

アジア地域における紛争裁定委員会 (Dispute Board) 普及，及びアジュディケーター育成体制整備促進のための企画検討調査

調査報告書

平成 24 年 3 月  
(2012 年)

独立行政法人 国際協力機構  
(JICA)

委託先  
日本工営株式会社  
(社) 日本コンサルティング・エンジニア協会

資金

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調査報告書

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(MOC)

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## 略 語 集

ACESL	:	Association of Consulting Engineer, Sri Lanka
ADB	:	Asian Development Bank
ADR	:	Alternative Dispute Resolution
AJCE	:	Association of Japanese Consulting Engineers
APA	:	Assessment Panel for Adjudicators
AW	:	Assessment Workshop
BAPPENAS	:	National Development Planning Agency, Philippines
CECOPHIL	:	Council of Engineering Consultants of the Philippines
DAB	:	Dispute Adjudication Board
DB	:	Dispute Board
DOF	:	Department of Finance, Philippines
DRB	:	Dispute Review Board
DRBF	:	Dispute Resolution Board Foundation
FIDIC	:	International Federation of Consulting Engineers
GPPB	:	Government Procurement Policy Board, Philippines
ICC	:	International Chamber of Commerce
INKINDO	:	National Association of Indonesian Engineering Consultants
JICA	:	Japan International Cooperation Agency
LKPP	:	National Public Procurement Agency, Indonesia
MA	:	FIDIC Member Association
MDB	:	Multilateral Development Bank
MOF	:	Ministry of Finance, Vietnam
MOFP	:	Ministry of Finance and Planning, Sri Lanka
NEDA	:	National Economic Development Authority, Philippines
OCAJI	:	Overseas Construction Association of Japan, Inc.
SLNAC	:	Sri Lanka National Arbitration Center
TW	:	Training Workshop
UKP4	:	President Delivery Unit for Development Monitoring and Oversight, Indonesia
VECAS	:	Vietnam Engineering Consultant Association
VIAC	:	Vietnam International Arbitration Center
WB	:	World Bank

## 第1章 調査業務概要

### 1.1 調査の背景

国際協力機構（JICA）では、調達業務の調和化の一環として土木工事の標準入札書類の改訂を2009年6月に行い、一般契約条件書としてFIDIC（国際コンサルティング・エンジニア連盟）がMDB（Multilateral Development Bank）と共同で開発した「MDB 調和化版」を採用した。「MDB 調和化版」では、契約紛争の解決プロセスとしてDB<sup>1</sup>（Dispute Board）が新たに導入されている。

このため、円借款案件でも今後DBの設置が増加していくことが考えられ、円借款借入国の大半を占めるアジア地域におけるアジュディケーター育成が今後の円借款案件における適切なDB設置のために急務となっている。また、発注者側については、DB導入に関わる理解を深めてもらう必要がある。

かかる状況下、円借款プロジェクトにおけるDBの導入・普及に向けた準備の一環としてJICAはこれまでに以下の調査を実施している。

- 1) 2008年度：アジア地域におけるDAB・アジュディケーター育成計画の企画検討調査
  - DAB普及に係る実態調査
  - DAB普及セミナーの開催（日本、インド、フィリピン）
  - アジア版アジュディケーター育成の方策検討
- 2) 2009年度：アジア地域におけるDAB・アジュディケーター導入・普及の企画検討調査
  - DAB普及セミナーの開催（ベトナム、カンボジア、インドネシア、スリランカ、バングラディシュ）
  - アジュディケーター育成のためのトレーニング教材の作成
  - アジュディケーター資格審査に係る運用規定（案）の作成
  - DAB導入・普及へのロードマップの作成
- 3) 2010年度：アジア地域におけるDAB・アジュディケーター導入・普及体制整備のための企画検討調査
  - アジュディケーター育成と資格審査に関わる先進国事例調査（ドイツ、ポーランド、ルーマニア）
  - MDBプロジェクトにおけるDB運用状況調査（アジア開発銀行、世界銀行、米州開発銀行）
  - 日本におけるアジュディケーター・トレーニングワークショップとアセスメントワークショップの開催

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<sup>1</sup> DAB（Dispute Adjudication Board）はFIDIC 1999年版の各種契約条件書の中で使われている用語であるが、MDB版ではDB（Dispute Board）と変更された。DABとDBの機能は同等である。本報告書においては、実施済みの内容で「DAB」が用いられている場合を除き、基本的に「DB」を用いる。

これらの調査を通して、円借款プロジェクトに DB の導入・普及をより確実に図るためには、解決すべき以下の課題が確認された。

- 1) 円借款案件に DB を採用、設置する際に関わるすべての関係者が、DB の正しい機能及び設置・運用方法を理解し、適切に DB を機能させるために、DB の設置と運用に必要な一連の情報及びプロセスをまとめたマニュアル(以下「DB マニュアル」)の作成が必要である。
- 2) アジアにおける円借款の主な借入国における関連機関を対象として、DB の機能や設置方法についての理解を改めて深めてもらい、協力を得るためのセミナー（以下、「DB セミナー」）を実施することが必要である。
- 3) アジアにおける円借款の主な借入国を中心に、昨年度我が国で実施したアジュディケーター・トレーニングワークショップならびにアセスメントワークショップを現地で開催し、今後需要が高まることが想定される現地のアジュディケーターリソースを育成すること、また継続してアジュディケーターを育成していくために必要なノウハウを現地の然るべき機関に移転していくことが重要である。

## 1.2 調査の目的

調査では、円借款事業における本格的な DB の導入・普及にむけた体制を整えるために、DB の機能、設置方法、運用に関わるマニュアルを策定するとともに、円借款事業に関与する政府機関との協議を行い、調査対象国における DB への理解深化のためのセミナーを実施し、アジュディケーター育成のためのワークショップ開催に向けた調査を行うことで、DB の「需要」、「供給」の両面から普及体制の整備を進めることを調査の目的とする。

## 1.3 調査の体制

調査は、日本工営と日本コンサルティングエンジニア協会（AJCE）の共同企業体により実施され、以下の 4 名の団員が業務を担当した。

表-1.1 調査団員リスト

	担当	氏名	所属
1	業務主任／国際契約 (1)	林 幸伸	日本工営
2	国際契約 (2)	大本 俊彦	日本工営 (大本俊彦建設プロジェクトコンサルタント)
3	契約マネジメント	山下 佳彦	AJCE
4	企画・調整監理	椎本ゆかり	日本工営

(出典：調査団)

また、海外調査の実施ならびに DB マニュアルの草稿に当たっては、調査団に加えて以下 2 名のドイツ人紛争解決専門家が参加した。両氏は、国際建設プロジェクトにおけるアジュディケーターとしての経験を数多く有し、2010 年度の JICA 調査においてはアジュディケーター・



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アセスメントワークショップの審査員を務めている。

- 1) Mr. Volker Jurowich
  - President of Executive Board of Dispute Resolution Board Foundation (DRBF)
  - FIDIC President List of Approved Dispute Adjudicator
  - Chairman of the Assessment Panel for German National List of DB Adjudicator
  - Chairman of the Assessment Panel for Japanese National List of DB Adjudicator (in 2010)
- 2) Dr. Götz-Sebastian Hök
  - FIDIC President List of Approved Dispute Adjudicator
  - Member of the Assessment Panel for German National List of FIDIC Adjudicator
  - Member of the Assessment Panel for Japanese National List of DB Adjudicator (in 2010)
  - Chairman of the Assessment Panel for French National List of DB Adjudicator. (in 2011/2012)

#### 1.4 調査の工程

調査は2011年11月から2012年3月の期間に実施した。調査における主なマイルストーンは以下の通りである。

- |                         |                    |
|-------------------------|--------------------|
| 1) 契約締結                 | : 2011年11月25日      |
| 2) インセプションレポート提出        | : 2011年12月5日       |
| 3) 現地調査資料提出             | : 2012年1月5日        |
| 4) 現地調査I（ベトナム、スリランカ）    | : 2012年1月10日～1月19日 |
| 5) 現地調査II（フィリピン、インドネシア） | : 2012年2月7日～2月16日  |
| 6) DBセミナー（東京）           | : 2012年3月6日        |
| 7) 調査報告書提出              | : 2012年3月21日       |

## 第2章 現地調査

### 2.1 現地調査の目的

以下項目の実施を目的としてアジア4カ国（ベトナム、スリランカ、フィリピン、インドネシア）において現地調査を実施した。

- 1) DBセミナーの開催
  - ・ JICA 円借款プロジェクト関係者の DB プロセスに関わる理解を深めること
  - ・ JICA の DB 運用指針を踏まえた DB 導入への取組を説明すること
  - ・ DB メンバーとしての必要な資質を説明すること
  - ・ 日本におけるナショナルリスト整備の経緯を説明すること
  - ・ 質疑応答とアンケート調査を通して、DB プロセスに関わる関係者の疑問点を抽出すること
- 2) 政府機関および仲裁機関との協議
  - ・ DB に関わる理解を深めること
  - ・ DB 導入に対する JICA の方針を伝えること
  - ・ DB 普及に対する障壁を確認し対応について協議すること
- 3) ナショナルリスト整備の担い手となる FIDIC 加盟協会との協議
  - ・ 各国加盟協会の概要を把握すること
  - ・ FIDIC 契約研修に関わる活動内容を把握すること
  - ・ 日本におけるナショナルリスト整備の経験を共有すること
  - ・ ナショナルリスト整備に関わる意向を確認すること

### 2.2 現地調査の工程

現地調査は2回に分け、以下の工程で実施した。

#### 1) 現地調査 I

表-2.1 現地調査 I の行程

日		滞在地	業務内容
1月10日	火	ハノイ着	JICA ベトナム事務所との協議（17：00-18：00）
1月11日	水	ハノイ	DB セミナー（8：00-12：30） MPI との協議（14：00-15：30）
1月12日	木	ハノイ	VECAS との協議（9：00-12：30） VIAC との協議（14：00-16：00）
1月13日	金	ハノイ	MOF との協議（14：00-15：30）
1月14日	土	移動	

日		滞在地	業務内容
1月15日	日	コロンボ	
1月16日	月	コロンボ	MOFP との協議（10：00－11：00） SLNAC との協議（14：30－15：30）
1月17日	火	コロンボ	DB セミナー（10：00－16：30）
1月18日	水	コロンボ	ACESL との協議（9：00－12：00） JICA スリランカ事務所との協議（13：30－14：30） MOFP との協議（15：30－16：30）
1月19日	木	帰国	

（出典：調査団）

## 2) 現地調査 II

表-2.2 現地調査 II の行程

日		作業場所	業務内容
2月7日	火	マニラ着	JICA フィリピン事務所との協議（16：00－17：00）
2月8日	水	マニラ	GPPB との協議（9：30－10：30） ADB との協議（11：00－13：00） DOF との協議（16：00－16：30）
2月9日	木	マニラ	DB セミナー（10：00－16：30）
2月10日	金	マニラ	CECOPHIL との協議（9：00－12：00） NEDA との協議（14：00－15：00）
2月11日	土	移動	
2月12日	日	ジャカルタ	
2月13日	月	ジャカルタ	JICA インドネシア事務所との協議（11：00－12：00） LKPP との協議（14：00－15：00）
2月14日	火	ジャカルタ	DB セミナー（10：00－16：30）
2月15日	水	ジャカルタ	INKINDO の協議（10：00－12：00） BAPPENAS との協議（14：00－15：00） UKP4 との協議（16：00－17：00）
2月16日	木	帰国	

（出典：調査団）

## 2.3 Dispute Board セミナー

### 2.3.1 セミナープログラム

セミナーでは JICA 調査団からのプレゼンテーションに加えて、開催国における紛争処理専門家などの参画を得て、参加者の DB に対する理解を深めるとともにインタラクティブな意見交換ができるように配慮した。各国の DRBF 代表を主とする現地スピーカーには、開催国にお

ける建設紛争ならびにその処理方法の現状についてプレゼンテーションを依頼した。

フィリピンでのセミナーではアジア開発銀行（ADB）からの参加も得て、DB の導入に関わる課題と ADB プロジェクトにおける DB 導入事例についてのプレゼンテーションが行われた。

また、インドネシアのセミナーでは、数多くの円借款事業の実施機関である公共事業省の大臣が開会の挨拶を行った。

講演を頂いた現地スピーカーの一覧は通りである。

表-2.3 現地講演者一覧

国	氏名	役職
ベトナム	Mr. Pham Van Khanh	General Director Ministry of Construction
	Mr. Vu Anh Duong	General Secretary Dispute Settlement at the Vietnam International Arbitration Center (VIAC)
スリランカ	Mr. Tilak P. Kolonne	Country Representative DRBF (Sri Lanka)
フィリピン	Mr. Salvador P. Castro Jr.	Country Representative DRBF (Philippines)
	Mr. Hamid L.Sharif	Principal Director Central Operations Services Office Asian Development Bank
インドネシア	Dr. Sarwono Hardjomuljadi	Country Representative DRBF (Indonesia)

