not yet fixed, there are limited numbers of adjudicators, which means current situation is the primary stage.			

Commented Answer

DAB Seminar Tokyo

Q3 Numbers of the DAB member			
(1) The reason of 3 persons	Securing fairness, impartiality, etc.	12 Cont., 6 Consul., 3 Others	
	It can reflect the opinion of both the Contractor and the Engineer, and enable them to discuss more.	1 Cont., 2 Consul.	
	It should be plural.	1 Cont., 1 Consul.	
	It is easier for the parties to accept the decision.	2 Contractor	
	It need both a lawyer and a engineer.	2	
	Transparency	Contractor	
	Both the Employer and the Contractor should chose the members. The chair shall be chosen by those two members. There should be both engineer and administrator.	Contractor	
	If the budget allows, it is desirable to select 3 persons. When adopting one-person DAB, it will be difficult to find the member who has both expertise and impartiality.	Contractor	
	If it is one-person, the member is likely to be the person of the Employer's side.	Contractor	
	There are few specialists with many specialities. Projects need more and more specialists. The problem will be the cost.	Consul.	
	It does not matter whether it is three-person or one-person, if both the Employer and the Contractor can accept and agree.	Others	
	(2) Condition to make 1 person	Size of the project, contracto value -less than US\$30million -grant project -less than JPY 5 billion -less than JPY a couple of billion -according to the percentage of the DAB cost against the contract value	6 Cont., 5 Consul., 1 Others
		Characteristics of the work (easy works, simple contract such as suppliment of the equipments, etc.)	2 Cont., 3 Consul.
		When the substitution is secured if the member become unavailable. The member of one-person DAB should have certain accreditation, experience and credit.	Contractor
Because of the cost. However, if the employer can bear, it should be three person.		Contractor	
When both parties fail to appoint DAB members.		Contractor	
To make DAB popular, it can't be helped to adopt one-person for the time being (until MDB is wide-spread).		Others	
When the dispute amount is small, the possibilities of continuing disputes is low.		Others	
Q4 Free Comments about Adoption of DAB			
	About the cost. -Who (the Employer, the Contractor) will pay, how (by Yen loan, grant) to pay, etc. -Whether the parties (especially the Employer) can accept to bear the cost. -Define the adjudicator fee, lower it, make it flat, etc.	8 Cont., 4 Consul., 1 Others	
	To analyze past projects with DAB (whether tiere were disputes solved by DAB or not), and estimate cost-benefit effect quantitably can make the governments of the aided countries have positive attitude against adoption of DAB (if the analysis reveals the positive cost benefit effect Agree to / expect the adoption of DAB for dispute resolution, fairness, smooth implementation of the projects. etc.	Consul	
	Request to conduct pilot project.	3 Cont., 2 Consul.	
		1 Cont., 1 Consul., 1 Others	
	The problem is to secure enforceability of the decision or the authority of the adjudicators.	4 Cont., 2 Consul.	
	Member selection and fairness of the decision are doubtful.	1 Cont., 2 Consul.	
	Grow up adequete adjudicators, availability of the adjudicators.	3 Cont., 2 Others	
	It is necessary to promote understanding of DAB and make consensus by the parties (especially the Employer).	3 Cont., 3 Consul.	
	It relates to the religion and the Engineer's ability so some people may not welcome DAB.	Contractor	
	Development of legal systems	Contractor	
	Is there any remedy when appointment of DAB is suspended or ignored by one party despite the contract defines DAB?	Contractor	
	Treatment of the upper organizations	Contractor	

