

Key Requirements for Adjudicators


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**President of Dispute Resolution Board
Foundation (DRBF)**

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FIDIC President's List Adjudicator

Japan International Cooperation Agency & FIDIC



Dispute Board Seminar

Key Requirements for Adjudicators

Dr. Götz-Sebastian Hök
Volker Jurowich

INTERNATIONAL FEDERATION OF CONSULTING ENGINEERS – WORLD TRADE CENTER – GENEVA – SWITZERLAND – WWW.FIDIC.ORG

Japan International Cooperation Agency & FIDIC

Subject matter of this session




- Activities of DRBF and DBF as well as FIDIC regarding Dispute Boards
- Key demands on adjudicators
- Useful information for the Employer regarding adjudicator's assignments

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Japan International Cooperation Agency & FIDIC


DRBF, DBF & FIDIC are promoting Dispute Adjudication

- DBF = Dispute Board Federation
- DRBF = Dispute Resolution Board Foundation
- FIDIC = Fédération Internationale des Ingénieurs-Conseils
- All of the associations above are non profit associations promoting alternative dispute resolution practices.

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Japan International Cooperation Agency & FIDIC



- FIDIC organises trainings and workshops on dispute resolution practices and FIDIC Contracts
- FIDIC is in continuous discussion with the MDBs
- FIDIC administers the FIDIC President's List where FIDIC assessed adjudicators are listed
- FIDIC strongly recommends best practice and ethical behaviour not only as a lip service.
- FIDIC has established a Code of Ethics, anti corruption management procedures, etc.

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FIDIC Contracts Step by Step

FIDIC Trainings

FIDIC Assessment

FIDIC President's List

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The Dispute Board Federation

DBF organises FIDIC trainings and Dispute Resolution trainings

DBF has published a Code of Ethics

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The Dispute Resolution Board Foundation
DRBF
Assessing Construction Risks | Dispute Resolution Worldwide

DRBF organises annual conferences in all parts of the world on Dispute Resolution Practices and workshops on the subject matter.

DRBF has published a Code of Ethics

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Key demands on adjudicators

- Good command of FIDIC
- Good command of the requirements of international construction business
- Ethical Requirements
- Language Skills
- Soft Skills

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Good command of FIDIC and the requirements of international construction business

- A good knowledge of the FIDIC form of contract
- A good knowledge of the general principles of contract law
- A good knowledge of the type of works involved



Ethical Requirements

- Be independent
- Be impartial
- Be fair
- Avoid anything which could give to either Party the slightest perception of bias
- See the DRBF, DBF and the FIDIC codes of ethics



Language Skills

- Communication Language
- Even if the communication language is not English the adjudicator should at least be able to read and understand the original contract version because otherwise he will not be able to follow up international practice and interpretation.



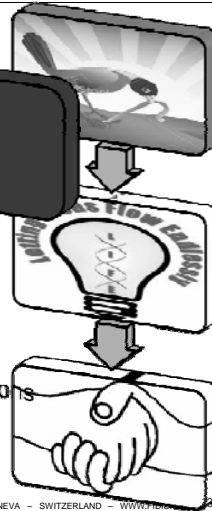
Soft Skills are very important

- Be charismatic
- Be flexible
- Keep cool
- Be a facilitator
- Save the face of all involved
- Be persuasive
- Be able to give clear reasons for a decision



Useful information for Employers regarding adjudicator's assignments (General)

- Make pro-active use of adjudicator's skills
- Standby DBs are also useful for Employers
- Interlocutory measures
- Forum for discussions
- Recommendations & Opinions
- DBs may offer special opportunities and options
- Involve MDBs
- Invite Subcontractors



Case Study

- The Employer considers that the Engineer made a manifestly wrong determination which will be included in the next IPC. The Contractor has already filed a payment application under Sub-Clause 14.3.
- The issue is that Sub-Clause 14.7 provides for a 56 days' period until payment. The Engineer has to certify amounts which were previously determined under Clause 20.
- What can be done?

Issue

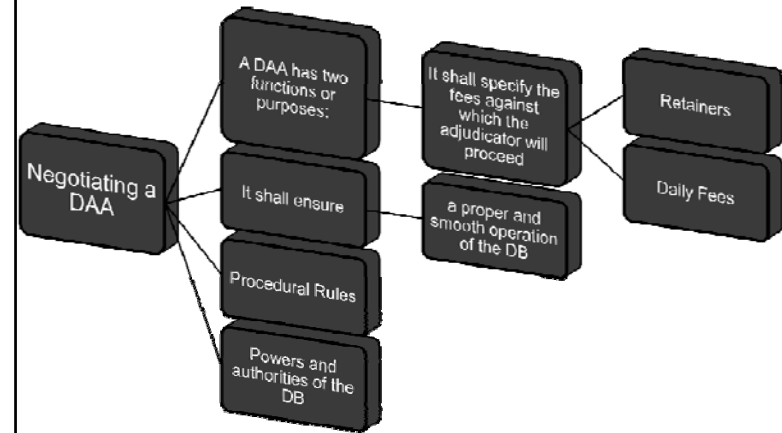
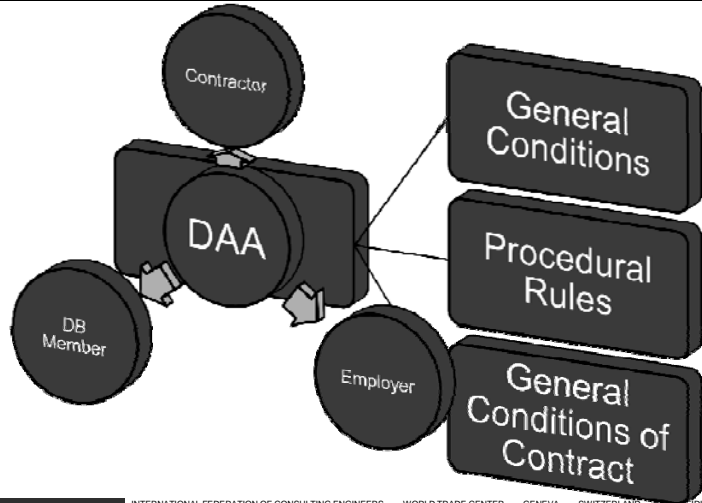
- Go to the DB
- Apply for interlocutory relief

Useful information for Employers regarding adjudicator's assignments (Particulars)

- Make use of your right to choose an appropriate adjudicator vs. Wait for appointment by appointing entity
- Choose a skilled and eminent adjudicator having integrity
- Expect adjudicators to apply the Contract in making decisions and in giving opinions and recommendations
- Make and maintain financial arrangements enabling you to bear the second half of the adjudicator's fees

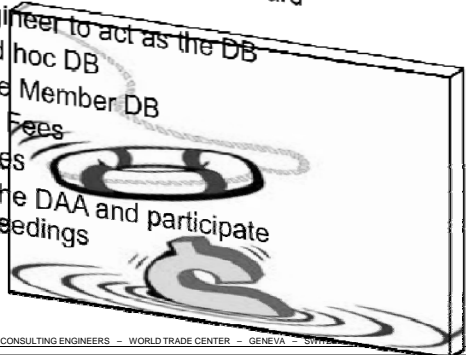
Case Study

- Contractor proposed to appoint an eminent expert in the field who has obviously no experience in conducting hearings and writing decisions.
- Employer intends to appoint an eminent local lawyer and former judge who has predominantly experience in domestic contracts.
- Comments & thoughts?