(出典：調査団)

セミナー招聘状ならびにセミナープログラムを添付-2.1 と 2.2 に示す。

### 2.3.2 セミナー教材

DB セミナーにおける JICA 調査団からのプレゼンテーションの骨子は以下の通りとした。

- 1) DB の基礎（担当：総括）
  - ・ JICA の DB 普及のための活動
  - ・ JICA 標準入札書と DB の関係
  - ・ DB の分類と特徴
  - ・ FIDIC 契約書に DB が導入された契機
  - ・ DB に関わる FIDIC MDB 版における条項の概説
- 2) DB の実践（担当：国際契約 2）

- ・ DB の現状
  - ・ DB の手続き
  - ・ DB の紛争回避機能
  - ・ DB の費用
  - ・ DB の効用
  - ・ DB 裁定の拘束力
  - ・ DB 導入事例紹介
- 3) JICA の活動実績と方針（担当：JICA）
- ・ DB 導入の経緯
  - ・ DB 普及に関わる課題認識
  - ・ 需要サイドの課題解決のための活動
  - ・ 供給サイドの課題解決のための活動
  - ・ DB の導入に関わる JICA 方針
  - ・ 今後の活動について
- 4) アジュディケーターの必要条件（担当：外部専門家）
- ・ DB に関連する国際組織
  - ・ DB の運営に関わる FIDIC のサポート
  - ・ アジュディケーターの必要条件
  - ・ 発注者にとっての DB 活用方法
- 5) 日本のナショナルリスト構築について（担当：契約マネジメント）
- ・ AJCE ナショナルリスト立ち上げの経緯
  - ・ 審査資格要件
  - ・ 研修と審査の手順
  - ・ ナショナルリストの運用に関わる体制
  - ・ ナショナルリストの運用に関わる内部規則

プレゼンテーション資料を添付-2.3 に示す。

### 2.3.3 セミナー参加者

円借款プロジェクトの実施機関を中心として、コンサルタント、コントラクター、法曹界などから、4カ国で合計約 320 名の参加を得た。

参加者の内訳を下表に示す。

表-2.4 DB セミナー参加者内訳

分類	ベトナム	スリランカ	フィリピン	インドネシア	計	
政府機関	42	46	30	62	180	56%
コンサルタント	6	4	13	9	32	10%

分類	ベトナム	スリランカ	フィリピン	インドネシア	計	
コントラクター	6		3	1	10	3%
法曹界(DRBF 含む)	4	8	6	7	25	8%
教育機関				14	14	4%
建設関連協会	2	11		2	15	5%
JICA		12	2		14	4%
ADB			6		6	2%
その他(調査団含む)	7	5	6	5	23	7%
計	67	86	66	100	319	100%

(出典：調査団)

### 2.3.4 質疑応答

セミナーにおける質疑応答記録を添付-2.4 に示す。

政府機関との協議を含め、主要な質問・コメントとそれらに対する調査団からの応答は以下の通りである。

Q1: 国の法律に DB が規定されていない場合に、DB の裁定は拘束力を持たないのではない  
 か？

A1: DB のプロセスは、契約自由の原則に基づいて契約当事者が契約のもとで合意するものである。法的な枠組みと対立するものではない。ADR に関わる法律が定められている場合は、DB プロセスをサポートすることになるかもしれないが、これは必ずしも必要ではない。また、DB の裁定に不服な場合は、次のステップとして和解と仲裁による解決プロセスが FIDIC 契約には定められている。

Q2: DB の裁定に不服な場合に仲裁に進むことができるが、DB のコストは発注者にとって無駄な費用とは考えられないか？

A2: 米国の統計では、DB に付託された紛争のうち仲裁に持ち込まれるのは 2%のみである。即ち、紛争の大部分が現場レベルで解決されているという事実に注目すべきである。さらに、常設 DB の持つ紛争回避機能により、紛争事態の発生自体を低減することができる。紛争の発生により、プロジェクトの完成遅延に繋がることが経験されているが、その場合の社会的損失は発注者にとって膨大なものとなる。DB に関わる費用負担は十分に正当化できるものとする。

Q3: DB のコストは円借款で賄われるのか？

A3: JICA では、DB コストはリーガルコストではなくコンストラクションマネジメント費用の一部であると捉えており、円借款の対象費用である。今後は、プロジェクト・アプレイザルの段階で実施機関とも DB の導入について協議を行い、確実に予算化が行われるように

配慮したい。

Q4: DB の普及のためには、その便益を示す具体的な事例を整理することが重要と思われる。

A4: これについては DRBF 内部でも議論されており、今後の課題であるとする。

Q5: DB はデザインビルドや EPC 契約においても有効に機能するのか？

A5: DB は全ての契約形態に適用可能である。尚、FIDIC の Yellow Book や Silver Book では現行バージョンでは ad-hoc DB が採用されているが、次期改訂版では standing DB に変更される見通しである。

### 2.3.5 アンケート調査

セミナー参加者に対して、添付-2.5 に示すアンケート用紙を用い意識調査を行った。アンケート調査は 1) セミナーに対する評価、2) DB 導入に対する意向、3) DB プロセスに関わる疑問点、の 3 項目から構成した。アンケートの回収率は平均で 62%であった。また、回答の集計を添付-2.6 に示す。

表-2.5 アンケート回収率

分類	ベトナム	スリランカ	フィリピン	インドネシア	合計
参加者数	67	86	66	100	319
アンケート回収数	44	68	47	39	198
アンケート回収率	66%	79%	71%	39%	62%

(出典：調査団)

#### 1) セミナーに対する評価

セミナーの関心度、有用性、明快性を 5 段階で評価させたが、以下に示す通り 3 項目ともに非常に高い評価が得られた。

表-2.6 DB セミナーに対する評価

質問事項		ベトナム	スリランカ	フィリピン	インドネシア
(1)	Interesting?				
	extremely	5%	6%	11%	23%
	very much	59%	60%	71%	41%
	fair	36%	32%	18%	31%
	not very much	0%	2%	0%	5%
	not at all	0%	0%	0%	0%
(2)	Useful?				

質問事項	ベトナム	スリランカ	フィリピン	インドネシア
extremely	13%	16%	15%	19%
very much	68%	64%	61%	59%
fair	20%	20%	24%	22%
not very much	0%	0%	0%	0%
not at all	0%	0%	0%	0%
(3) Clear and easy to understand?				
extremely	14%	15%	11%	11%
very much	43%	55%	62%	37%
fair	41%	29%	27%	40%
not very much	3%	2%	0%	11%
not at all	0%	0%	0%	0%

(出典：調査団)

## 2) DB 導入に対する意向

以下の質問により、参加者の DB の導入に対する意向を確認した。

表-2.7 DB の導入に対する意向

質問事項	ベトナム	スリランカ	フィリピン	インドネシア
Are you willing to adopt DB for the project you are / will be concerned?				
1) Yes, I want to adopt DB.	50%	65%	60%	47%
2) No, I don't want to adopt DB.	9%	3%	9%	0%
3) No, but I will adopt DB if certain issues are cleared.	41%	32%	31%	53%

(出典：調査団)

上表に見られるように、概ね半数以上の参加者が DB 導入に肯定的であり、否定的な意見についても一定の条件が満たせば導入に前向きである。

肯定的意見の理由のうち上位3位は以下の通りであった。DB コストは合理的である、という理由が3位につけているのは興味深い。

- 1) I think disputes/conflicts likely to happen in the project.
- 2) DB most likely makes fair decision.
- 3) DB is cost-effective.

また、否定的意見の理由のうち上位3位は以下の通りであった。これらの中では、DB コストが高い、という理由が多数を占めている。



- 1) DB costs high.
- 2) I doubt the effect. / I don't think it works well in my country.
- 3) Others.

3) DB プロセスに関わる疑問点

DB プロセスに関わる疑問点や要望事項についてのコメントを添付-2.7 に示す。これらコメントは DB マニュアル作成において参考とした。

## 2.4 政府機関との協議

### 2.4.1 概要

現地調査において、円借款事業の実施に密接な関わりを持つ中央官庁、アジア開発銀行、ならびに仲裁関連組織と面談し、円借款事業へのDBの導入について議論を行うと共にJICAの方針について説明を行った。

表-2.8 現地面談組織一覧

国	組織名
ベトナム	<ul style="list-style-type: none"> <li>・ 計画投資省（Ministry of Planning and Investment , MPI）</li> <li>・ ベトナム国際仲裁センター（Vietnam International Arbitration Centre, VIAC）</li> <li>・ 財務省（Ministry of Finance , MOF）</li> </ul>
スリランカ	<ul style="list-style-type: none"> <li>・ 財務計画省（Ministry of Finance and Planning , MOFP）</li> <li>・ スリランカ仲裁センター（Sri Lanka National Arbitration Center, SLNAC）</li> </ul>
フィリピン	<ul style="list-style-type: none"> <li>・ 政府調達政策委員会（Government Procurement Policy Board, GPPB）</li> <li>・ アジア開発銀行（Asian Development Bank, ADB）</li> <li>・ 財務省（Department of Finance, DOF）</li> <li>・ 国家経済開発局（National Economic Development Authority , NEDA）</li> </ul>
インドネシア	<ul style="list-style-type: none"> <li>・ 国家公共調達局（National Public Procurement Agency ,LKPP）</li> <li>・ 国家開発計画局（National Development Planning Agency, BAPPENAS）</li> <li>・ 大統領府開発管理局（President Delivery Unit for Development Monitoring and Oversight, UKP4）</li> </ul>

（出典：調査団）

協議の記録を添付-2.8 に示すと共に協議の骨子を以下に記述する。

### 2.4.2 ベトナム

1) 計画投資省（MPI）

- ・ DB 制度と国内法規との整合性について議論があり、調査団より DB は契約上の取り決めであり、国内法規との対立はないと理解していることを説明した。

- DB のもたらす便益については、米国の統計に示されるように紛争が仲裁へ発展することが回避され、現場レベルで解決されることをより評価すべき、と調査団より説明を行った。
- MPI より、DB の便益を立証するためにはパイロットプロジェクトの実施が有効であるとの提案がなされた。

## 2) ベトナム国際仲裁センター（VIAC）

- VIAC より、国内の建設紛争が年々増加する傾向にあることが示された。
- VIAC には約 120 名の仲裁人が登録されており、この中には Engineering and Construction Expert が約 10 名含まれている。ナショナルリストの候補者となる可能性がある。
- ベトナムでも民法に契約自由の原則があり、DB が法律に違反しているという解釈は無いと思われる。（VIAC）
- ODA 事業の発注者の多くは PMU であるが、彼らの裁量権は限られており、しばしば上位機関（higher authority）の承認を必要とするところに問題がある。（VIAC）

## 3) 財務省（MOF）

- standing DB では紛争の予防機能があり仲裁における高額な費用の負担を回避できるという理屈は理解できるが、DB を普及するためには発注者にとって便益があることのエビデンスが必要となろう。
- DB 制度と国内法規との整合性について議論があり、調査団より紛争解決を DB により行うという合意は契約当事者が契約で取り決めるものであるため、ベトナムの法規との対立はないと理解している、と説明した。
- 借款契約は調印されたら「法」である。もし、借款契約において DB の適用が規定されるのであれば、それは法的効力を持つことになり、DB の利用が確実に進められると思われる。（MOF）

### 2.4.3 スリランカ

#### 1) 財務計画省（MOFP）

- 仲裁という制度があるなかで DB は必要か、との MOFP からの問いに対して、調査団から、DB には紛争の抑止機能があり、また紛争が生じた場合には仲裁などに比べて格段に早く解決することができることを説明した。
- コストセービングの観点からは、紛争が発生する可能性が少なくなったと判断された時点で、現場訪問を中断したり、DB を解任したりする事例もあることを、調査団から説明した。
- アジュディケーターの選任方法について MOFP から質問があり、そのプロセスを説明した。

## 2) スリランカ仲裁センター（SLNAC）

- スリランカでは、内戦が沈静化して以来建設工事が増加しており、特に建設に関わる仲裁が増加している。協会の会員には、建設関係の National Construction Contractor Association や Chamber of Construction Industry of Sri Lanka も加盟している。（SLNAC）
- SLNAC より、DB については、契約において紛争解決の手段として規定されていれば、その運用に国内法との不整合は無いと考える、との解釈が示された。
- 仲裁判断の拘束性について調査団より質問を行い以下の回答を得た。

「仲裁の手続きの妥当性について裁判を行う場合はあるが、裁定内容について裁判を行う例は殆どないと考える。スリランカでは、裁定を遵守させるための特別法廷が commercial court に設置されている。」