## Commented Answer

## DAB Seminar Tokyo

	From the view of the Contractor, disputes are arisen when the commencement of the construction / bid before all the site is secured, or unfair contract neglecting the FIDIC's intention, is allowed by JICA in many cases. Besides adopting DAB, I request other measures to prevent disputes. (ex.confirm the situation of site possession before bid; modify the one-sided contract before bid)	Contractor
	Revises the one-sided contracts	Contractor
	Because I did not know the existance of DAB, there should be more promotion. How will JICA	Consul
	When Japanese become DAB members, they will tend to be lawyers. It will be difficult when they are employees ?	Consul
	It seems DAB will benefit more the Contractor, therefore the Employer may hesitate to adopt	
	In Japanese ODA projects, the Engineer is employed mostly by the Employer and there will be disputes between the Engineer and DAB.	
	How can the Engineer express dissatisfaction against DAB?	
	I think E's Decision and DAB's Decision is fundamentally the same. In the countries where there are many disputes, won't they escalate into arbitrations after all? When the dispute end in amicable settlement, is it still "settlement of the dispute"?	
	Quality of DAB should be based on the member's suitability and competence	Consul
	Even with DB, some case needs long time to settle the disputes. (I feel it depends on the culture of the country). Is there any analysis of the failed case (the case in which DAB did not work	Consul
	It will be important to grow up Japanese DB members, however, if nationality of the member should not be the same as the parties, there will be limited chance for Japanese adjudicators to work for Yen loan projects in Asian countries.	Consul
	Although developing the DAB system is important, it is also important to try to introduce DAB actually. It is pity because I feel the Engineer's position / reliability is being lost.	Consul
	How to justify making DAB mandatory in Contract Condition (P.C, Sum, etc)	Consul
	Include agreement to the charter in resolving dispute in the contract of the project. Make the requirements for DAB members and the fee clear and open. To hold the workshop for DAB adjudicator, the Employer, and the Contractor.	Consul
	Expect to increase the number of the projects with DAB both in domestic and international	Others
	I am considering to serve as DAB member in the future.	Others
<b>Q6 AB Training Course</b>		
(4) Condition to attend	According to the cost.	6 Cont., 2 Consul.
	Time, timing	2 Cont., 2 Consul.
	If the employer (company) orders	2 Consul.
	According how it lead to being adjudicator	Contractor
	If JICA clearly state they will introduce DAB.	Contractor
	I want to consider when more detailed contents is given.	Contractor
	To realize the activity of DAB (as the Contractor)	Contractor
	Just to acquire the knowledge	Contractor
	When I have the ability.	Contractor
	It's spiritual thing, the view of human nature as fundamentally good always prevail ?	Contractor
	Unless we study DAB and grow up the contract management ability, we will lose China and Korea.	Contractor
<b>Q7 Adjudicator's Assessment Workshop</b>		
(2) Condition to apply	Timing	1 Cont., 1 Consul.
	According to the employer(company)'s intention	Consul
	According to my position expected in my company	Consul.
	Now I don't have enough experience, I want to apply in the future.	Contractor
	When I have the ability.	Contractor
	Cost-benefit of the workshop	Contractor
	If JICA clearly state they will introduce DAB.	Contractor
	To realize the activity of DAB (as the Contractor)	Contractor
	To acquire information personally.	Consul.
	Because I am not the engineer, according to the requirements to be certified.	Contractor
	I want to know the contents of the preparation.	Consul.
	Abilities of english and internationally local language	Contractor
<b>Q8 Other Comments</b>		
	Thank you very much. It is an interesting view that DAB prevent corruption.	Contractor
	I wonder how I can manage current work in my company if I became listed in the National List.	Contractor
	What if there is a conflict of Interest as an employee?	
	Seminar text is very good, which helped my understanding very much.	Contractor