Saving Money Attitudes

- Delete DB clauses and go straightforward to Arbitration
- Appoint the Engineer to act as the DB
- Have only an ad hoc DB
- Have only a One Member DB
- Delete Retainer Fees
- Agree on low fees
- Refuse to sign the DAA and participate then in the proceedings



Saving Money Attitudes

- Ensure good & effective Contract Management
- Avoid disputes
- Avoid lawyers and legal counsels
- Avoid hearing witnesses
- Avoid hearing experts
- Trust in DBs rather than to challenge their decisions for the only reason of lack of trust

Summary & Conclusions

- A DB may be and can be a beneficial instrument
- It is intended to be a complementary contract management tool
- The major benefits are:
 - The DB is an expert panel being available for the purposes of the project
 - The DB may help to avoid formal disputes
 - The DB may give quick decisions helping to complete the project rather than to have prolonged disputes with regard to the final invoice
- DBs are less expensive than arbitration but anyway a good investment in a smooth and succesful project



I thank you for your kind attention

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添付 - 2.3.5

Creation of National List of Japanese Adjudicators

Mr. Yoshihiko Yamashita

**Secretary General of Association of Japanese
Consulting Engineer**



Dispute Board Seminar

Creation of National List of Japanese Adjudicators

Japan International Cooperation Agency (JICA)

Yoshihiko Yamashita
Association of Japanese Consulting Engineers

JICA Dispute Board Seminar 2012



Presentation Topics

- Background of Introducing Adjudicators
- AJCE List
- Adjudicator Assessment and Registration Process

JICA Dispute Board Seminar 2012

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Background of Introducing Adjudicators

JICA Dispute Board Seminar 2012

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FIDIC Initiative

- President List of Adjudicators
 - ✓ Since employment of DB and Adjudicators in Red Book, FIDIC has implemented Adjudicator Assessment at about 3 years interval.
 - ✓ At present, 46 Adjudicators are listed on President List of Adjudicators including Dr. Toshihiko Omoto, Japan.

<http://www1.fidic.org/resources/contracts/adjudicators/default.asp>

JICA Dispute Board Seminar 2012

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FIDIC Initiative – National List

- ✓ FIDIC Recommends promotion and realization of National List(*) that is initiated by each Member Association of FIDIC to cope with expected future demand.
- (*) *List of Adjudicators registered by each FIDIC MA is called National List.*
- ✓ At present, FIDIC publicise 8 National List
UK, Germany, Poland, Rumania, Hungary,
South Africa, Philippines, Japan
- ✓ AJCE has started registration and operation of National List in Japan since 1 May 2011.



AJCE List



AJCE List (1)

History and Background

- ✓ In Dec. 2010, JICA conducted FIDIC Contract Seminar, and Adjudicator Training Workshop to examine effectiveness of JICA Adjudicator Training Kit
- ✓ 19 qualified candidates participated
- ✓ AJCE has drafted "Procedural Rules and Guidelines" for Adjudicator Assessment and Registration"
- ✓ AJCE received a list of 10 successful candidates from Assessment Panel
- ✓ 10 candidates satisfied conditions of "Procedural Rules and Guidelines"
- ✓ At present, 7 candidates have registered on AJCE List.



AJCE List (2)

Criteria for Registration

- ✓ To pass Adjudicator Assessment conducted by AJCE
 - Validation of certificate : 3 years
 - Fail to register within 3 years:
Participate in FIDIC Training courses for
Module 1, 2, 3, 3A
- ✓ To be able to correspond to appointment if the condition of appointment is agreeable



AJCE List (3)

Re-registration

- ✓ Re-registration: at every 3 years
- ✓ Record of following career development is mandated for re-registration
 - Adjudicator activities/ practice
 - participate in training program on Adjudicator
 - experience in FIDIC contract practice
 - publication, presentation, articles in related subject
 - others



Association of Japanese Consulting Engineers

AJCE List of Adjudicators

On May 2011, AJCE has started operation of the AJCE List of Adjudicators and requested successful candidates to register in the AJCE List of Adjudicators. Successful candidates were examined by the "AJCE Adjudicator Guidelines" that reflect the "FIDIC Guidelines for National Lists", following the rigorous assessment workshop conducted by the assessment panel who are composed of FIDIC president's list of approved adjudicators.

Disclaimer

AJCE does not administer selection and appointment of adjudicators under any circumstances whatsoever as prescribed below:

- Appointees shall take responsibility in selection of Adjudicators from the AJCE Adjudicators List.
- AJCE is not in a position to appoint any adjudicators on AJCE Adjudicators List.
- AJCE is not responsible for listees' information as AJCE has not made any revision, alteration or modification of the information submitted by the listees.
- AJCE is not responsible for any liability or damage that is attributable to listees' conducts, regardless of their acts and omissions.

Adjudicators are entered on the list from the date of registration to the renewal date.

AJCE Listees

CV of the subject adjudicator can be downloaded by clicking the underlined name

- Oba Kunihisa
- Kato Takeshi
- Kaido Masaru
- Manai Ryuji
- Kiburaki Takaharu
- Olamoto Takashi
- Saisho Yoichi



Adjudicator Assessment And Registration Process



Adjudicator Assessment and Registration Process (1)

Before Adjudicator assessment

- 1) Documentary Examination
- 2) FIDIC Contract Seminar: 5 days
 - Module 1: Practical Use of the FIDIC Contracts
 - Module 2: Management of Claims and the Resolution of Disputes
- 3) Adjudicator Training Workshop: 4-5 days
 - Module 3 and 3A: Dispute Adjudication Board or
 - Dispute Board Training Kit (JICA)



Adjudicator Assessment and Registration Process (2)

Adjudicator Assessment

- 4) Adjudicator Assessment: 3days
- 5) Decision to pass or fail

Registration

- 6) Review passed candidates & issue pass-certificate
- 7) Application for Registration
- 8) Application review and approval by AJCE
- 9) Payment for registration
- 10) Issue registration certificate and Announcement on AJCE List
(Duration of registration: Longest 3 years)

Flow of Adjudicator Assessment and Registration

Process	Person in charge	Duration
Appointment of Assessment Panel	(AJCE)	
Announcement	(AJCE)	6 mos. before
Submission of Application	(Candidates)	Before deadline
Documentary Examination, Decision to pass or fail	(Assessment Panel - AP)	1 month
FIDIC Contract Seminar FIDIC Module 1 and 2	(FIDIC Accredited)	5 days
Adjudicator Training Workshop	(F. President List of Adjudicator)	5 days
Adjudicator Assessment	(AP)	3 days
Decision to pass or fail, and Reporting Results	(AP)	1 month
Issue pass-certificate	(AJCE)	1-2 months
Application for registration, Review and approval	(Candidate) (AJCE)	within 3 years
Payment of registration fee Issue Registration Certificate, Announcement on AJCE List	(Candidate) (AJCE)	

Flow of Re-registration

Process	Person in charge	Duration
Notice of re-registration	(AJCE)	6 mos. before
Application Form Record of CPD	(Candidate)	3 mos. before
Submission		
Documentary Examination, Decision to pass or fail	(AJCE)	1 month
Letter of Pledge and Consent, Payment of registration Fee	(Candidate)	1 month
Issue Registration Certificate, Announcement on AJCE List	(AJCE)	1-4 Weeks
FIDIC Contract Seminar FIDIC Module 1 and 2	(FIDIC Accredited Trainer)	5 days
Adjudicator Training Workshop	(F. President List of Adjudicator)	4-5 days
Letter of Pledge and Consent, Payment of Registration Fee	(Candidates)	1-2 months
Issue Registration Certificate, Announcement on AJCE List	(AJCE)	



Application Requirements for Adjudicator Assessment (1)

Application requirements: comply with FIDIC Adjudicator Guidelines

- 1) Possess appropriate qualification
 - Professional Engineer, - First-class architect,
 - First-Class engineer on construction management,
 - Attorney or - Other appropriate professional qualifications.