### 2.4.4 フィリピン

#### 1) 政府調達政策委員会（GPPB）

- 調査団より、セミナー資料に基づき DB の概要並びに DB 普及に関わるこれまでの JICA の活動を説明した。
- DB コストについて、調査団より、リティナーフィーを 1 日/月とするなどの運用が実際に行われていることを説明した。また、紛争に起因してプロジェクトの完成が遅延するケースがあるが、この場合の巨額の社会的損失も考慮すべきである、ことを伝えた。
- DB の普及については、その長所を示す具体的な事例を整理することが説得力ある手段となり得る。（GPPB）
- フィリピンでは、仲裁および ADR に関わる 2 つの法律が整備されている。契約自由の原則により、DB と国内法との対立はないと認識する。（GPPB）

#### 2) アジア開発銀行（ADB）

- ADB 融資のプロジェクトにおいても、発注者は DB の導入に対して概して後ろ向きであることが経験されている。発注者にとっては DB のコスト負担が最大の障壁となっている。（ADB）
- DB 普及に関わるこれまでの JICA の積極的な活動を高く評価する。DB の導入については ADB も JICA も共通の課題を抱えており、今後 JICA と協調して DB の普及を図ってゆきたい。（ADB）
- DB メンバーは技術者が主役になると理解しているが、やはり DB を成功させるにはアジュディケーターの質の確保が重要である。DB コストの縮減のためには、ローカルアジュディケーターの育成も課題である。また、紛争を最小化するためには the Engineer の質の確保も不可欠であると認識する。さらには ADB 職員の DB に対する理解度も高める必要がある（ADB）

- ADB のプロジェクトにおいても DB の経験はまだ少ないが、明日のセミナーではパキスタンのガジバロータ水力発電事業の事例を紹介したい。（ADB）
- 局長との面談の後、ADB 職員を対象にこれまでの JICA の取組と今後の契約についてプレゼンテーションを行った。

### 3) 財務省（DOF）

- DB の最大の利点は、紛争の予防であることは理解するが、DB が実際にどのように運用されるのかが契約当事者にまだ十分に理解されていないと認識している。（DOF）
- DB のコストが円借款でカバーされることは理解するが、個々のプロジェクトの事業費の中で確実に予算化されることが重要である。（DOF）
- JICA では、規模の大きなプロジェクトにおいて先ず DB を確実に導入する意向である。

### 4) 国家経済開発局（NEDA）

- 円借款案件における JICA の DB 導入に関わる積極的な活動を歓迎する。（NEDA）
- JICA としては契約金額が 1 億ドルを超える契約（年間 10～15 案件）に対して常設 DB の設置を確実に図りたい。そのためにもプロジェクトアプレイザルの段階で担当省庁などの関係者と DB の導入について協議を行い、DB コストが確実に予算化されるように図る所存である。（JICA）
- DB のコスト負担を敬遠する向きがあるが、DB による紛争回避機能を評価すべきである。DB は法的な手段というよりもプロジェクトマネジメントのツールであることを認識いただきたい。一種の保険のような機能を有している。また、契約自由の原則により、法的な枠組みとの対立は生じないと認識している。（調査団）

## 2.4.5 インドネシア

### 1) 国家公共調達局（LKPP）

- DB の概念は良好なものと認識しているが、その普及のためには財務省の理解が不可欠になると思われる。また、学界のサポートも有用である。今回のセミナーでは複数の大学からの参加が予定されていることは望ましと考える。（LKPP）
- インドネシアでは 1999 年に ADR に関わる法律（No.30）が制定されており、さらに契約自由の原則により、DB はインドネシアの法的枠組みと対立しないと理解している。（LKPP）
- DB の最大の目的は紛争の予防にある。この点が仲裁とは大きく異なる。また、DB を導入することにより請負者のリスクが緩和され、入札金額の低下にも寄与することを認識すべきである。（調査団）
- ナショナルリストの整備について、JICA はどのように考えているのか。（LKPP）  
今回の調査では、各国の FIDIC 加盟協会との協議を行い、ナショナルリストに関わる協

会の意向や実施体制を確認している。調査の結果次第ではあるが、JICA がナショナルリストの整備を支援することも計画している。（調査団）

## 2) 国家開発計画局（BAPPENAS）

- 昨日の DB セミナーでは、公共事業省大臣が開会の挨拶をされたと部下から聞いた。公共事業省は多くのインフラプロジェクトを管轄していることから、大臣の参加は DB の普及を助長する上で大きなインパクトがあったと思われる。（BAPPENAS）
- DB の効用としては、DB が導入されることにより入札の競争性が促されるという事実も認識すべきである。またその費用はプロジェクトのマネジメントコストと捉えるべきである。（調査団）
- DB ナショナルリストの整備については、それを運用する主体に公平性と透明性が求められることに留意すべきである。（BAPPENAS）

## 3) 大統領府開発管理局（UKP4）

- DB は法的な紛争解決手段というよりもプロジェクトマネジメントの手法であると理解すべきである。（調査団）

その点は理解できるが、やはり発注者にとってはコストの負担が懸念材料として存在する。（UKP4）

FIDIC は DB を導入することで、契約書に数々の新たな付加価値を付与したと考えることができる。紛争予防、紛争の早期解決などが付加価値の代表格である。紛争に起因する工事の遅延によりもたらされる巨額の経済損失を考慮すべきである。これら付加価値には当然のことながら代償が必要となるが、投資に見合う付加価値を享受することができる。代償を単なる追加コストと考えるべきではない。（調査団）

- DB の運用とその効果について、具体的な事例を知りたい。事例を認識することで、DB の普及が促されるであろう。（UKP4）

## 2.5 FIDIC 加盟協会との協議

### 2.5.1 協議事項

調査対象 4 カ国におけるアジュディケーター・ナショナルリストの開発の可能性を確認するために、下記 FIDIC 加盟協会と協議を実施した。

表-2.9 FIDIC 加盟協会一覧

国	FIDIC 加盟協会	URL
ベトナム	Vietnam Engineering Consultant Association (VECAS)	<a href="http://www.vecas.org.vn/">http://www.vecas.org.vn/</a>
スリランカ	Association of Consulting Engineers, Sri Lanka	<a href="http://www.acesl.org/">http://www.acesl.org/</a>

国	FIDIC 加盟協会	URL
	(ACESL)	
フィリピン	Council of Engineering Consultants of the Philippines (CECOPHIL)	<a href="http://www.cecophil.com/">http://www.cecophil.com/</a>
インドネシア	National Association of Indonesian Engineering Consultants (INKINDO)	<a href="http://www.inkindo.org/">http://www.inkindo.org/</a>

(出典：調査団)

協議事項は以下の通りであり、協議記録を添付-2.9 に示す。

- 1) FIDIC 会員協会の概要
- 2) アジュディケーターナショナルリストの整備に関する事項
  - (1) 会員協会における FIDIC 契約約款関連の活動
  - (2) 当該国におけるアジュディケーターリストの利用可能性
  - (3) アジュディケーターナショナルリスト候補者のポテンシャル
  - (4) アジュディケーターナショナルリスト整備の可能性
  - (5) アジュディケーターナショナルリスト整備に向けた課題と対策
  - (6) アジア地域でのアジュディケーターワークショップ開催について

## 2.5.2 FIDIC 会員協会の概要

各 FIDIC 加盟協会の概要は以下の通りであり、15 年～40 年の歴史を有している。

表-2.10 FIDIC 加盟協会概要

	ベトナム	スリランカ	フィリピン	インドネシア
協会名	VECAS	ACESL	CECOPHIL	INKINDO
設立年	1995 年	1980 年	1976 年	1970 年
会員数	220 社	13 社	24 社	7,379 社
社員数	約 50,000 人	約 1,100 人	約 3,500 人	約 35,000 人
協会組織	理事会 委員会 事務局	理事会 事務局	理事会 委員会, 諮問委員会 事務局	理事会 委員会 事務局

(出典：FIDIC MA)

各協会の活動内容は以下の通りであり、各協会共にコンサルティングエンジニア(CE)の社会的地位と能力の向上を目指している。

表-2.11 FIDIC 加盟協会の活動内容

会員協会	活 動 内 容
VECAS (ベトナム)	1) 協会の地方展開 現在の活動拠点（ハノイ市とホーチミン）にメコンデルタ、中部地域(北、中央、南)、北部の 5 つを追加し 7 地域に展開 2) 会員の能力開発 将来、研修・教育機関を設立し、海外からの講師による研修を行い会員の

会員協会	活動内容
	能力開発を図る。いずれはベトナム人講師により実施 3) 会員の増強 VECAS 会員は大半が政府系の大手企業であるが、中小企業会員を増強
ACESL (スリランカ)	1) FIDIC 契約約款の普及・促進 2) 能力開発のための研修やセミナーの実施 (FIDIC 契約約款、EPC、DB 関連の研修、セミナー、ワークショップ) 3) 他協会との国際連携の促進 4) その他の活動方針 会員増強、資格の相互認証、アジュディケーターリストの作成、他協会との連携
CECOPHIL (フィリピン)	1) フィリピン国内の CE 地位向上。 2) 発注者と会員の協働の促進。 3) フィリピン国内の CE 関連企業との連携促進。 4) フィリピン国内の CE 企業の利益の擁護。 5) フィリピン経済の成長への貢献。
INKINDO (インドネシア)	1) 会員の資格と能力の向上 2) 国内事業や開発事業の計画・実施への参画 3) 会員相互の連携の促進 4) 会員の CE 業務の開発、CE の地位向上、良好な事業環境の創造 5) 国内外市場への参加の促進 6) INKINDO の倫理要綱や行動規範に準拠した公正な事業の実施

(出典：FIDIC MA)

### 2.5.3 アジュディケーターナショナルリストの整備に関する事項

#### 1) 会員協会における FIDIC 契約約款関連の活動

各 FIDIC 会員協会では、FIDIC 契約約款セミナーの開催や FIDIC 契約約款翻訳などの活動を行っており FIDIC 契約条件書の啓蒙に努めている。DB やアジュディケーターの理解度も高いものと考えられる。

FIDIC 契約約款に関わる研修については、FIDIC が定める研修モジュールに従ったものが多く、研修の実績は以下の通りとなっている。

表-2.12 FIDIC 契約研修の実績

会員協会	FIDIC Module 1	FIDIC Module 2	その他
VECAS (ベトナム)	VECAS 主催の FIDIC Module 関連セミナーは開催されていない		FIDIC 約款セミナー (2003 年)
ACESL (スリランカ)	2008 年	2009 年	Module 3 (2010 年)
CECOPHIL (フィリピン)	2008 年、2009 年	2010 年	Module 4 (2011 年) Module 3 (2012 年、予定)
INKINDO (インドネシア)	2008 年、2010 年	2010 年、2011 年	Silver Book (2011 年)

(出典：FIDIC MA)

- (注) FIDIC Module 1 : Practical use of the FIDIC Conditions of Contracts  
 FIDIC Module 2 : Management of Claim and Dispute Resolution  
 FIDIC Module 3 : Management of Dispute Adjudication Board procedures  
 FIDIC Module 4 : Management and Administration of FIDIC Contracts

2) アジュディケーターリストの利用可能性

アジュディケーターリストが公開、または利用可能な国はスリランカのみであり、FIDIC 会員協会がナショナルリストを整備する意義は高いと考えられる。

スリランカにおいてアジュディケーターリストが利用可能な組織は以下の通りであるが、ACESL では確立された基準に基づくリストを独自に整備したいとの意向を強く有している。

公開 : IESL(Institution of Engineers, Sri Lanka) : 会員はすべて技術者

非公開 : ICTAD (Institute for Construction Training and Development)

3) アジュディケーターナショナルリスト候補者のポテンシャル

AJCE が作成したアジュディケーター規程を参考に、各国の会員協会が資格要件などを設定した段階で、具体的なポテンシャルが把握できると思われる。すべての協会がアジュディケーターナショナルリスト候補者のポテンシャルは高いと言及しているが、現時点では実態を正確に把握することは難しい。しかしながら、裁判外紛争解決（ADR）制度、FIDIC 契約書ならびに英語の普及度に鑑みると、スリランカとフィリピンにアジュディケーター適格者が輩出されるポテンシャルが比較的に高いと推察される。

表 2.13 ADR、FIDIC 契約書ならびに英語の普及度

項目	ベトナム	スリランカ	フィリピン	インドネシア
裁判外紛争解決（ADR）の国内普及度		○	○	
DRBF 国内組織の存在		○	○	○
仲裁関連協会の存在	○	○	○	○
FIDIC 加盟協会の存在	○	○	○	○
FIDIC 契約の国内事業での利用		○		
英語の普及度		○	○	

(出典：調査団)

ベトナム国内には日本の技術士に対応する技術者認定制度が存在していないので、技術士法が制定されるまで(2014年頃)の間、ベトナム国内の技術士は輩出されないが、海外の同等な資格や国内で同等な資格や経験を有する技術者であれば問題ないので、技術士資格保有の有無が障害になるとは思われない。