## Commented Answer

## DAB Seminar Tokyo

I realize the effort since two years ago. The contents of questionnaire are really interesting as well. Good job. As for the human resource, improve the quantity taking it into account that Japanese people do not have many experiences of judging the "communication ability" which Japanese people are not good at. Otherwise, it might harm the reputation of Japan. I feel lawyers and those who have experienced judge are more suitable (reliable). Thank you.	Contractor
In construction project, site possession and geological condition are the biggest factors to change the work schedule. When the work is suspended, it makes the Contractor bear increased cost, and make the cash flow of the donor worse, which leads the dispute. Matters like possession of the site can be predicted at the time when the contract is signed or even before bidding, therefore it will be another way of the Yen loan projects that introducing professional review before the bidding to prevent future disputes, even DAB shall be adopted to prevent disputes after the commencement of the work.	Contractor
It is difficult to get agreement from the Employer -in Yen loan project, the government - who will receive the claims in the aspect of bearing the cost. Therefore promotion for the Employer is required.	Contractor
Very provocative seminar.	Contractor
The topics are very interesting. I wanted to know more detailed and practical explanations with more time.	Contractor
I think it very good if Japan can lead the institution.	Contractor
Very useful. Thank you very much.	Contractor
The understanding was deepened. I have become aware of the necessity.	Contractor
I want to know about the practical case of the disputes.	Contractor
The importance of DAB is both the Employer and the Contractor cooperate, which depends on the Employer. If the cost is beared by the Employer, all depends on the Employer.	Contractor
According to the practical experience of DAB. I want to know the problems comprehensively.	Consul.
Thank you for giving valuable chance. It need JICA to encourage the Agencies. It needs the explanation (that DAB should be adopted according to the Sample Documents) at the time of approval.	Consul.
It was really useful seminar to realize outline of DAB. I think to become an (qualified) adjudicator, experience is required, what is the criteria? Is there any chance of limitation by the age?	Consul.
The explanation is very precise, plain and easy to understand. I expect supports by JICA for establishing the institution.	Consul.
I feel it important to have the view of the adjudicator when conducting the consultant service, rather than serving as an adjudicator. I feel the view necessary for PM of the consultant, therefore I expect the program for that. I feel it necessary to have more chances to know the cases, and it will be very helpful if public organization like JICA make the database.	Consul.
I feel in today's seminar the explanation about the mechanism of DAB is not enough. I wanted more practical examples of utilizing DAB. I think DAB Training Course contains useful information to conduct project management work as the Engineer and want to attend the course. In domestic construction projects, it is considered to introduce third party to prevent dispute, which will be based on the DAB.	Consul.
The time (length) of the seminar was adequate.	Consul.
More pilot projects with the Employer's intention, discussion and consent. At first, I don't think they execute the decision especially money disbursement. Other decisions may be executed, even which benefits the project. Currently, the cost of DAB is not clear, which makes them doubtful and anxious. It depends of the cost-benefit. If they all accept some projects pay and others not, DAB can be adopted.	Consul.
I attended this seminar considering that improving understanding of FIDIC is introduction of commitment to this matter. I will keep in touch with this matter hereafter.	Consul.
I think it is timely.	Others
Very useful seminar with lively exchange of opinions from many side of view by many fields of people such as lawyers, consultants, MOFA, JICA, contractors, etc. Especially, open discussion about practical difficulties.	Others
It is essential for JICA internal staff to improve the awareness of the contract, so I suggest to hold the training seminar for them regarding the necessity of DAB which includes actual condition of disputes and claims in international construction projects. In addition, I want continued seminars for consultants and contractors too.	Others
I want to know the policy of JICA to introduce DAB. Can they fund DAB fee by Yen loan?	Others

DAB Seminar Photographs (Tokyo)



## **Guideline for Implementation of Qualification Procedure of DB Adjudicators (Draft)**

### **1. General**

This guideline is applied when FIDIC Member Association (MA) or other organization such as university (hereinafter referred to as an “accrediting organization”) conducts DB adjudicators assessment, lists the approved adjudicators on the National List of Approved DB Adjudicators (NL)<sup>1</sup>, and maintains the NL (hereinafter referred as “qualification procedure”).

### **2. Accrediting Organization**

An accrediting organization shall be the organization which is able to conduct the adjudicators assessment properly and continuously.

### **3. Process of Qualification Procedure**

Qualification procedure shall consist of six phases, including the training prior to assessment as described below:

- (1) Training prior to assessment
- (2) Assessment workshop
- (3) Recommendation by APA (Assessment Panel for Adjudicators)
- (4) Approval by the accrediting organization
- (5) Listing on the NL by the accrediting organization
- (6) Maintenance of NL by the accrediting organization

#### **3.1 Training Prior to Assessment**

The training shall consist of two parts as described below. Applicants must complete the training before applying to the assessment.

(1) FIDIC Module 1 and Module 2

All the applicants are to have completed Module 1 and Module 2 which contents are regulated by FIDIC. The contents of each Module are to reflect MDB Harmonised Edition.

- Module 1: Practical use of the FIDIC Conditions of Contracts (includes MDB Harmonised Edition)
- Module 2: The management of claims and dispute resolution procedures

(2) DB training

All the applicants are to have completed five-day DB training workshop using JICA DB Training Kit.