(in-house law expert having sufficient experience in FIDIC contract is qualified as well)
- 2) Possess 10 or more years of working experience in consulting engineering industry or construction industry. However, this shall not apply to an attorney.



Application Requirements for Adjudicator Assessment (2)

- 3) Possess all of the experience as specified below:
- ① International construction works
- work experience, consulting services, construction supervision or advice : any one of them is sufficient
 - ② FIDIC Contract Documents
 - ③ Dispute resolution



Application Requirements for Adjudicator Assessment (3)

- 4) Fluent in English and able to compose concise sentences
- 5) To have complete FIDIC contractual training programs: FIDIC Modules 1 and 2
- 6) To have completed FIDIC Adjudicator Training workshop: FIDIC Module 3 and 3A
- 7) To have an intention to register on AJCE List (AJCE List prepared by AJCE and opened to public when registration is accepted)
- 8) To be listed on AJCE List and have an intention to accept upon appointment

Program: FIDIC Contract Management Seminar

Module 1: Practical Use of the FIDIC Contracts	
Day 1	FIDIC Contract Documents: Introduction and Principle Responsibilities of the Main Parties
Day 2	The Management of Projects Working Exercise No.1- Taking Over Financial Clauses and Procedures Risk, Force Majeur and Termination
Day 3	FIDIC Contract Documents and JICA ODA Loan Project FIDIC Contract Documents and Dispute Resolution
Module 2: Management of Claims and Resolution of Disputes	
	Introduction Managing Variations
Day 4	The Management of Claims Notice and Claims Procedures Contractor's Claims Sub-clause 20.1 Claims for Delay The management of Claims Claims for Delay (continued) Claims for Additional Payment Employer's Financial Claims
Day 5	The Resolution of Disputes Dispute adjudication Boards (DABs) The JICA Alternative Particular Conditions Workshop Exercise No.2- Notices Workshop Exercise No.3- Variations The Resolution of Disputes Arbitration Claims (materials only)

FIDIC Contract Seminar, Tokyo



4-Days Adjudicator Training Workshop

Program

Day 1	AM	Introduction of Trainers/Trainees
	PM	Introduction to Dispute Setting up a DB DB Costs Prepare a draft CV (Evening Homework)
Day 2	AM	Operation of Dispute Board (1) Operation of Dispute Board (2)
	PM	Operation of Dispute Board (3) Preparation for Mock Hearing (Evening Homework)
Day 3	AM	Operation of Dispute Board (4)
	PM	Operation of Dispute Board (5) After the Decision Preparation for Drafting of mock decision (Evening Homework)
Day 4	AM	Review and discussions of draft
	PM	Review and discussions of draft

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Adjudicator Training Workshop, Tokyo



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Adjudicator Assessment, Tokyo

Day 1	AM	Introduction of the Assessment Panel and Assessors DAB organisation
	PM	Multiple Choice Test Case Studies
Day 2	AM	Collection of Case Study Multiple Choice Test Review Procedural Rules: Q & A
	PM	Case Study Case Study
Day 3	AM	Collection of Case Study Oral examinations
	PM	Individual interviews

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Adjudicator Assessment, Tokyo



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Thank you for your attention

添付 - 2.3.6

Common Disputes during Construction in Vietnam

Mr. Pham Van Khanh

General Director, Ministry of Construction

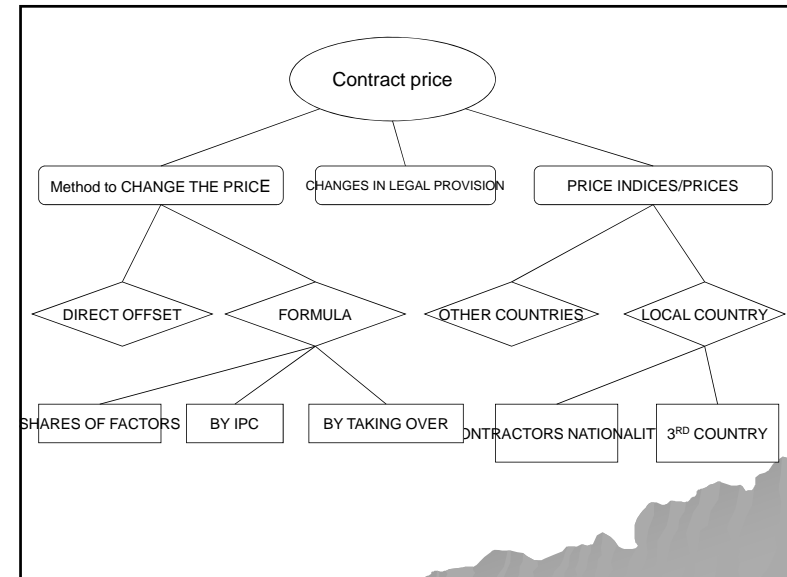
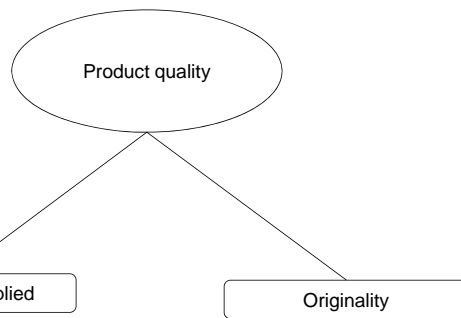
Disputes that often happen in implementation of construction contract in vietnam