スリランカには、Chartered Engineer（公認技師）、建築士、弁護士などの国家資格があり、インドネシアには、技術士、建築士等の国家資格がある。



フィリピンには日本の技術士制度に相当する資格はないが、Registered Civil Engineer（Chartered Engineer に類似）、Senior Structural Engineer（大学卒業後、構造分野での6年間以上の実務経験）、Quantity Surveyor、建築士、弁護士等の資格が存在している。また、米国や英国への留学や実務経験者が多く存在し、海外でPE資格やChartered Engineer資格を取得している者も多い。

#### 4) アジュディケーターナショナルリスト整備の可能性

すべての会員協会が、アジュディケーターナショナルリストの整備に意欲的であり、候補者のポテンシャルも高いと言及していることから、下記5)に挙げる課題を克服することによりアジュディケーターナショナルリストの整備を実現することが期待される。

#### 5) アジュディケーターナショナルリスト整備に向けた課題と対策

##### (1) 課題

アジュディケーターナショナルリスト候補者への、FIDIC Module 1、2、3、3Aの研修セミナーやワークショップの実施が課題となっている。

FIDIC Module 1 及び 2 については、過去に各国でセミナーが実施されているが、今後ナショナルリストを整備する場合に、候補者全員が過去に実施されたセミナーの参加者とは考えられないため、JICAが2010年に実施したような総合的な研修セミナーやワークショップ(FIDIC Module 1, 2, 3, 3A)の実施が望まれる。

すべてのFIDIC Moduleを実施することが難しい場合は、過去のFIDIC Module 1 及び2の受講者を対象にFIDIC Module 3 及び3A（ディスピュートボード）ワークショップを実施し、その後にアジュディケーターアセスメントを実施することも妥当なオプションと考えられる。

これらFIDIC Moduleのセミナーやワークショップを実施するには、プログラム内容と候補者のレベル（品質）を確保することが必須であるため、FIDICの認定講師やFIDIC President List of Approved Adjudicatorsを講師として招聘する必要がある。しかしながら、これらの講師を招聘するには、各協会とも経済的負担が重く実施は困難な状況である。

ナショナルリストの保持に関しては、各FIDIC協会は、担当する窓口を設け実施したい、との意向であるが、具体的な体制や運用方法は今後の課題となっている。

また、持続的にナショナルリストを保持するには、各協会が自前で継続的に研修や審査を実施するか、又は候補者がFIDICの提供する研修やアセスメントに自費で参加するオプションが考えられる。外部から講師を招聘する場合、受講者が自己負担で参加費を負担することは、経済的な負担が大きいと予想されるため、第一回目の審査とこれに関わる研修は、融資機関など外部からの財政的支援が有効と思われる。

(2) 対策

このような背景から、FIDIC Module のセミナーやワークショップの実施には、JICA や ADB などの融資機関の支援が望まれる。

また、ナショナルリストの整備にあたっては、アジュディケーターガイドラインを策定している FIDIC やナショナルリスト整備の経験を有する AJCE の積極的な支援が有効であると考えられる。

6) アジア地域でのアジュディケーターワークショップ開催について

すべての協会が、アジア地域でのアジュディケーター・アセスメントワークショップの開催に前向きである。各協会ともに自国での開催を希望しているが、他国で開催される場合でも参加する、との意向を示している。

## 第3章 国内 DB セミナー

### 3.1 セミナープログラム

日本の円借款事業関係者に DB マニュアル（ドラフト版）の概要を説明し、意見交換を行うことを目的として 2012 年 3 月 6 日に東京で「円借款事業における Dispute Board 普及セミナー（副題：Dispute Board Manual の解説）」を開催した。

セミナーでは、導入部としてこれまでの DB 普及に関わる JICA の活動を先ず紹介し、引続き Dispute Board Manual の主要部分の解説を行った。

セミナー案内状とプログラムを添付-3.1 に示す。

### 3.2 セミナー資料

セミナーにおけるプレゼンテーションの骨子は以下の通りである。

#### 1) Dispute Board 普及に向けての JICA の活動

- FIDIC 契約書と Dispute Board
- JICA のサンプル入札書類と Dispute Board
- DB 普及のための課題
- JICA の取り組み
- AJCE アジュディケーター・ナショナルリスト

#### 2) Dispute Board Manual の解説

- DB のコンセプト
- マニュアルの目的
- マニュアルの内容説明

添付-3.2 にプレゼンテーション資料を示す。

### 3.3 セミナー参加者

海外建設協会（OCAJI）および日本コンサルティングエンジニア協会（AJCE）を通して参加者の募集を行い、87 名の参加を得た。

表-3.1 DB 普及セミナー(東京)参加者数

分類	参加者数
コントラクター	32
コンサルタント	33
法律事務所	2
建設関連協会	6
JICS	4

分類	参加者数
JICA	4
その他（調査団を含む）	6
計	87

（出典：調査団）

### 3.4 質疑応答

以下の質疑応答が行われた。（C：コメント、Q：質問、A：回答）

C: 本マニュアルはDBの実体を発注者が理解するためにも大変役立つと思われる。願わくば、もっと早く出してほしかった。（参加者）

C: 仲裁条項などにおいて、MDB2010年版はMDB 2006年版との比較で、より公平性が確保されていると思われる。JICA 標準入札書においてもMDB2010年版が採用されることを期待する。（参加者）

JICA では本年4月に調達ガイドラインの改訂を計画している。引続き標準入札書の改訂を行う予定であるので、その時点で検討したい。（JICA）

C: 本マニュアルは、JICA のウェブサイトにおいて公開資料とするので、コメントは随時受け付け継続的に改良を図ってゆく所存である。（JICA）

C: ad-hoc DB については、規模の小さな案件もあることを考えると、現実問題として完全に排除すべきかどうかは議論の余地があると考えている。継続検討課題である。（JICA）

C: ad-hoc DB を検討する場合に、1人制 standing DB の可能性も考慮に値すると考える。（調査団）

C: DB メンバーの選定において、なかなか合意に至らずその設置が引き延ばされる事例がある。このような場合に、仮に JICA 又は日本政府に指導的役割を果たしていただければ解決されやすいと思われる。（参加者）

合意に至らない場合は、指名機関に委ねるとというのが契約の規定であり、その手続きに従うべきである。（調査団）

Q: DB 費用を全額発注者に請求できる、という考え方は成り立たないのでしょうか。請負者分のDB費用をオーバーヘッドなどに見込むとなるとその見積りが難しい。（参加者）

A: 全額発注者に請求という方法は、DB 費用折半の原則に反することになるのではないかと考える。また、DB 費用は仲裁費用に比べると高い精度で見積りが可能である。（調査団）

全額発注者に請求できるとすると、請負者からの紛争付託に歯止めがかからなくなり、モラルハザードに陥る可能性を否定できないと考える。（JICA）

Q: ヒアリングにおける the Engineer の立場はどのようなものであるか。ヒアリングの当事者

となり得るのか。（参加者）

- A: 紛争は、the Engineer の決定(determination)に起因するものが多い。その場合にヒアリングにおいて the Engineer に対して説明を求める、という事は当然のことながらあり得る。（調査団）

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## 第4章 DB マニュアルの概要

### 4.1 マニュアルの目的

プロジェクトに DB を採用する際、また実際に DB が設置される際に関わるすべての関係者が、DB の正しい機能及び設置・運用方法を理解し、適切に DB を機能させることを目的に、プロジェクトコスト見積もり時の DB の設置に必要な費用の積算やアジュディケーター選定プロセス、また DB 設置後の現地訪問、支払い等、DB の設置と運用に必要な一連の情報及びプロセスをまとめたマニュアルを作成した。

マニュアル作成は「業務主任」、「国際契約 2」がマニュアルのフレーム・ワークを構成し、「国際契約 2」が本文を執筆、「外部専門家」のレビューを経て最終ドラフトを作成した。「JICA DB Training Kit」作成に貢献されたゴードン・ジェーンズ氏のレビューを得て、さらに質の高いマニュアルの完成を見た。

### 4.2 マニュアルの構成と概要

JICA ローン借入国の政府・役所高官のように DB プロセスの概要だけ知りたい読者には「エグゼクティブ・サマリー」を読んでもらい、実務担当者のように詳細まで知りたい読者には「Appendices」を読んでもらうという 2 部構成とした。

マニュアルの概要は以下のとおりである。セクション 3 以下は、同じ番号の Appendix に詳細を記述した。

#### Acknowledgement

本マニュアルの作成に携わった人、貢献した人々に謝意を表する。

#### Preface

本マニュアルの提供者である JICA のまえがき。

#### 1. Introduction

本マニュアルの目的を示す。また、DB の最大の特徴である紛争の予防を強調した。Ad hoc DB がこの特徴を欠いていることを指摘し、使用にあたっての留意点を指摘した。本マニュアルが他の融資期間や民間でも利用されることを勧めている。

#### 2. Brief Explanation of DB

DB コンセプトを概説した。これによってすでに知識がある人はおさらいをし、知識がない人は基本を学ぶことができる。

#### 3. Consideration at Pre-implementation Stage

発注機関に対してプロジェクト計画時に何をすべきかを示すガイドである。プロジェクトのアプレイザル時に DB コストをプロジェクトの予算として組み込むための作業フローが

示されている。DB 採用の決定、1 人メンバーの DB か 3 人メンバーの DB かを決定すれば工期の長さを考慮して、DB コストを見積もることができる。見積もりでは大型で複雑、工期も長くかかるプロジェクトに国際的 DB アジュディケーターを 3 人用いる場合と、比較的単純で工期もあまり長くない中・小型プロジェクトにローカル・アジュディケーター 1 人を用いる場合の見積もり例を示している。

#### 4. Consideration at preparation of Tender documents

発注者がコンサルタントの助けを借りて入札図書を作成するときに、DB 関連ではどのような情報を盛り込む必要があるかを示した。Contract Data には DB 設置の期日、DB メンバーの数（1 または 3）、もし DB メンバーの選択が合意されないときに指名を依頼する指名機関名を記入しなければならない。また、発注者の DB コスト負担分の支払いを可能にする「Provisional Sum」を BQ（数量・単価表）に設けるべきことを示した。

#### 5. Selection of DB members

DB メンバーの選び方を示し、選択手順のフロー・チャートを示した。どこで DB メンバーを探すかを示唆し、選択の合意が得られなかった時にどのように指名機関を使って指名してもらうかのガイドとした。DB メンバーの報酬の合意や 3 者合意書の調印についても説明している。

#### 6. Remuneration of DB members

DB メンバー報酬、必要経費の支払い手順を解説した。

#### 7. Site Visit

DB の現場訪問（Site visit）の契約書上の規則を解説し、初回の訪問の重要性、定期的訪問の実務、訪問レポート（Site visit report）の意義と注意点を説明した。

#### 8. Information to DB during Intervals between Site visit

現場訪問と次の訪問の間に DB メンバーに提供すべき情報とその方法について解説。必要な情報には毎月出来高調書、アップデートされた工程表、必要なクレーム・ノーティス、変更などが含まれる。また、それら情報の伝達方式、たとえばインターネットまたはハード・コピーの使い分けについて説明した。

#### 9. DB Informal opinions

DB による非公式見解・助言・勧告が紛争の予防に非常に役立っていることを指摘した。当事者が DB に依頼することを合意して初めて要請できる。これらに拘束力はないが、受け入れるのは当事者の自由である。また、これらをベースにさらなる交渉を続けることによって和解に至る可能性は高い。

## 10. Referral and DB Decision

正式な紛争に至ってしまった場合には、その紛争はDBに付託され裁定が求められる。本章では紛争解決手続きのフロー・チャートを示した。DBへの付託手続きはフレキシブルであり、契約条件はDBがコスト・セーブと時間ロスをできるだけ防ぐ方法をとることを規定している。裁定は付託後84日以内に出さなければならないが、以外に短いので注意が必要となる。

## 11. Amicable Settlement

DB裁定に不服申し立てを提出しても、56日以内は仲裁を始めることができない。この期間に当事者は和解の努力をすることが求められている。この期間を当事者のトップ・マネジメントがDB裁定を承認すれば仲裁は回避される。いわゆるミニ・トライアルや模擬仲裁の手法を用いて和解交渉をすることが推奨される。

## 12. Arbitration

入札図書の作成時に仲裁に関連する情報をContract Dataに記入しなければならないが、具体的な必要情報の解説をした。また、契約条件書の仲裁条項のあいまいさも指摘している。最後に仲裁にかかる費用の膨大さ、仲裁判断の不確定さを考えて、和解を勧めている。



## 第5章 DB 導入・普及のための今後の方策

### 5.1 DB 普及セミナーなどの推進活動の継続的な実施

2008 年以降、JICA では一連の DB 調査を通じて合計 14 回の DB 普及セミナーを開催し、これまでに 1100 名以上の人が参加している。

表 5.1 DB 普及セミナーの開催実績

No.	開催日	国	参加者数
1	2008 年 7 月	日本（京都）	9
2	2008 年 7 月	日本（東京）	123
3	2008 年 8 月	インド（デリー）	16
4	2008 年 8 月	フィリピン（マニラ）	111
5	2009 年 11 月	カンボジア（プノンペン）	77
6	2009 年 11 月	ベトナム（ハノイ）	157
7	2010 年 1 月	バングラディッシュ（ダッカ）	53
8	2010 年 2 月	スリランカ（コロンボ）	105
9	2010 年 2 月	日本（東京）	73
10	2012 年 1 月	ベトナム（ハノイ）	67
11	2012 年 1 月	スリランカ（コロンボ）	86
12	2012 年 2 月	フィリピン（マニラ）	66
13	2012 年 2 月	インドネシア（ジャカルタ）	100
14	2012 年 3 月	日本（東京）	87
	合計		1,140