#### **3.2 Assessment Workshop**

Assessment Panel for Adjudicators (APA) consists of three members with one of whom from APA of FIDIC President’s List of Approved Adjudicators or the listees of FIDIC President’s List of Approved Adjudicators as the chair of APA, in principle, shall be established. APA shall assess the

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<sup>1</sup> In this guideline, it is referred to as “NL” that the list of approved adjudicators published by not only FIDIC MAs but also other organizations and institutions such as universities.

application documents of applicants, following the Application Criteria for an Approved Adjudicators. Application Criteria for an Approved Adjudicators shall be developed by the accrediting organization, with advice of APA, using Attachment – 1, Sample Application Requirements for Assessment of an Approved Adjudicator and. APA shall conduct the assessment workshop following Attachment – 2, a Sample Programme of a Three-Day Assessment Workshop toward those who satisfy the application criteria. It shall be stipulated in the Application Criteria that the conclusions of both documentary assessment and assessment workshop are final and binding hence any challenge is not accepted.

The terms to be assessed through the assessment workshop are described below. APA shall develop the assessment materials and hypothetical scenario for case study suitable to assess the abilities:

- Familiarity with FIDIC MDB Harmonised Edition;
- familiarity with DB process;
- ability to analyze hypothetical scenarios of contract facts and to identify issues arising from the scenario;
- ability to write clear and convincing guidance on how to deal with contentious issues;
- ability to work under time pressure; and
- ability to communicate orally with relating persons

### 3.3 Listing on the NL

APA shall recommend those who are considered to be appropriate to be listed on the NL, based on the assessment workshop, to the accrediting organization. Thus the accrediting organization shall finally decide whether the candidates could be listed or not, according to the recommendation from APA, and list their names and CVs on the NL if the accrediting organization concludes appropriate. The accrediting organization publishing the NL should clarify that (1) those who are choosing adjudicators from the list should review the CVs carefully and survey further if necessary by themselves; (2) Neither FIDIC nor the accrediting organization shall recommend any individuals from this list; and (3) No indemnity liability shall be arisen from any activities provided by the listed adjudicators.

### 3.4 Updating and Maintaining the NL

APA shall be commissioned by the accrediting organization the periodical review of the lists and provision of the recommendations on those listees whose listing should be renewed. The terms to be reviewed are; the listee's intention and physical possibility to serve as a DB member; further training relevant to work as a DB member; service on DBs and other experience on contracts using MDB edition; relevant publications, since listing or latest review.

According to the recommendation by APA, the accrediting organization shall decide on the update of the list.

Period

Attachment – 1 : Sample Application Requirements for Assessment of an Approved Adjudicator

Attachment – 2 : A Sample Programme of A Three-Day Assessment Workshop

**[Attachment – 1]****Sample Application Requirements for Assessment of an Approved Adjudicator****1. Purpose**

This is to stipulate the application requirements to attend adjudicators assessment workshop provided by the accrediting organization to list on the NL.

**2. Application Requirements**

Those who want to attend the assessment workshop have to satisfy the requirements as described below. The application form is to be accompanied by the copies of the required certificates and/or evidences.

## 1) Academic record:

Appropriate academic record relating to engineering and/or construction such as civil engineering, architecture, electronics, mechanical engineering, etc.

## 2) Professional record:

At least ten years successful practice as a principal engineer (or equivalent profession) in a consulting engineering office, construction company, etc.

## 3) Professional qualifications:

Appropriate professional qualifications. Lawyers shall be considered to satisfy the requirements if they have sufficient experiences of construction contract, regardless of the requirements above

4) Specific experiences<sup>2</sup>:

(1) Experience relating to international construction projects

(2) Experience of using FIDIC Conditions of Contract

(3) Experience of resolving contract disputes

## 5) Fluent in English and have the ability to write plain and succinct text

## 6) Completion of FIDIC Modules 1 &amp; 2 (including MDB Edition)

## 7) Completion of DB training workshop

## 8) Commitment to, and availability for, serving as a DB member when listed on NL and appointed

**3. Nominating Letter**

Applicants have to provide two nominating letters from the individuals who assure that the applicant is appropriate to become a DB adjudicator.

**4. Documentary Assessment**

Applicants must submit the copies of certificates clarifying that they satisfy the requirements described in clause 2 above, nominating letters in clause 3 above, and detailed CVs with digital photographs of themselves. APA (Assessment Panel for Adjudicators) shall assess these application documents and those who passed the documentary assessment shall be able to attend the assessment workshop. Unsuccessful candidates of the documentary assessment shall be given the notice of fail,

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<sup>2</sup> All the requirements (1) ~ (3) have to be satisfied.



while successful candidates will be asked to give confirmation to attend the assessment workshop.