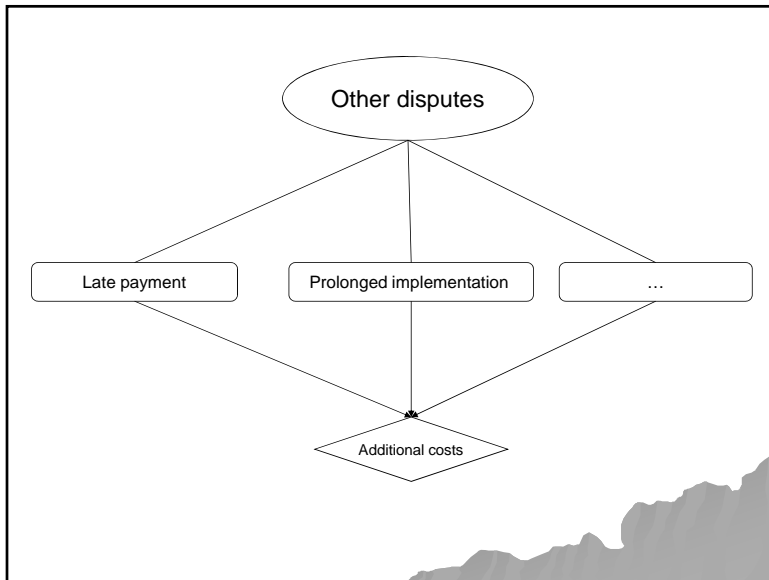
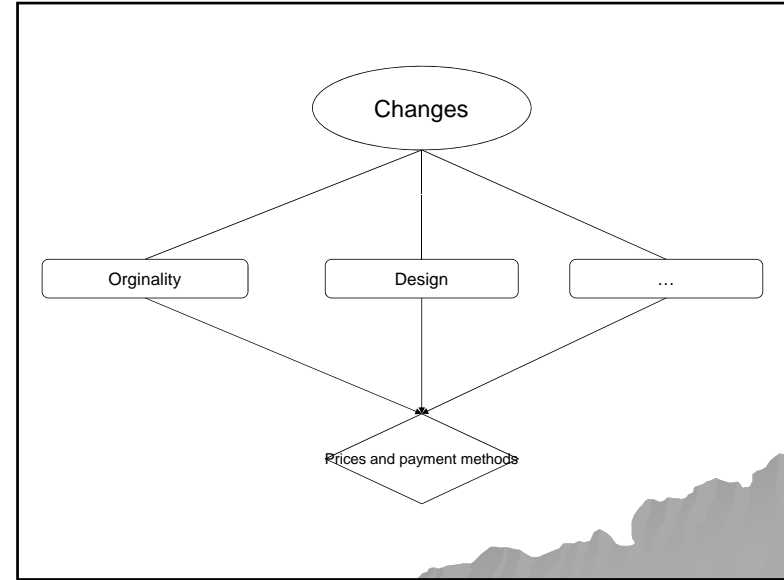
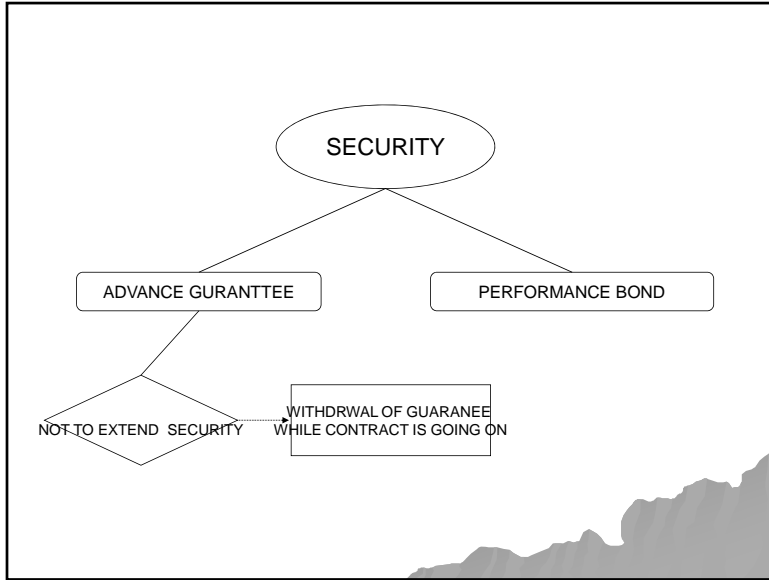
Dr. Pham van khanh

General director of construction economics –
Ministry of construction

Group of disputes that often happen

1. Disputes on quality
2. Disputes on contract price
3. Disputes in connection with security, (guarantees) in the contract
4. Disputes arising from changes in the process of contract implementation
5. Other disputes





Thank you for listening!

添付 - 2.3.7

Dispute Settlement at the Vietnam International Arbitration Center (VIAC)

Mr. Vu Anh Duong

Attorney-at- Law, General Secretary of VIAC

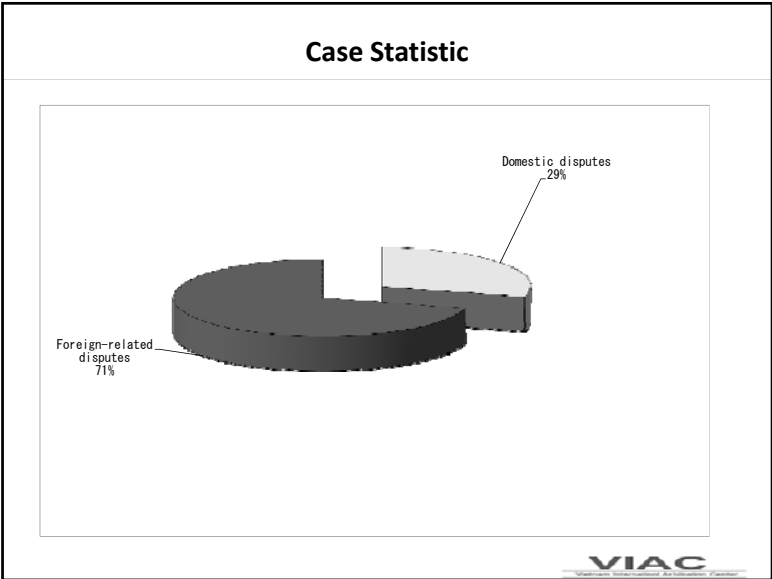
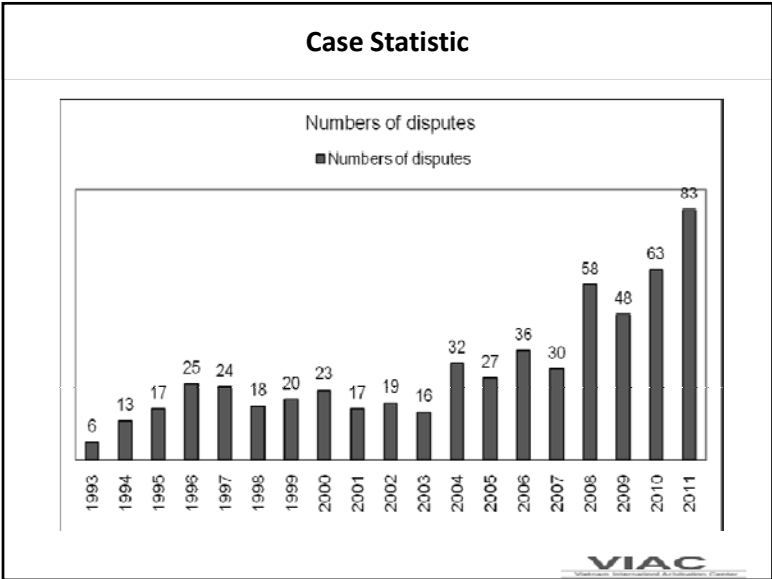
VIAC
 VIETNAM INTERNATIONAL ARBITRATION CENTRE
 AT THE VIETNAM CHAMBER OF COMMERCE AND INDUSTRY
 Trung tâm Trọng tài Quốc tế Việt Nam

DISPUTE SETTLEMENT AT THE VIAC

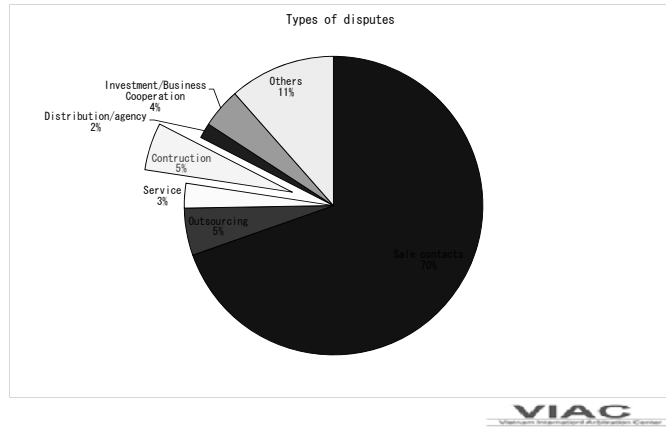
VIAC's overview

- Established in 1993 (*the merge of the Foreign Trade Arbitration Council founded in 1963 and the Maritime Arbitration Council founded in 1964*).
- An independent and non-profit organization with its own charter, seal and bank account.
- Head office in Hanoi and three branches in Ho Chi Minh City, Da Nang and Can Tho.
- VIAC fuction: to resolve commercial (+) disputes by mediation and arbitration