（出典：調査団）

このうち、ベトナム、フィリピン、スリランカでは DB 普及セミナー開催は 2 回目であったが、参加者の DB に対する理解度は前回に比べて確実に高まっていることが、質問内容などからも確認された。DB プロセスの認知度をより高めるためには、DB 普及セミナーなどのプログラムを継続的に実施することが効果的である。

また、DB を経験していないということが設置が進まない大きな要因の一つであるので、実例を増やす必要がある。融資機関がパイロットプロジェクトを特定し、DB を導入してゆくことも効果的であると考えられる。更に、セミナーにおいて模擬 DB を行うことも、DB に対する理解促進に大きく貢献すると考えられる。

### 5.2 DB の運用に関わる事例の整理

アンケート調査の結果から、発注者の DB コスト負担への抵抗感が依然として高いことが確認されている。発注者は、以下に例示される便益が DB の導入により期待されることは理解しているが、これを裏付ける事例を知りたいとの意見が政府機関との協議や DB セミナーの場で聞かれた。

- 紛争発展への抑止機能
- 素早い紛争の解決
- プロジェクトの完成遅延の回避（社会経済的損失の回避）
- 仲裁の回避機能
- 入札における競争状況の確保
- 投資環境の改善

DBの便益に関わる事例の整理は、DB普及への強力な説明材料となると考えられ、今後の課題として認識される。

### 5.3 MDB との協調

フィリピンの現地調査では、ADBの調達部門の責任者と会談し、DBセミナーではプレゼンターとして参加いただいた。ADBでは、DB普及に関わるこれまでのJICAの先導的活動を高く評価しており、今後はJICAと協調してゆきたいとの発言が得られた。DBの認知度向上プログラムやアジュディケーターの育成プログラムを、世銀なども含めたMDBと共同で実施することにより、DB普及への推進力が増すことが期待される。

### 5.4 アジア地域におけるナショナルリストの整備

今回の調査では、日本のナショナルリスト整備について説明を行い、FIDIC加盟協会(MA)ならびにDBセミナー参加者から大きな関心が寄せられた。

2.5章に記述したとおり、各国のMAのナショナルリスト整備にかかわる意向は次の通り集約される。

- 1) 各国MA共にナショナルリストの整備には意欲的である。
- 2) 各国共にアジュディケーター候補は存在すると考えられる（特にスリランカとフィリピンがポテンシャルが高いと考えられる）。
- 3) 各国共にナショナルリストの整備に関わる研修や審査費用の負担が障害となっている。

従って、JICAが日本におけるナショナルリスト整備の経験を生かし、アジア地域のナショナルリスト整備のための技術的・資金的な支援を行うならば、アジアにおける質の高いアジュディケーターの特定は確実に加速されると考えられる。

この場合、4カ国からのアジュディケーター候補者の研修ならびにアセスメントは、候補者を1か所に集めて集中的に実施することが経済性の面でも最も効率的である。ADBとの協調の可能性を鑑みるとマニラでの開催が有望視される。

また、研修ならびにアセスメントの実施に当たっては、ナショナルリストが実際に立ち上げられ持続的に運用されることが要件となるので、FIDIC加盟協会にはこの点に対するコミットメントが求められる。

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ナショナルリスト整備に至る全体のプロセスは以下の通り想定される。

- 1) 応募要項の作成  
募集人数、応募要件、応募書類、研修・審査日程、費用負担、応募締切日を記載した応募要項を作成する。応募要件には、FIDIC ガイドラインに基づくアジュディケーターとして最低限備えるべき経験やスキルが記述され、各国間で均一な高い質を有するアジュディケーターを選定するためのクライテリアとなる。審査受審のためには、FIDIC Module 1 & 2 研修、DB トレーニング・ワークショップの修了を要件とする。
  - 2) 各国 MA へ応募要項の配布  
上記応募要項を JICA から各 MA に配布する。MA は応募要件を満たす候補者の選定を行う。
  - 3) 研修・アセスメント参加申請書類受領  
JICA は参加申請書類を MA より受領する。
  - 4) Module 1 & 2 実施（5 日間）  
応募者の中には、FIDIC Module 1 & 2 研修を修了していない者もいると思われるので、Module 1 & 2 を開催する。
  - 5) 面談、簡易試験、申請書類による予備選考  
Module 1 & 2 実施後に講師は候補者との個別面談を行い、簡易試験（三択試験）と申請書類の内容を確認することで、予備選考を実施する。予備選考通過者の員数は 20 名程度を上限とする。
  - 6) 参加者に書類選考結果通知  
予備選考の結果を MA に通知する。
  - 7) DB トレーニング・ワークショップ実施（5 日間）  
予備選考の通過者を対象に、JICA DB トレーニングキットを用いた DB トレーニング・ワークショップを開催する。
  - 8) DB アセスメント・ワークショップ開催（3 日間）  
DB トレーニング・ワークショップに引き続き、3 名のアジュディケーター審査パネル（APA）による審査ワークショップを実施する。
  - 9) APA による審査  
アセスメント・ワークショップ終了後、APA はナショナルリストに掲載するに相応しい合格者を合議により決定する。DB の成功は、アジュディケーターの資質に依存するため、審査は厳格に行われる。
  - 10) APA から JICA に結果報告  
APA はアセスメント結果を JICA に報告する。
  - 11) MA に結果伝達  
JICA は MA にアセスメント結果を伝達する。
-

12) MA がナショナルリストを整備

各国の MA はアセスメント結果を参考として、自らのナショナルリストへの掲載手続きを行う。

添 付



Japan International Cooperation Agency

### **Invitation to the Seminar on Dispute Board**

Dear Sir,

First of all, we would like to express our appreciation for your cooperation and support extended to JICA operations in \_\_\_\_\_.

As you are aware of, JICA issued a revised Sample Bidding Documents for Works in 2009 in which Dispute Board is introduced as a dispute resolution mechanism during construction. The Dispute Board is formed by one or three adjudicators who make decision of the dispute referred by the contract parties. The Dispute Board is also used in JICA Sample Bidding Documents for Plant works and the dispute under JICA Sample Bidding Documents for Small Works is resolved by adjudicator now. The Dispute Board system becomes a standard dispute resolution practice in international construction projects.

It is recognized that the stakeholders of Japanese ODA Loan projects are required to well understand the Dispute Board to utilize this new dispute resolution mechanism effectively. JICA also recognizes that development of national/local adjudicators in the Asian region is essential to cope with increasing demand of adjudicator for the projects.

In this context, we are pleased to invite you to the one-day seminar on Dispute Board to be held on \_\_\_\_\_ 2012 in which the Dispute Board system and development of national adjudicators will be discussed intensively.

In the attached, please find the Seminar Program and Registration Form. For confirming your participation to the seminar, please kindly return the Registration Form to our Consultant no later than \_\_\_\_\_ 2012.

We are looking forward to your participation to the seminar. Thank you very much.

Sincerely yours,

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## DISPUTE BOARD SEMINAR

### Seminar Program

Date & Time : 11 January, 2012 (Wednesday), 8:00 to 12:30

Venue : The Press Club

59A Ly Thai To, Hanoi (<http://www.hanoi-pressclub.com/>)

Language: English with Vietnamese Interpretation

Time		Session	Speaker
7:45 – 8:00		(Registration)	
8:00 – 8:10	10'	Opening Address	Mr. Toshio Nagase Senior Representative JICA Vietnam Office
8:10 – 8:50	40'	<ul style="list-style-type: none"> <li>JICA's Activities on Promotion of Dispute Board</li> <li>Basics of Dispute Board</li> </ul>	Mr. Yukinobu Hayashi Nippon Koei Co., Ltd.
8:50 – 9:30	40'	<ul style="list-style-type: none"> <li>Practice of Dispute Board (advantage of Dispute Board and its case study)</li> </ul>	Prof. Toshihiko Omoto Kyoto University FIDIC President's List Adjudicator
9:30 – 9:50	20'	<ul style="list-style-type: none"> <li>Common Disputes during Construction in Vietnam</li> </ul>	Mr. Pham Van Khanh General Director, Ministry of Construction
9:50 – 10:05	15'	Coffee Break	
10:05 – 10:20	15'	<ul style="list-style-type: none"> <li>Dispute Settlement at the Vietnam International Arbitration Center (VIAC)</li> </ul>	Mr. Vu Anh Duong Attorney-at-Law, General Secretary VIAC
10:20 – 10:40	20'	<ul style="list-style-type: none"> <li>- Dispute Board - JICA's Experience, Initiatives and Way Forward</li> </ul>	Mr. Takashi Ito Director, Loan Procurement Policy and Supervision Division, Financing Facilitation and Procurement Supervision Department, JICA
10:40 – 11:30	50'	<ul style="list-style-type: none"> <li>Key Requirements for Adjudicators</li> </ul>	Mr. Volker Jurowich President of Dispute Resolution Board Foundation (DRBF)
11:30 – 11:55	25'	<ul style="list-style-type: none"> <li>Creation of National List of Japanese Adjudicators</li> </ul>	Mr. Yoshihiko Yamashita Secretary General of Association of Japanese Consulting Engineer
11:55 – 12:15	20'	Q and A Session	JICA Study Team
12:15 – 12:20	5'	Closing Remarks	JICA
12:20 –		Lunch	

## About Speakers

### **Yukinobu Hayashi**

General Manager, Contract Administration Office, 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.

### **Toshihiko Omoto**

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

Toshihiko Omoto is a First Class Civil Engineer in Japan, 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 after retirement in 2010, he is teaching as a Visiting Professor. He is a Fellow of the Chartered Institute of Arbitrators, UK, and currently serves as a Neutral such as 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.

### **Vu Anh Duong**

Attorney-at-Law  
General Secretary

Duong holds law degree from Hanoi National University and LLM from Hochiminh City Law University. Duong has been working at the Vietnam International Arbitration Centre (VIAC) for 15 years. Being VIAC's General Secretary, he is in charge of management of arbitral proceedings and supervision of dispute resolution by Arbitral Tribunals in accordance with the VIAC Rules of Arbitration.

He was a member of the Drafting Committee of the Ordinance on Commercial Arbitration 2003, the Law on Commercial Arbitration 2010 and the VIAC's Rules of Arbitration.

Duong has been a visiting lecturer on dispute resolution by arbitration at the Judicial Academy under the Ministry of Justice of Vietnam, the Diplomatic Academy of Vietnam and the Vietnam Commercial University. Duong also regularly presents on dispute resolution by arbitration at many conferences and training courses.



**Volker Jurowich**

President, Dispute Resolution Board Foundation

Dipl.-Ing. Volker Jurowich is a civil engineer, Technical University, Aachen, Germany. He has been working with a major German international contractor for 35 years, the last 15 of which as an Executive Director. His responsibilities were part of the local business and all of the international business outside of the European Union. Projects under his direct responsibility include major infrastructure works, hydroelectric projects, harbour construction, drill and blast as well as TBM tunnelling and building works. He has experience in dispute resolution by negotiation, by mediation, by dispute boards and by arbitration. Volker is now working as a contract consultant and in dispute resolution. He was member of the Executive Board of Directors of the DRBF from October 2006 to May 2010, President of DRBF Region 2 from October 2008 to May 2010 and is now President Elect of the Executive Board. He holds the diploma in International Commercial Arbitration from Queen Mary and Westfield College, University of London. He served on the ICC task force for Dispute Boards. Presently Volker serves on a DAB in South Africa, as Chairman of a Panel of Experts in Sudan and as single member DAB in Romania.

He is lecturer at the University of Stuttgart on international construction. Volker is listed on the FIDIC President's List of Approved Adjudicators. He is Chairman of the Assessment Panel for the German National List of FIDIC Adjudicators.

**Yoshihiko Yamashita**

Secretary General, Association of Japanese Consulting Engineers (AJCE)

Yoshihiko Yamashita is a Professional Engineer registered in Japan, holding Doctor of Philosophy in Ocean Engineering, and Master's Degree in Mechanical Engineering awarded by University of Hawaii. He has engaged in plan, design, supervision and management of water environment and its related infrastructure both in Japan and overseas. After working for 27 years in consulting firms in Japan, he has been working for AJCE for 4 years.

He has been involved with FIDIC activities since 1991 in various committees, attending annual conferences, and possesses abundant network among FIDIC member associations.