#### 5. Attending the Assessment Workshop and the Fee

Those who passed the documentary assessment and wish to attend the assessment workshop must send the application accompanied by stated workshop and assessment fees.

#### 6. Assessment Through the Assessment Workshop and Listing on the NL

The assessees shall be assessed through the programme provided separately by the accrediting organization (which includes the date, time, venue, detailed workshop programme, etc.) whether they shall be qualified as DB adjudicators or not. All the assessees shall be notified whether they passed or not. This notice is final and any challenge is not accepted.

If the successful candidates have the intension and physical availability to serve as a DB member upon request, they must pay stated listing fee to the accrediting organization.

#### 7. Updating the NL

The NL shall be updated every three years. The listees who have the intension and physical availability to serve as a DB member upon request shall clarify it and submit detailed description of; further training relevant to work as a DB member; service on DBs and other experience on contracts using FIDIC Conditions or FIDIC MDB Edition; relevant publications, since listing or latest update. APA shall review those submissions and if concluded eligible, the listees must pay stated updating fee to the accrediting organization.

**[Attachment - 2]****A Sample Programme of A Three-Day Assessment Workshop**

	AM	PM	Evening / Homework
Day 1	<ul style="list-style-type: none"> <li>Introduction of Assessors/Assesseees</li> <li>Examination on the claims and disputes based on FIDIC MDB Edition (#1)</li> </ul>	<ul style="list-style-type: none"> <li>Examination on setting, operating, conducting DB (#2)</li> <li>Explanation on hypothetical case for the homework</li> </ul>	Extracting potential contract disputes on hypothetical scenario (by each assessee) (#3)
Day 2	<ul style="list-style-type: none"> <li>Mock hearing using case study on hypothetical scenario (#4)</li> </ul>	<ul style="list-style-type: none"> <li>Case study (#4: continued)</li> <li>Explanation on referred dispute regarding hypothetical scenario for the homework</li> </ul>	Making DB “Decision” to the referral (by each assessee) (#3)
Day 3	<ul style="list-style-type: none"> <li>Private interview by APA</li> </ul>	<ul style="list-style-type: none"> <li>Private interview by APA (continued)</li> <li>Close</li> </ul>	-

注:

#1: Quiz with multiple choice answers quiz

#2: Essay examination

#3: Report or “Decision” shall be submitted the next morning

#4: Assesseees shall be divided into several DB groups, each with three persons (one Chair)

- |   |            |
|---|------------|
| (1) APA shall play roles as a claimant and a respondent.  | 10 minutes |
| (2) Assesseees (mock DB members) are allowed to ask questions to the claimant and the respondent. | 10 minutes |
| (3) Assesseees (mock DB members) are given the time for internal discussion.                      | 10 minutes |
| (4) APA chooses one group of DB, which makes “Decision”.  | 10 minutes |

Total

40 minutes

The above process shall be repeated to cover all the DB groups (7 to 8 times).

## A Sample Estimate of DB Costs for the Pilot Project

### 1. Assumption for cost estimate

Contract amount: JPY 10 billion

Time for Completion: 4 years

Type of DB: Standing DB

Number of DB members: 3 persons

Interval between regular site visits: once in four months

Period of regular site visit: 5 days / time

Retainer fee: US\$ 3,000 / month

Daily fee: US\$ 3,000 / day

### 2. Basic cost

Items	For each member	For 3 members
Monthly retainer fee	$\$3,000 \times 12 \times 4 = \$144,000$	\$432,000
Monthly retainer during DFP (Defect Notification Period)	$\$2,000 \times 12 = \$24,000$	\$72,000
Daily fee for regular site visit	$\$3,000 \times 5 \times 3 \times 4 = \$180,000$	\$540,000
Other costs regarding regular site visit	$\$5,000 \times 3 \times 4 = \$60,000$	\$180,000
Total		\$1,224,000

### 3. Additional costs in case disputes are referred to DB

Assume disputes are referred to DB once in a year, each time DB members spend 3 days to study the documents at home, hearings and interviews are held taking the opportunities of regular site visits with another 2 days stay at the site.

Items	For each member	For 3 members
Additional daily fee	$\$3,000 \times 5 \times 4 = \$60,000$	\$180,000
Other costs spent additionally	\$5,000	\$15,000
Total		\$195,000