VIAC

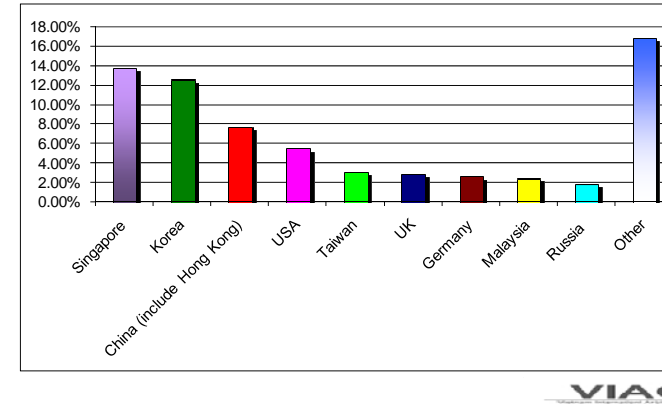


Case Statistic



Dispute parties: Over 50 countries

Top Countries & Territories



VIAC's Arbitrators

120 arbitrators (114 Vietnamese, 6 foreigners)



DISPUTE SETTLEMENT BY ARBITRATION IN VIETNAM

Current legal sources on arbitration:

Domestic arbitration:

- ❖ Ordinance on Commercial Arbitration 2003
- ❖ Commercial Arbitration Law 2010
- ❖ Enforcement of Judgment Law 2008

Foreign arbitration:

- ❖ New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958: Vietnam joined in 1995
- ❖ Civil Proceedings Law (the part on recognition and enforcement of foreign arbitral awards in Vietnam)
- ❖ Enforcement of Judgment Law 2008

VIAC

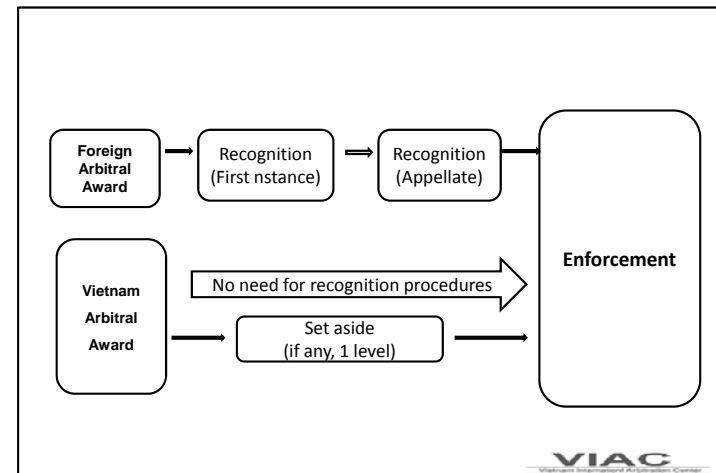
DISPUTE SETTLEMENT BY ARBITRATION IN VIETNAM

Commercial Arbitration Law 2010

- ❖ Legal framework completed, basically consistent with legal and practical principles in international arbitration practices
- ❖ Party autonomy (arbitrator, place of arbitration, language of arbitration, applicable law)
- ❖ Complete the supporting role of the Court with arbitration
- ❖ Abolish criteria on arbitrator nationality
- ❖ Empower the arbitral tribunals to apply for interim relief, gather evidences, and summon witnesses
- ❖ Simplify procedures for Court to set aside arbitral awards (1 level)

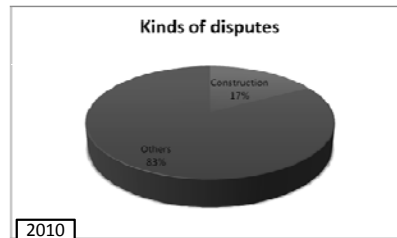
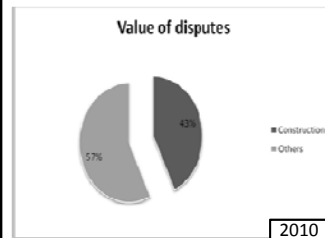
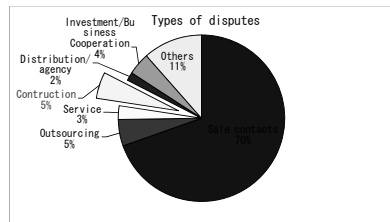


Recognition and enforcement of arbitral awards in Vietnam



Construction disputes at the VIAC

- Increasing trends
- High value amount
- Complicate



Construction disputes at the VIAC

ARTICLE 9 : ARBITRATION

Any disputes and disagreements, which can arise under the present Contract or in connection with it, are subject to the settlement by the way of negotiation. If the agreement is not achieved by the Parties, the disputes and disagreements are subject to consideration in the Arbitration court of Hanoi- Vietnam in accordance with the regulations of the given court. The arbitrators establish their decision on the regulations of the present Contract and the vietnam Substantive Right is accepted as the right regulating the present Contract. The decision of the above-stated court will be final and obligatory for both Parties.

Article 15: Dispute

15.1 Any dispute arising between the Contractor and the Owner shall be settled by amicable negotiation. In case the parties fail to reach amicable, the dispute shall be referred to arbitration to be appointed by the Vietnam International Arbitration Centre.

Article 16: Settlement procedures

16.2 ...

Within 30 days from the date of receiving the arbitral award, any party can bring the arbitral award to the upper court for final judgment.

Article 4: During the execution of the contract, all arisen disputes in connection with this Contract which cannot reach amicable settlement shall be referred to Vietnam International Arbitration Centre (VIAC) at the Viet Nam Chamber of Commerce and Industry under the Rules of the International Chamber of Commerce and arbitration shall be final and binding both parties.



Recommendation

- Arbitration award is final and binding, can not appeal
- Shouldn't use a mixed clause, refer the dispute to both court and arbitration.
- Use the Model Arbitration Clause (VIAC, SIAC, ICC, JCAA etc.)
- Contact us in case the parties wish to insert the VIAC's Model Clause + +
- Follow the requirements and procedures of the dispute settlement clause before action (bring dispute to court or arbitration)



VIAC
Vietnam International Arbitration Centre

VIETNAM INTERNATIONAL ARBITRATION CENTRE
AT THE VIETNAM CHAMBER OF COMMERCE AND INDUSTRY

Thank you for your attention !

Vu Anh Duong

General Secretary

Add.: 9 Dao Duy Anh, Ha Noi

Tel : 04. 3577 0545

Fax : 04. 3574 3001

Email: duongva@viac.org.vn

Website: www.viac.org.vn

添付 - 2.3.8

Construction Dispute in Sri Lanka

Mr. Tilak P. Kolonne

Country Representative of DRBF in Sri Lanka

Japan International Cooperation Agency (JICA)

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

Speaker:

Tilak Kolonne
Consultant, practicing Arbitrator, Adjudicator
Country Representative of DRBF in Sri Lanka

Email: tpk@vform.net
tilakkolonne@yahoo.com

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

17/01/2012

CONSTRUCTION DISPUTE IN SRI LANKA

- Introduction of DAB/Adjudication to Sri Lankan construction industry
- Popularity of the process
- What have we gained so far
- Problems & areas for improvement
- Recommendation

CONSTRUCTION DISPUTE IN SRI LANKA

Prior to introduction of DAB/ Adjudication

Standard conditions in use were:

- ICTAD/SCA/1 provides Engineer's Decision(optional) and Arbitration
- FIDIC Red Book 1987 provides Engineer's Decision and Arbitration
- Arbitration Ordinance of 1948
- Arbitration Act No 11 of 1995