He is aware of the importance of FIDIC contract documents in international projects. Through JICA projects, he has been disseminating and promoting the use of FIDIC contract documents and dispute board mechanism. He is a member of drafting Japanese versions of FIDIC contracts including Red Book 1999 and Yellow Book 1999.

## DISPUTE BOARD SEMINAR

### Seminar Program

Date & Time : 17 January, 2012 ( Tuesday), 10:00 to 16:30

Venue : Galle Face Hotel, Colombo (<http://www.gallefacehotel.com/>)

Language: English

Time		Session	Speaker
9:30 – 10:00		(Registration)	
10:00 – 10:05	5'	Opening Address	Mr. Akira Shimura Chief Representative JICA Sri Lanka Office
10:05 – 10:55	50'	<ul style="list-style-type: none"> <li>JICA's Activities on Promotion of Dispute Board</li> <li>Basics of Dispute Board</li> </ul>	Mr. Yukinobu Hayashi Nippon Koei Co., Ltd.
10:55– 11:45	50'	<ul style="list-style-type: none"> <li>Dispute Board Practice (advantage of Dispute Board and its case study)</li> </ul>	Prof. Toshihiko Omoto FIDIC President's List Adjudicator
11:45 – 12:15	30'	<ul style="list-style-type: none"> <li>Construction Dispute in Sri Lanka</li> </ul>	Mr. Tilak P. Kolonne Country Representative of DRBF in Sri Lanka
12:15 – 13:15	60'	Lunch	
13:15 – 13:45	30'	<ul style="list-style-type: none"> <li>Dispute Board : JICA's Experience, Initiatives and Way Forward</li> </ul>	Mr. Shokichi Sakata Deputy Director General for Planning and Coordination, Financing Facilitation and Procurement Supervision Department, JICA
13:45 – 14:45	60'	<ul style="list-style-type: none"> <li>Key Requirements for Adjudicators</li> </ul>	Mr. Volker Jurowich President of Dispute Resolution Board Foundation (DRBF)
14:45– 15:15	30'	<ul style="list-style-type: none"> <li>Creation of National List of Japanese Adjudicators</li> </ul>	Mr. Yoshihiko Yamashita Secretary General of Association of Japanese Consulting Engineer
15:15 – 15:35	20'	Coffee Break	
15:35 – 16:25	50'	Q and A Session	JICA Study Team
16:25 – 16:30	5'	Closing Remarks	JICA

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### **Tilak P. Kolonne**

BSc (Hons), DipArb, FRICS, FIQSSL, ACI Arb  
Director, VFORM Consultants (Private) Limited.

Tilak Kolonne is a Chartered Quantity Surveyor, holding BSc in Quantity Surveying and Diploma in Arbitration. He has followed course leading to Certificate of Adjudication conducted by University of Reading in UK. He has obtained training as a Mediator from The Chartered Institute of Arbitrators, UK. He is a Fellow of The Royal Institution of Chartered Surveyors (FRICS), UK; an Associate member of The Chartered Institute of Arbitrators (ACI Arb.), UK; and Fellow of Institute of Quantity Surveyors Sri Lanka (FIQSSL). He is the Sri Lanka Country Representative of the Dispute Resolution Board Foundation, USA.

He has over 20 years experience in the construction industry, including 12 years experience in the international projects. He presently serves in Sri Lanka as the DAB (Dispute Adjudication Board) member of the Southern Transport Development Project (Package 2). In addition he serves in resolution of

## Japan International Cooperation Agency

construction disputes in various projects including foreign funded projects in the capacity of DAB member/ Adjudicator, Arbitrator and representative/ consultant of disputant party.

He was instrumental in creation of a formal professional body for construction dispute resolvers in Sri Lanka. As a result, The Institute of Dispute Management Professional (IDMP) was established and he serves in the IDMP as its founder Secretary.

He has actively participated in various international dispute resolution forums and seminars in Sri Lanka, United Kingdom, Singapore, Philippines, Thailand, and Vietnam.

**Volker Jurowich**

President, Dispute Resolution Board Foundation

Dipl.-Ing. Volker Jurowich is a civil engineer, Technical University, Aachen, Germany. He has been working with a major German international contractor for 35 years, the last 15 of which as an Executive Director. His responsibilities were part of the local business and all of the international business outside of the European Union. Projects under his direct responsibility include major infrastructure works, hydroelectric projects, harbour construction, drill and blast as well as TBM tunnelling and building works. He has experience in dispute resolution by negotiation, by mediation, by dispute boards and by arbitration. Volker is now working as a contract consultant and in dispute resolution. He was member of the Executive Board of Directors of the DRBF from October 2006 to May 2010, President of DRBF Region 2 from October 2008 to May 2010 and is now President Elect of the Executive Board. He holds the diploma in International Commercial Arbitration from Queen Mary and Westfield College, University of London. He served on the ICC task force for Dispute Boards. Presently Volker serves on a DAB in South Africa, as Chairman of a Panel of Experts in Sudan and as single member DAB in Romania.

He is lecturer at the University of Stuttgart on international construction. Volker is listed on the FIDIC President's List of Approved Adjudicators. He is Chairman of the Assessment Panel for the German National List of FIDIC Adjudicators.

**Yoshihiko Yamashita**

Secretary General, Association of Japanese Consulting Engineers (AJCE)

Yoshihiko Yamashita is a Professional Engineer registered in Japan, holding Doctor of Philosophy. in Ocean Engineering, and Master's Degree in Mechanical Engineering awarded by University of Hawaii. He has engaged in plan, design, supervision and management of water environment and its related infrastructure both in Japan and overseas. After working for 27 years in consulting firms in Japan, he has been working for AJCE for 4 years.

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He is aware of the importance of FIDIC contract documents in international projects. Through JICA projects, he has been disseminating and promoting the use of FIDIC contract documents and dispute board mechanism. He is a member of drafting Japanese versions of FIDIC contracts including Red Book 1999 and Yellow Book 1999.

## DISPUTE BOARD SEMINAR

### Seminar Program

Date & Time : 9 February, 2012 (Thursday), 10:00 to 16:30  
 Venue : Ballroom II  
 6<sup>th</sup> Floor Hyatt Hotel and Casino Manila  
 1588 Pedro Gil St. corner M.H. Del Pilar St. Manila  
 Language: English  
 Registration fee : Free

Time		Session	Speaker
9:30 – 10:00		(Registration)	
10:00 – 10:05	5'	Opening Address	Mr. Masanori Kurisu Senior Representative JICA Philippine Office
10:05 – 10:50	45'	<ul style="list-style-type: none"> <li>• JICA's Activities on Promotion of Dispute Board</li> <li>• Basics of Dispute Board</li> </ul>	Mr. Yukinobu Hayashi Nippon Koei Co., Ltd.
10:50 – 11:35	45'	<ul style="list-style-type: none"> <li>• Dispute Board Practice (advantage of Dispute Board and its case study)</li> </ul>	Prof. Toshihiko Omoto Kyoto University FIDIC President's List Adjudicator
11:35 – 12:05	30'	<ul style="list-style-type: none"> <li>• Construction Dispute in Philippines</li> </ul>	Mr. Salvador P. Castro Jr. Country Representative of DRBF for Philippines
12:05 – 13:05	60'	Lunch	
13:05 – 13:35	30'	<ul style="list-style-type: none"> <li>• Construction Disputes in ADB financed Projects</li> </ul>	Mr. Hamid L. Sharif Principal Director, Central Operations Services Office Asian Development Bank
13:35 – 14:05	30'	<ul style="list-style-type: none"> <li>• - Dispute Board - JICA's Experience, Initiatives and Way Forward</li> </ul>	Mr. Takashi Ito Director, Loan Procurement Policy and Supervision Division, Financing Facilitation and Procurement Supervision Department, JICA
14:05 – 14:55	50'	<ul style="list-style-type: none"> <li>• Key Requirements for Adjudicators</li> </ul>	Dr. Götz-Sebastian Hök FIDIC President's List Adjudicator
14:55 – 15:15	20'	Coffee Break	
15:15 – 15:45	30'	<ul style="list-style-type: none"> <li>• Creation of National List of Japanese Adjudicators</li> </ul>	Mr. Yoshihiko Yamashita Secretary General of Association of Japanese Consulting Engineer
15:45 – 16:25	40'	Q and A Session	JICA Study Team

Time		Session	Speaker
16:25 – 16:30	5'	Closing Remarks	JICA

## About Speakers

### **Yukinobu Hayashi**

General Manager, Contract Administration Office, 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.

### **Toshihiko Omoto.**

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

Toshihiko Omoto is a First Class Civil Engineer in Japan, 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 after retirement in 2010, he is teaching as a Visiting Professor. He is a Fellow of the Chartered Institute of Arbitrators, UK, and currently serves as a Neutral such as 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.

### **Mr. Salvador P. Castro Jr**

Country Representative of DRBF for the Philippines

Salvador P. Castro, Jr., Chairman and President of SPCastro, Inc., has over 40 years of work experience in Project and Construction Management, including 20 years in Alternative Dispute Resolution (ADR). Mr. Castro is a Fellow of the Association of Project Management, Inc. and the Chartered Institute of Building, and Member, Society of Construction Law, all in the UK. He is also the Philippine's Country Representative to the Dispute Resolution Board Foundation (USA).

Mr. Castro plays a significant role in the field of ADR in the region. He is an accredited Mediator and

## Japan International Cooperation Agency

Arbitrator of the Construction Industry Arbitration Commission (CIAC, Philippines), the Hong Kong International Arbitration Centre, Inc., Singapore Mediation Council, Philippine Dispute Resolution Center, Inc., Mediator of Court- Annexed Cases and Professor of the Supreme Court's Philippine Judicial Academy (PHILJA).

Mr. Castro is past president of the Philippine Institute of Construction Arbitrators and Mediators (PICAM), the organization of all CIAC-accredited Mediators and Arbitrators. He is a Trustee of the Philippine Dispute Resolution Center, Inc. (PDRCI), the arbitration arm of ICC-Philippines.

Taking an equally active role in the promotion of FIDIC Forms of Contract in the region, geared towards dispute avoidance through a better understanding of FIDIC's various forms of contract, Mr. Castro has completed the training requirements for accreditation to the FIDIC President's List of Adjudicators and is now an accredited FIDIC International Trainer for FIDIC Contracts and Management of Claims and Resolution of Disputes. He is an Adjunct Professor at the Asian Institute of Management (AIM) in its collaboration with the Japan International Cooperation Agency (JICA) and FIDIC in the Course, Practical Project Management Program in the Global Market, wherein he lectures on Contract Administration using FIDIC/MDB/JICA Conditions of Contracts. Mr. Castro is also past president of the Council of Engineering Consultants of the Philippines (CECOPHIL).

**Götz-Sebastian Hök**

FIDIC President's List Approved Adjudicator

Dr. Götz-Sebastian Hök graduated in Law from Göttingen University and is a German solicitor registered at the Berlin Bar. He has extensive international project and commercial experience gained while living and working in Europe, the Middle East, Africa and Asia. For the past 20 years he has been partner and senior partner of Dr. Hök, Stieglmeier & Kollegen. Dr. Hök is acting as arbitrator, adjudicator and legal counsel and also an accredited FIDIC trainer. He is a lecturer at Berlin University of Applied Science for construction contract management law. Since 2009 he is a FIDIC listed Adjudicator. In 2011 he was appointed as the Legal Advisor of the FIDIC Task Group Design & Build Subcontract and FIDIC Task Group ODB. He is also a Member of the FIDIC Assessment Panel for Trainer Accreditation. Dr. Hök has written various books and articles in French, English and German on FIDIC forms of contract. He is a co-author of the book FIDIC for Practitioners and member of the German Dispute Adjudication Assessment Panel and former past Chairman of Eurojuris Commission International Litigation.

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## DISPUTE BOARD SEMINAR

### Seminar Program

Date & Time : 14 February, 2012( Tuesday), 10:00 to 16:30  
 Venue : Hotel Atlet Century Park (<http://atletcentury.com/contents/>)  
 Language: English  
 Participation fee : Free

Time		Session	Speaker
9:30 – 10:00		(Registration)	
10:00 – 10:05	5'	Opening Address	Mr. Motofumi Kohara Chief Representative JICA Indonesia Office
10:05 – 10:10	5'	Opening Address	His Excellency Djoko Kirmanto Minister Ministry of Public Works
10:10 – 11:00	50'	<ul style="list-style-type: none"> <li>JICA's Activities on Promotion of Dispute Board</li> <li>Basics of Dispute Board</li> </ul>	Mr. Yukinobu Hayashi Nippon Koei Co., Ltd.
11:00– 11:50	50'	<ul style="list-style-type: none"> <li>Dispute Board Practice (advantage of Dispute Board and its case study)</li> </ul>	Prof. Toshihiko Omoto Kyoto University FIDIC President's List Adjudicator
11:50 – 12:20	30'	<ul style="list-style-type: none"> <li>Construction Dispute in Indonesia</li> </ul>	Dr. Sarwono Hardjomuljadi Country Representative of DRBF in Indonesia
12:20 – 13:20	60'	Lunch	
13:20 – 13:50	30'	<ul style="list-style-type: none"> <li>Dispute Board : JICA's Experience, Initiatives and Way Forward</li> </ul>	Yasuaki Momita Assistant Director, Loan Procurement Policy and Supervision Division, Financing Facilitation and Procurement Supervision Department, JICA
13:50– 14:50	60'	<ul style="list-style-type: none"> <li>Key Requirements for Adjudicators</li> </ul>	Dr. Götz-Sebastian Hök FIDIC President's List Adjudicator
14:50– 15:20	30'	<ul style="list-style-type: none"> <li>Creation of National List of Japanese Adjudicators</li> </ul>	Mr. Yoshihiko Yamashita Secretary General of Association of Japanese Consulting Engineer
15:20 – 15:40	20'	Coffee Break	
15:40 – 16:25	45'	Q and A Session	JICA Study Team





Time		Session	Speaker
16:25 – 16:30	5'	Closing Remarks	JICA

## About Speakers

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General Manager, Contract Administration Office, Nippon Koei Co., Ltd.