CONSTRUCTION DISPUTE IN SRI LANKA

Introduction of DAB/ Adjudication

Standard conditions in use are:

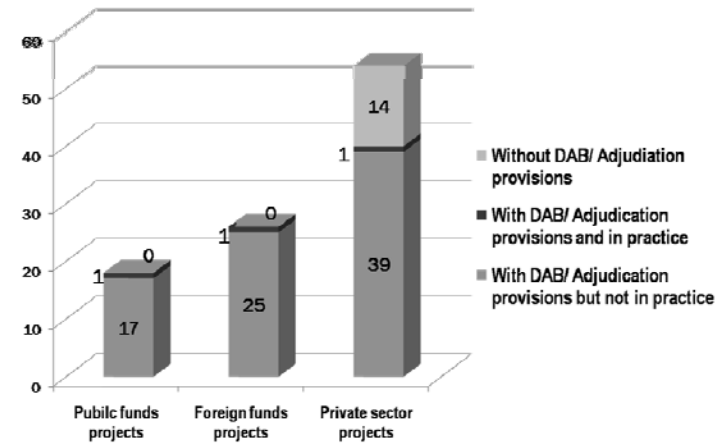
- ICTAD/SBD/1, 2, 3 and 4 provides Engineer's Determination, DAB/ Adjudication, Arbitration
- FIDIC 1999 suite of CoC provides Engineer's /Employer's Determination, DAB/ Adjudication, Arbitration
- No law to govern DAB or Adjudication process

HOW POPULAR DAB/ ADJUDICATION IN SRI LANKA

A brief survey was carried out to have an understanding of popularity

- Six major contractors were interviewed
- Categorized into foreign funds, public funds and private sector projects
- Following information was obtained;
 - Number of projects with DAB/ Adjudication provisions in contract
 - Number of projects actually implement
 - Number of projects without DAB/ Adjudication provisions in contract

HOW POPULAR DAB/ ADJUDICATION IN SRI LANKA



WHAT HAVE WE GAINED SO FAR BY DAB/ ADJUDICATION

1. DAB/ Adjudication as a method of dispute resolution by ADR (i.e. other than litigation) in Sri Lanka
2. Construction professionals as dispute resolvers
3. Emergence of IDMP (Institute of Dispute Management Professionals)
4. The outcome is mostly considered as bargaining factor at the final negotiated settlement (e.g. Southern Expressway)

PROBLEMS IDENTIFIED AND AREAS FOR IMPROVEMENT



1. Lack of knowledge as to crystallization of dispute
2. Inadequate use of dispute avoidance feature of DAB process

**PROBLEMS IDENTIFIED AND
AREAS FOR IMPROVEMENT**



3. Knowledge and understanding about requirement of Adjudication/ DAB

- Question of Engineer's impartiality in old FIDIC Red Book
- Interim solution to dispute
- "Pay now argue later"
- "Quick & dirty fix"

**PROBLEMS IDENTIFIED AND
AREAS FOR IMPROVEMENT**



Knowledge & understanding about requirement of Adjudication/ DAB



Sri Lankan construction industry needs awareness programmes...



**PROBLEMS IDENTIFIED AND
AREAS FOR IMPROVEMENT**



4. Appointment of Adjudicator/ DAB

- **Personal contacts**
Why?
No formal independent list published – difficult to find appropriate adjudicators, qualifications and their capacity is not published
- **Appointing bodies - ICTAD, SLIA, IESL, IQSSL**
 - ICTAD as appointing body
 - Professional bodies as appointing body
 - Conflict amongst professionals



**PROBLEMS IDENTIFIED AND
AREAS FOR IMPROVEMENT**



5. Competency of DAB members/ Adjudicators for the job

- Academic training as to legal studies
- Academic training as to dispute resolution
- Practical training as to dispute resolution

**PROBLEMS IDENTIFIED AND
AREAS FOR IMPROVEMENT**



5. Giving immediate effect to Adjudicator's/
DAB decision

- Decision is binding but not necessarily final
- Parties, particularly the employers' fear
- Accuracy of DAB decision
- Competency of DAB

**PROBLEMS IDENTIFIED AND
AREAS FOR IMPROVEMENT**



6. Enforcement of immediate effect of
Adjudicator's/ DAB decision

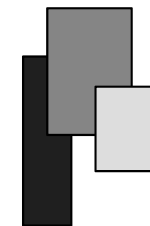


No law to this effect



SUMMARY & RECOMMENDATIONS

- Sri Lanka is among few countries in the region to adopt DAB/ Adjudication extensively
- Party confidence is improving but need lot of work to retain
- Mostly forced rather than voluntary
- Need of awareness and training programmes
- Need of researches
- Need of necessary legal backing



Thank You..

添付 - 2.3.9

Resolution of Construction Dispute in the Philippines

Mr. Salvador P. Castro Jr.

Country Representative of DRBF in Philippines

SEMINAR ON DISPUTE BOARD
Ballroom II, Hyatt Hotel and Casino Manila
09 February 2012

RESOLUTION OF CONSTRUCTION DISPUTES (In the Philippines)

Speaker : **SALVADOR P. CASTRO, JR.**, FAPM, ICIOB, MCIArb
FIDIC Contracts International Accredited Trainer
Country Representative, Dispute Resolution Board Foundation
Accredited Arbitrator and Mediator, Construction Industry Arbitration Commission
Past President, Council of Engineering Consultants of the Philippines

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1. MAJOR ADR MILESTONES

- 1953 Republic Act No. 876, or the Arbitration Law was enacted by Congress**
- 1985 Creation of the Construction Industry Arbitration Commission (CIAC)**
 - > Executive Order 1008, "Original and Exclusive" jurisdiction over construction disputes.
- 1989 Started its operation as an arbitration center of construction cases.**
 - > CIAC Arbitration Rules and Procedures

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1. MAJOR ADR MILESTONES (cont'd)

2004 Passage of the landmark law "Republic Act No. 9285 or the Alternative Dispute Resolution Act of 2004 (ADR Act of 2004).

- > Affirmed CIAC's "original and exclusive" jurisdiction of construction and construction-related disputes.
- > Expanded parties to include project owner, contractor, subcontractor, fabricator, project manager, design professional, consultant, quantity surveyor, bondsman or insurer or an insurance policy in a construction project.
- > Allows the appointment of foreign arbitrators.

Court to dismiss cases involving construction disputes and refer the parties to CIAC for arbitration.

- > not later than pre-trial conference
- > unless both parties, assigned by respective counsel, submit to RTC written agreement exclusivity for the Court rather than CIAC.

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1. MAJOR ADR MILESTONES (cont'd)

- 2005 CIAC Rules of Procedures Governing Construction Arbitration was amended to align with the ADR Law, which allows, among others, the entry of foreign arbitrators in arbitration cases filed with the CIAC.**
 - > CIAC added Mediation as part of mode of dispute resolution with its own CIAC Mediation Rules.
- 2009 First CIAC Arbitration Case with a Foreign Arbitrator as member of the Arbitral Tribunal.**

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2. STATISTICS ON NUMBER OF CASES FILED IN CIAC AND SUMS IN DISPUTE (1989 – Dec 2011)

Number of Cases

- > Total Number = 694
- > Highest Number = 50 in 1999
- > Lowest Number = 8 in 1989/1992/1993
- > Average/Year = 31 cases

Sums in Dispute

- > Total SID = P37.3 Billion (USD867.5 M)
- > Highest SID = P 5.6 Billion (USD 131.5 M) ^{2001/2002}
- > Lowest SID = P26.8 Million (USD629.5 K) ¹⁹⁸⁹
- > Average/Year = P54.4 Million (USD 1.28 M)

Time to Resolve Cases from TOR : 6 months

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Source : CIAC 5

3. CONSTRUCTION CONTRACTS IN THE PHILIPPINES AND THEIR MODES OF DISPUTE RESOLUTION

a] Domestic Contracts

	Court	DAB/DB	Mediation	Arbitration
CIAP 102 : Contracts for Private Construction	No	No	No	YES
Philippine Bidding Documents (Domestic Contractors)	No	No	No	YES
Contracts prepared by				
..... Quantity Surveyors	No	No	Sometimes	YES
..... Lawyers	No	No	Sometimes	YES
..... Parties	Sometimes	No	Sometimes	Sometimes
FIDIC Contracts (Domestic Contractors)	No	Sometimes/ later deleted	No	YES
Multilateral Development Banks (MDB) Harmonised Edition 2010 (Domestic Contractors)	No	Sometimes/ Deleted	No	YES

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3. CONSTRUCTION CONTRACTS IN THE PHILIPPINES AND THEIR MODES OF DISPUTE RESOLUTION (cont'd)

b] International Contracts

	Court	DAB/DB	Mediation	Arbitration
Philippine Bidding Documents (International Contractors)	No	Sometimes/ deleted	No	YES
Philippine Bidding Documents (as harmonized with Development Partners)	No	Yes/ deleted	No	YES
FIDIC Contracts	No	Sometimes/ later deleted	No	YES
MDB Contracts	No	Sometimes/ Deleted	No	YES
JICA Sample Bidding Documents (MDB Edition 2006)	No	Sometimes/ deleted	No	YES
Other International Contracts	No	Sometimes/ deleted	No	YES

@ 2012

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4. PERCEIVED BARRIERS AND ISSUES ON THE USE OF DAB/DBs

(in various types of projects in the Asia-Pacific Region, specifically in Emerging Countries like the Philippines)

a) BARRIER NO. 1 : HIGH COST OF "INTERNATIONAL" DAB/DBs

47 in FIDIC President's List of Approved Adjudicators

(country residence and not nationality)

41 from Europe, Middle East, Canada, North America, Africa

3 from Asia-Pacific

3 Country of residence not known

(Presented during the FIDIC Asia-Pacific Contract Users' Conference, Singapore, June 2011)

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4. PERCEIVED BARRIERS AND ISSUES ON THE USE OF DAB/DBs (cont'd)

b) BARRIER NO. 2 : COST OF TRAINING OF LOCALS FOR THE NATIONAL LIST OF DAB/DBs

- Since 2005, FIDIC has encouraged FIDIC Member Associations to conduct DAB training and to establish their National Lists of Approved Adjudicators; however to-date :
 - > Most of the FIDIC Member-Associations within the region either have not started or are still in various development stages.

4. PERCEIVED BARRIERS AND ISSUES ON THE USE OF DAB/DBs (cont'd)

b) BARRIER NO. 2 : COST OF TRAINING OF LOCALS FOR THE NATIONAL LIST OF DAB/DBs (cont'd)

- One of the barriers is the cost of DAB trainings and accreditation criteria in order to be included in the National List.
 - > Resistance from the locals to spend for training since there is no assurance of the enforceability of the Clause on DAB in the FIDIC, MDB, JICA contracts.

4. PERCEIVED BARRIERS AND ISSUES ON THE USE OF DAB/DBs (cont'd)

c) BARRIER NO. 3 : ENFORCEABILITY OF THE DAB/DB DECISIONS

- A question on the legal enforcement of the DAB decisions.
- Perception is that DAB is another layer of delays and costs :
 - > decisions not binding,
 - > decisions cannot be enforced by the court,
 - > decisions still to be referred to arbitration if party fails to comply
- Barrier is relevant in countries without adjudication laws or when arbitration timeline is fast.
- This barrier is relevant in the Philippines since there is no Law on Adjudication.

4. PERCEIVED BARRIERS AND ISSUES ON THE USE OF DAB/DBs (cont'd)

d) BARRIER NO. 4 : UNDERSTANDING OF THE DAB/DB AND ITS BENEFITS

- Construction Industry Stakeholders are not familiar with DAB and role of DAB in “jobsite dispute resolution”.
- Perception is that :
 - > “DAB/DB is viewed as a duplication to arbitration”
 - > “DAB is another layer in dispute resolution.”

4. PERCEIVED BARRIERS AND ISSUES ON THE USE OF DAB/DBs (cont'd)

- e) **BARRIER NO. 5 : BUDGET FOR COST OF DAB/DBs**
- o Cannot estimate and/or no budget allocated for the DAB.
 - o Budget for DAB, if any, is not included in the Loan Package of the Employer.
 - > On Full Term DB, parties jointly decide to defer the appointment and appoint only a DB when dispute arises.

5. SUMMARY

- o We hope that this Dispute Board Seminar sponsored by JICA, in cooperation with DRBF and CECOPHIL, will address and resolve the perceived barriers in the use of DAB in our construction contracts.
- o We further hope that JICA will continue its advocacy of cooperating with AIM and JICA on the “Practical Project Management Program in the Global Market”, with the management of FIDIC/ MDB/JICA Contracts and use of the Dispute Board as the main subjects.

(JICA gives grants to the Philippine Government and subsidizes fees of the contracting and engineering organizations.)

5. SUMMARY (cont'd)

- o Thank you for choosing the Philippines as the venue for the launch of the “JICA Sample Bidding Document 2008” 3 years ago, and this time as one of the five countries for the training and accreditation of DAB/DBs.

MANIFESTO

Endorsing DRBF's Advocacy to Develop and Use of the Disputes Adjudication Board in the Resolution of Construction and Commercial Disputes

WHEREAS, disputes invariably arise for different reasons in any kind of business undertaking between contracting parties;

WHEREAS, it is recognized that it is in the best interest of the contracting parties to resolve such disputes at an early stage, as they occur;

WHEREAS, the Dispute Resolution Board Foundation (DRBF), a non-stock and non-profit organization that is committed to the foregoing objective, has spearheaded the advocacy in introducing and promoting the development and use of the Dispute Adjudication Board to speedily resolve conflicts and disputes in the construction and business industries as they occur;

WHEREAS, in order to succeed in realizing this endeavor, DRBF needs the support of concerned organizations.

NOW THEREFORE, WE, the undersigned representatives of the recognized business and construction organizations in the country, do hereby declare our unwavering support for DRBF's efforts to promote and institutionalize the use of the Dispute Adjudication Board in the resolution of disputes and conflicts among contracting parties within the business and construction industries.

WE RESOLVE further to commit our support in whatever information campaign or fora that will be organized by DRBF in order to meet the foregoing objectives.

Done in the City of Pasig, Philippines this 28th day of August 2008.

COUNCIL OF ENGINEERING CONSULTANTS OF THE PHILIPPINES

Michael Robert P. Reyes
Michael Robert P. Reyes
President

PHILIPPINE CONSTRUCTORS ASSOCIATION

Anthony L. Fernandez
Anthony L. Fernandez
President

PHILIPPINE DISPUTE RESOLUTION CENTER, INC.

Eduardo R. Ceniza
Eduardo R. Ceniza
President

PHILIPPINE INSTITUTE OF CONSTRUCTION ARBITRATORS MEDIATORS

Beda G. Fajardo
Beda G. Fajardo
President

WITNESSES

JAPAN BANK FOR INTERNATIONAL COOPERATION

Hiroshi Togo
Hiroshi Togo
Chief Representative
- Manila Office

JAPAN INTERNATIONAL COOPERATION AGENCY

Norio Matsuda
Norio Matsuda
Representative

DISPUTE RESOLUTION BOARD FOUNDATION

Salvador F. Castro, Jr.
Salvador F. Castro, Jr.
Member Emeritus
Board of Directors

PHILIPPINE OVERSEAS CONSTRUCTION BOARD

David M. Conunji
David M. Conunji
Chairman

Mabuhay !!!