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

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In 2006, he became a full time Professor at the Graduate School of Management (MBA) of Kyoto University and after retirement in 2010, he is teaching as a Visiting Professor. He is a Fellow of the Chartered Institute of Arbitrators, UK, and currently serves as a Neutral such as 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.

### **Sarwono Hardjomuljadi**

Dr, Ir, MSc (Civ.Eng), MSBA (Bus), MDRBF, ACPE, ICPE, ACI Arb, FIDIC International Accredited Trainer

Dr. Sarwono Hardjomuljadi is Special Adviser to the Minister of Public Works, individual consultant on construction contract management and dispute resolution in construction projects. He is the lecturer at Post Graduate Program of Parahyangan Catholic University, Tarumanagara University, Atma Jaya Yogyakarta University, Mercu Buana University and Muhammadiyah Jakarta University on Construction Contract Administration, FIDIC International Accredited Trainer (FIDIC-IAT), Associate Member of Chartered Institute of Arbitrators (ACI Arb), Country Representative, Dispute Resolution Board Foundation (DRBF), The Vice Chairman for Legal, Contract and Dispute Resolution of LPJKN (National Board for Construction Services Development), Indonesian Chartered Professional Engineer on Water Resources (PE-HATHI), ASEAN Chartered Professional Engineer (ACPE), member of Indonesian Commission on Large Dam (INACOLD), member of Geotechnical Engineer Association of Indonesia (HATTI), member of Indonesian Engineer Association (PII). He has 30 years experience in the construction activities as Procurement Committee, Project Manager and Project Coordinator of several Hydro Electric Power Projects as well as Geothermal Projects in Indonesia and as Expert Witness, Dispute Board for several projects. He is the author of several books i.e. The Importance of Management Decision in the Construction Contract based on FIDIC GCC (1999), Construction Claim Strategy based on FIDIC

Conditions of Contract (2006), Tunneling, Construction Method and Contract Administration (2007) and the Team Leader for the translation of of FIDIC Conditions of Contract fo Construction MDB Harmonised Edition (2008), EPC/Turnkey Project (2010) and Short Form of Contract (2010) into Bahasa Indonesia.

### **Götz-Sebastian Hök**

FIDIC President's List Approved Adjudicator

Dr. Götz-Sebastian Hök graduated in Law from Göttingen University and is a German solicitor registered at the Berlin Bar. He has extensive international project and commercial experience gained while living and working in Europe, the Middle East, Africa and Asia. For the past 20 years he has been partner and senior partner of Dr. Hök, Stieglmeier & Kollegen. Dr. Hök is acting as arbitrator, adjudicator and legal counsel and also an accredited FIDIC trainer. He is a lecturer at Berlin University of Applied Science for construction contract management law. Since 2009 he is a FIDIC listed Adjudicator. In 2011 he was appointed as the Legal Advisor of the FIDIC Task Group Design & Build Subcontract and FIDIC Task Group ODB. He is also a Member of the FIDIC Assessment Panel for Trainer Accreditation. Dr. Hök has written various books and articles in French, English and German on FIDIC forms of contract. He is a co-author of the book FIDIC for Practitioners and member of the German Dispute Adjudication Assessment Panel and former past Chairman of Eurojuris Commission International Litigation.

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添付 - 2.3.1

# **Basics of Dispute Board**

**Mr. Yukinobu Hayashi**  
**Nippon Koei Co., Ltd.**



Dispute Board Seminar

## Basics of Dispute Board

Japan International Cooperation Agency (JICA)

Yukinobu Hayashi  
Nippon Koei Co., Ltd.

JICA Dispute Board Seminar 2012

## Topics

2

- JICA Procurement Documents and Dispute Board
- JICA's Activities for Dissemination of DB
- Claim/Dispute Settlement Procedures under FIDIC MDB Contracts
- Why DB is introduced in FIDIC Contracts
- Basic Knowledge of DB in FIDIC MDB Contracts

JICA Dispute Board Seminar 2012



3

## JICA Sample Bidding Documents (SBD) and Dispute Board

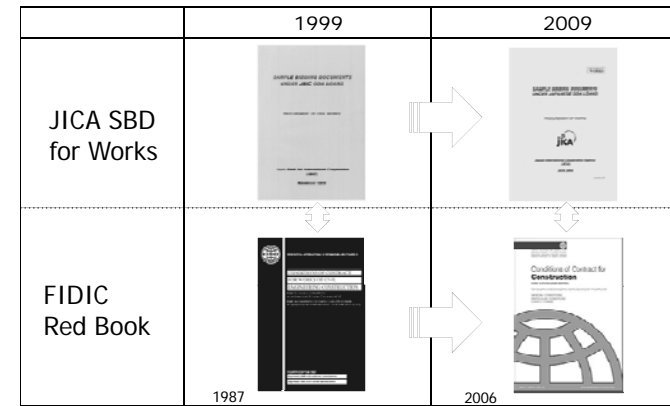
	JICA SBD	Version (year)	Conditions of Contract	Dispute Resolution (First Step)
1	Works	1.1 (2009)	FIDIC MDB harmonized edition	Dispute Board
2	Plant Design, Supply and Installation	1.0 (2010)	ENAA form	Dispute Board
3	Small Works	1.0 (2010)	MDB original	Adjudicator

JICA Dispute Board Seminar 2012



4

## JICA SBD for Works and FIDIC Contracts



JICA Dispute Board Seminar 2012



## Issues for Dissemination of Dispute Board

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1. Demand side (user side) issue:  
The users of DB has not been sufficiently familiar with DB.
  
2. Supply side issue:  
Sufficient numbers of DB members (adjudicator) will (or are) not available to cope with increasing demands.



## JICA's Activities for Dissemination of DB (1)

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1. YEAR 2008:
  - Survey on dispute resolution practice in international construction projects
  - DB promotion seminar in India, Philippines and Japan
  
2. YEAR 2009:
  - DB promotion seminar in Vietnam, Cambodia, Sri Lanka and Bangladesh
  - Development of DB Adjudicator Training Kit



## JICA's Activities for Dissemination of DB (2)

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3. YEAR 2010:
  - Survey on development of national list of DB adjudicator in Germany, Poland and Rumania
  - Survey on use of Dispute Board in the projects financed by World Bank, ADB and IDB
  - Assistance in development of national list of DB adjudicator in Japan
  
4. YEAR 2011 (This fiscal year):
  - DB Seminar in Vietnam, Sri Lanka, Indonesia and Philippines
  - Study on development of national lists of DB adjudicators in Asia
  - Preparation of Dispute Board Manual



## What is the DISPUTE in FIDIC Contracts? (1)

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### Definition in FIDIC Gold Book 1<sup>st</sup> Edition (2009)

#### 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.



## What is the DISPUTE in FIDIC Contracts? (2)

9

### Description in FIDIC MDB edition (2006)

#### 20.4 Obtaining Dispute Board's Decision

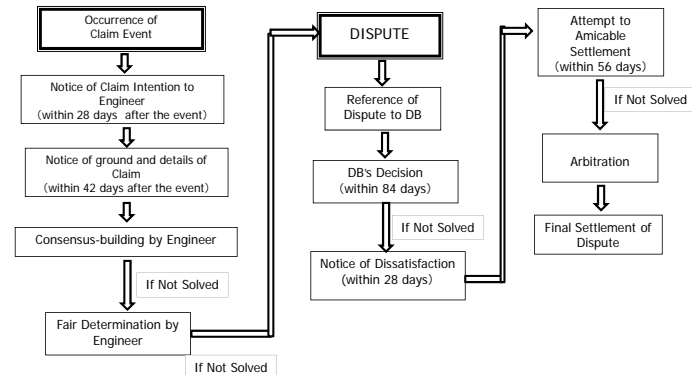
If a dispute (of any kind whatsoever) arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works, including any dispute as to any certificate, determination, instruction, opinion or valuation of the Engineer, either Party may refer the dispute in writing to the DB for its decision, with copies to the other Party and the Engineer. Such reference shall state that it is given under this Sub-Clause.



JICA Dispute Board Seminar 2012

## Claim and Dispute Resolution Process under MDB edition (1)

10



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## Claim and Dispute Resolution Process under MDB edition (1)

11

### 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



JICA Dispute Board Seminar 2012

## ADR (Alternative Dispute Resolution) and DB

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### Arbitration

### Mediation

### Conciliation

### Dispute Board\*1

- Dispute Review Board
- Dispute Board (or Dispute Adjudication Board)
- Combined Dispute Board

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



JICA Dispute Board Seminar 2012

Type of Dispute Board (Decision or Recommendation)

- Dispute Review Board, DRB
  - DRB issues recommendations.
- Dispute Board, DB (DAB)
  - DB 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.



Type of Dispute Board (Full-term or Ad-hoc)

- Full-term (standing) DB
  - appointed just after conclusion of the construction contract
  - periodical site visit regardless of existence of the 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

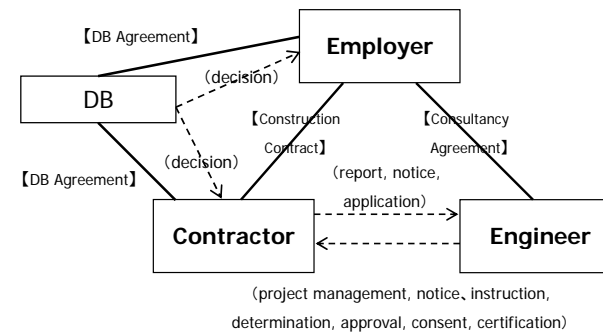


Comparison : Full-term and Ad-hoc DB

	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



Organization under FIDIC MDB Contract





## Why DB is introduced in FIDIC Contracts

### 1. FIDIC Questionnaire Survey in 1996

#### Question 16: Engineers' impartiality

	%	1	2	3	4	5	n
Cons	6	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
<b>Tot</b>	<b>19</b>	<b>23</b>	<b>11</b>	<b>28</b>	<b>18</b>		<b>201</b>

Engineers are rarely impartial in exercising their powers under a contract

Engineers are usually impartial in exercising their powers under the contract

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

	%	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
<b>Tot</b>	<b>1</b>	<b>2</b>	<b>25</b>	<b>44</b>	<b>27</b>		<b>201</b>

Engineers typically favour the Contractor in administering contracts

Engineers typically favour the Employer in administering contracts



## Why DB is introduced in FIDIC Contracts

#### Question 18: Engineer as dispute settler

	%	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
<b>Tot</b>	<b>19</b>	<b>18</b>	<b>5</b>	<b>27</b>	<b>30</b>		<b>201</b>

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

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

	%	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
<b>Tot</b>	<b>24</b>	<b>16</b>	<b>3</b>	<b>24</b>	<b>32</b>		<b>201</b>

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

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



## Why DB is introduced in FIDIC Contracts

#### Question 20: Decisions of adjudicators

	%	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
<b>Tot</b>	<b>14</b>	<b>18</b>	<b>6</b>	<b>24</b>	<b>37</b>		<b>201</b>

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

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



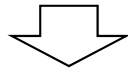
## Why DB is introduced in FIDIC Contracts

3. The Engineer would be required to obtain Employer's approval before taking some actions under the Contract.
  - 【In case of MDB edition】
  - 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
4. The Employer assigns Employer related person as the Engineer in some cases.



## 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)

(Three 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 DB

---

- 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 three-party 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 ½ 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




---

# The End

Thank you for your attention!



添付 - 2.3.2

# **Practice of Dispute Board**

**Prof. Toshihiko Omoto**

**Kyoto University**

**FIDIC President's List Adjudicator**



Dispute Board Seminar

## Practice of Dispute Board

Japan International Cooperation Agency (JICA)

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

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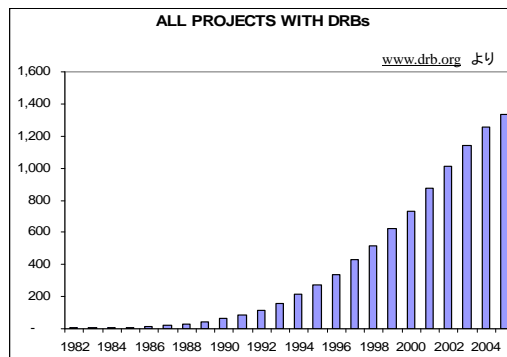
## Today's Topics: Dispute Boards

- Present State of DB's Dissemination
- Operation of DB
- Effects of DB
- Costs of DB
- Integrity under DB existence
- Enforceability of DB's Decision
- 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

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- **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: [Name]  
Project: [Name]  
Appointment of DAB

Thank you for your letter dated [Date] 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 [Position] in 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 [Name] was involved, often tendered for contracts in joint venture with [Name] 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 [Project Name] Hydroelectric Project in [Country]. I left the employ [Name] in 1997 have not had contact with [Name] 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.

Sincerely,  
[Name]  
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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
- Payment
  - Retainer Fee
  - Daily Fee

DISPUTE BOARD AGREEMENT

EMPLOYER CONTRACTOR MEMBER

PROJECT

When the Employer and the Contractor have entered into a contract (Specifically the "Contract Documents" for the "Project") and desire jointly to appoint the Member to act as one of the three persons whose names are jointly called the DAB.

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 "Particulars" that are in Volume 2, Section VII, pages 106 to 114 of the Contract, all other terms of the Contract that apply to the work of the DAB, and the following provisions. In these 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 4 of the General Conditions of Dispute Adjudication Agreement, the Member shall be paid as follows:  
A retainer fee of [Amount] per month,  
plus a daily fee of [Amount] per day.
3. In consideration of these fees and other payments to be made by the Employer and the Contractor in accordance with Clause 4 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 DAB.
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 4 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 as For and on behalf of the Contractor as 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 sized 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
	13:30		Afternoon session & to Hotel	Mr. X	DB, Emp, Cont, Eng, Sub A&B
	18:30				
Wednesday 9	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**
  - Incompleteness 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

---

- 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)

---

- 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)

---

- 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)

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- 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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## Integrity under DB existence

---

- Engineer can act more fairly and impartially than under Old Red Book
  - Variation, Additional payment etc. can be open among the Parties, Engineer and DB
  - These process can help prevention of corruption
- 



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## Enforcement of DB Judgment Dispute Review Board (DRB)

---

- Board issues a Recommendation
  - If either or both parties express dissatisfaction within specified period (e.g. 14 days), the Recommendation is not binding on the parties
  - If neither party expresses dissatisfaction within specified period, the Recommendation becomes final and binding.
- 



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## Enforcement of DB Judgment Dispute Adjudication Board

---

- Board issues a Decision
  - Party, having expressed dissatisfaction and intention to commence arbitration, is entitled to commence arbitration
  - Decision shall be complied with as soon as issued and shall be binding on the parties until and unless it is revised in an amicable settlement or an arbitral award
  - If neither party has expressed dissatisfaction within specified period, Decision becomes final and binding
- 



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## Issues on the enforceability of the DB's Recommendation or Decision

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- DRB's Recommendation/DAB's Decision becomes final and binding on the parties if neither party disagree within the specified period.

If a party does not comply with the final and binding recommendation/decision, then what?



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## Issues on the enforceability of the DAB's Decision

---

- One of the parties expressed dissatisfaction with DAB's Decision, but has not complied with it and never commence arbitration

What can the aggrieved party do to rectify the situation?



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## Issues on the enforceability of the DAB's Decision –continued-

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- An Engineer's Decision/Dispute Adjudication Board's Decision is enforceable by an arbitral award

ICC Case No. 10619

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. 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.

Reported by Christopher R. Seppälä in the International

Construction Law Review



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## Issues on the enforceability of the DAB's Decision –continued-

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- Arbitral Tribunal did not have jurisdiction to award enforcement of DB Decision made under FIDIC Red Book 1999, thus the award was set aside in:  
CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK [2011] SGCA 33  
at Court of Appeal, Singapore



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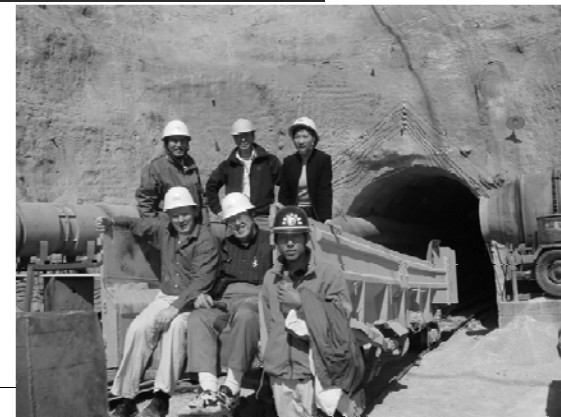
## Cases of DB Cases of DRE (One-person DRB)

- 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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## Water Supply Tunnel – Kunming, China



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Water Supply Tunnel – Kunming, China

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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

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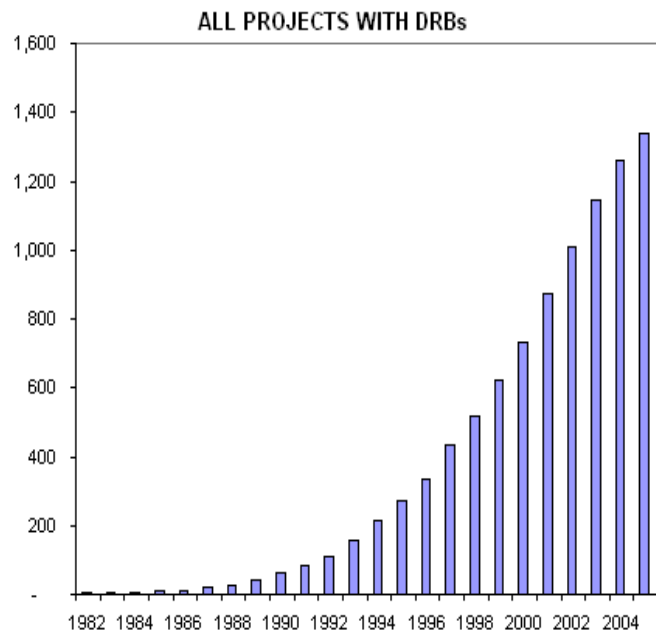
documents and the Site operation and progress of the project, it will not take much time to judge the dispute. Even if the determination is rejected by one or both parties, it will be the basis for further negotiation in an amicable manner. Thus, the benefit of DB is prevention of disputes and early 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

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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>

types of DBs, i.e., DRB and DAB; DRB issues a Recommendation and DAB issues a decision.

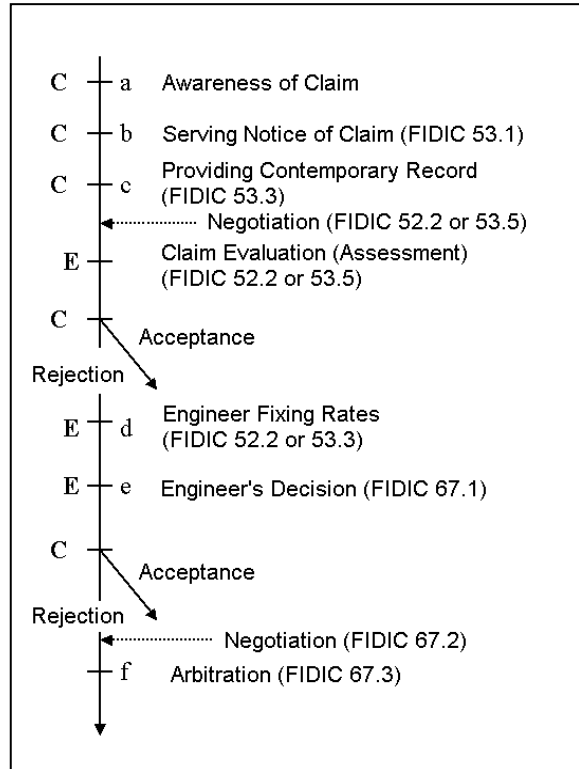
The CDB operates normally as DRB. However, a party may sometimes need to have a decision with which the parties will comply immediately even if they wish to challenge it in arbitration. What is such an occasion when a party requires an immediate decision? A party may go into bankruptcy if it does not 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.



**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 FID. DAB rules as integral part of the conditions.

Also, the ICC has adopted it for dispute resolution 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.

**- Dispute Board -  
JICA's Experience, Initiatives and  
Way Forward**

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# Japan International Cooperation Agency (JICA)

## ~Dispute Board~

JICA's experience, initiative and way forward



Japan International Cooperation Agency (JICA)

JICA Dispute Board Seminar 2012

1

## Outline of the Presentation

- Dispute Board (DB) and Multilateral Development Banks
- Issues to be addressed
- JICA's Approach
- Still, a long way to go....

2

## Dispute Board (DB) and Multilateral Development Banks (1)

- FIDIC MDB version in the Standard Bidding Documents (JICA's SBD for Works: available since June 2009)
- Funding large scale infrastructures
- Frequent disputes in the contract implementation
- Progress not at their expectation

3

## Dispute Board (DB) and Multilateral Development Banks (2)

- MDB's expectation from DB
  - Dispute prevention (or rapid resolution)
  - "Dissuasive effect" on unreasonable behavior of the Parties to the Contract
  - Enhanced capacity of the Employer in terms of contract management
  - Improvement of the Employer's reputation
  - More participation of good competitors in the bidding process

4

### **DB under JICA's ODA Loans**

- In a very limited number of projects in China, Turkey, etc.
- DB member
  - ✓ Stimulate the dialogue between parties
  - ✓ Foresee future possible issues and preventive advice
- Executing Agency
  - ✓ Amicable discussion with contractors with DB for various contract amendment
  - ✓ Clear understanding between parties by DB's explanation about FIDIC clause and smooth contract implementation

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### **What we hear from Contractors**

- Arbitration takes forever; DB takes 84days. Faster. Cheaper.
- DB decisions as the basis for argument in Arbitration
  - ✓ Members familiar with Contracts and Constructions, whereas arbitrators may not be so
  - ✓ DB right at the site during construction
  - ✓ Arbitration gets smoother and faster

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### **JICA's Awareness raising activities**

- Organized DB dissemination seminars in the major partner countries: participation of more than 500 government officials and other stakeholders
  - India ,Philippine (August, 2008)
  - Cambodia, Vietnam (November, 2009)
  - Bangladesh (January, 2010)
  - Sri Lanka (February, 2010)
- Political dialogue with selected partner countries: encouraging to know some countries try to integrate DB in their legal system
- Successfully raised awareness, but also identified some challenges

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### **Issues to be addressed**

- 1) DB: still a new concept
  - Uncertainty of the benefit of DB
  - A lot of "how to?"
- 2) Cost of DB
  - Expensive
  - "No money if not budgeted"
- 3) "Level playing field" in the bidding process
- 4) Prevent "moral hazard" of the contractor
- 5) Lack of qualified adjudicators in the partner countries

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## JICA's Approach

### (1) Awareness raising and human resource development

- Enhanced dissemination seminars in Asian countries in 2012 (This Seminar)
  - Indonesia
  - Vietnam
  - Philippines
  - Sri Lanka
- Adjudicator training & assessment workshops from late 2012 onward (←successful workshops in Tokyo in 2010)

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## JICA's Approach

### (2) Targeting : DB within the project framework

For civil works contracts or contracts involving civil works as major component procured through ICB

#### 1) Standing with 3 adjudicators in case of:

- contracts of which the estimated amount is not less than JPY 10 billion subject to the agreement of the Employer; and

2) Ad hoc in case of contracts of which the estimated amount is less than JPY 10 billion.

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## JICA's Approach

### (3) Budgeting

- In case of “standing with 3 adjudicators”:  
Add an amount covering the whole cost of DB \* in the project cost estimate at the time of JICA's appraisal
  - \* including the cost during the defect liability period
- In case of “ad hoc”:  
No specific action required at the time of JICA's appraisal: Potential cost of DB is deemed to be included in the contingency.

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## JICA's Approach

### (4) Level playing field & moral hazard

- In case of “standing with 3 adjudicators”:  
Put the half amount \* in the provisional sum to cover the cost borne by the Employer
  - \* including the cost during the defect liability period
- In case of “ad hoc”:  
For the same purpose, put an appropriate amount/year \* or 1% of the estimated contract amount in the provisional sum, whichever is smaller
  - \* including the cost during the defect liability period

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## **JICA's Approach**

(5) Want to set up a DB.....but how?

- Prepare a guide for practitioners in 2012
  - concise;
  - practical; and
  - action-oriented

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## **Still, a long way to go....**

- Skepticism....even in donors/consultants  
(never learn before doing)
- New challenges (e.g. a DB for multiple contracts/lots)

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**Thank you for your attention!**

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