添付 - 2.3.10

Implementation Challenge to the Dispute Board Mechanism

Mr. Hamid L. Sharif

**Principal Director
Central Operation Service Office
Asian Development Bank**

Implementation Challenges to the Dispute Board Mechanism

Hamid Sharif
Principal Director
Central Operations Service Office



DB in ADB Documents

- ✓ Civil Works: FIDIC MDB Harmonized Edition (June 2010)
- ✓ Procurement of Plant – Design, Supply, and Install: Model Form of International Contract for Process Plant Construction published by ENAA (the Engineering Advancement Association of Japan)
- ✓ ADB Guidelines on the Use of Consultants



Standard Bidding Documents Section 8 –Particular Conditions of Contract

20.2	Date by which the DAB shall be appointed	28 days after the Commencement
20.2	The DAB shall be comprised of	insert either "One sole Member" or "Three Members"
20.2	List of potential DB sole members	[Only when the DB is to be comprised of one sole member, list names of potential sole members; if no potential sole members are to be included, insert: "none"]
20.3	Appointment (if not agreed) to be made by	[Insert name of the appointing entity or official]

ADB Guidelines on the Use of Consultants

- ✓ Para. 2.47 – Indefinite Delivery Contract (Price Agreement):

When borrowers need to have "on call" specialized services to provide advice on a particular activity, the extent and timing of which cannot be defined in advance.

This is commonly used to retain "advisers" for implementation of complex projects (for example, dam panel), **expert adjudicators for dispute resolution panels**, ... and so forth, normally for a period of a year and more.



Pros

- ✓ Quick solution (3-4 months)
 - ✓ They know contract docs., specs., plans, procedures and parties in advance
 - ✓ As against Arbitration (2-3 years) and Litigation (more than 3 years)
- ✓ Reliable solution
 - ✓ Depending on the appointment: reputable persons with moral authority
- ✓ Practical solution
 - ✓ Project is moving

ADB

Pros

- ✓ Opinions and early warnings prevent future disputes
- ✓ Employers use DB's decision for accountability support against higher authority (such as Line Ministry, Congress, Cabinet, Prime Minister), Auditor General, Mass Media, etc.
- ✓ Impact on Engineers: to be more professional in performing tasks and rendering decisions

ADB

Pros

- ✓ DB members are involved and thus more knowledgeable of site situations than arbitrators
- ✓ More transparency for contract variations
- ✓ Smoother project implementation

ADB

But practice may differ

Ghazi Barotha Hydropower Project

- ✓ Objective was to meet demand for electric power in Pakistan by generating hydropower in an environmentally sustainable and socially acceptable manner (with minimal environment and resettlement impacts)
- ✓ Cofinanced among ADB, WB, JBIC, KfW and IDB)
- ✓ Included 2 contracts for construction of a Barrage and Power Channel, both awarded to a JV of int'l contractors
- ✓ Original construction period: Dec. 1995 – Mar 2000
- ✓ Actual Construction period: Dec. 1995 – Dec. 2003

ADB

But practice may differ

Ghazi Barotha Hydropower Project

- ✓ JV contractor alleged various faults against the Engineer and the Employer, such as denials of adequate time extensions and reimbursement of costs, including claims against the impartiality of the Engineer
- ✓ Contract provided for referral to a DRB if either party is dissatisfied with the Engineer's decisions. Also provided for arbitration if either party is dissatisfied with DRB's recommendation
- ✓ The DRB was not successful, and case eventually reached arbitration (ICSID)
- ✓ Case was settled at the arbitration stage (in 2005).

ADB

But practice may differ

Ghazi Barotha Hydropower Project

- ✓ LESSONS LEARNED – Major stumbling blocks to success of the DRB in this case:
 - ✓ Delays in the appointment of representatives to the DRB
 - ✓ Failure to soundly establish a DRB and constant challenges to its membership
 - ✓ Failure of the DRB to render a decision that was respected by both parties

ADB

Challenges

- ✓ General lack of knowledge or experience among executing/implementing agencies
- ✓ Judicial/bureaucratic barriers to enforcement
- ✓ Absence of local procedures and pools of national experts

ADB

Challenges

- ✓ Failure of parties to appoint DB members at the onset. Some questions to consider:
 - ✓ Why don't the parties commit to the DB, even when it is already in the contract?
 - ✓ Are there any constraints from the government's side (*e.g.*, cultures of bureaucracy, budget and appropriation constraints)?
- ✓ Cost should be considered, particularly for standing DB (creating ad hoc DBs will diminish original purpose of being an early solution provider)

ADB

Estimating DB Cost

Project Cost	3 Person Standing DB	1 Person Standing DB
\$10 mil.	18 %	6 %
\$30 mil.	6%	2%
\$50 mil.	3.6%	1.2%
\$100 mil.	1.8%	0.6%
\$500 mil.	0.36%	0.12%

Estimating DB Cost

- ✓ Costs generally cover:
 - ✓ Retainer fee for each member (generally three times the daily fee)
 - ✓ Daily/hourly fee for each member
 - ✓ Per diem
 - ✓ Travel costs
 - ✓ Taxes
 - ✓ Administrative expenses
- ✓ Consider:
 - ✓ Requires 3 to 4 site visits a year, with around 10 working days per visit
 - ✓ Contracts can have a term of 2 to 5 years (plus 1 yr. Defects Liability Period)
 - ✓ Many variables so estimating actual costs can be like measuring a piece of string



Recommendations

- ✓ Regional capacity development programs to build awareness for both executing/implementing agencies and contractors' associations
- ✓ Support the creation of national pools of experts
- ✓ Check the creation of DBs as part of fiduciary reviews



Recommendations

- ✓ Selective use of DB based on amount and Complexity (in ADB, all Civil Works contracts \$10M and up use FIDIC harmonized SBDs)
- ✓ Lower Costs by:
 - ✓ Establishing credible National Lists
 - ✓ Considering multiple project assignments and IDCs
 - ✓ Waiving Retainer Fees
 - ✓ Considering Piggy-back TAs for loans with complex civil works contracts, to ensure that DBs are funded and constituted



添付 - 2.3.11

Construction Disputes and Alternative Disputes Resolution in Indonesia

Dr. Sarwono Hardjomuljadi

Country Representative of DRBF in Indonesia

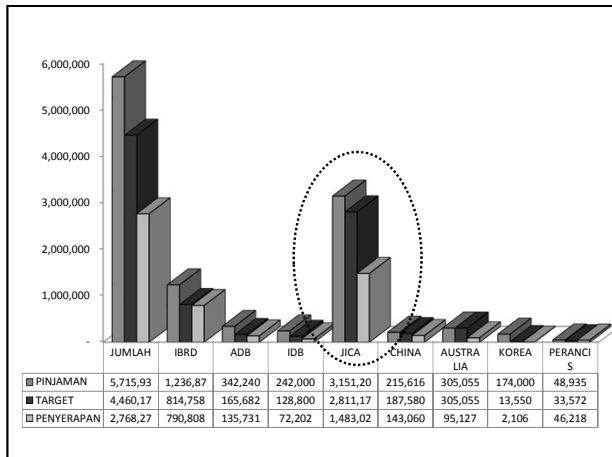
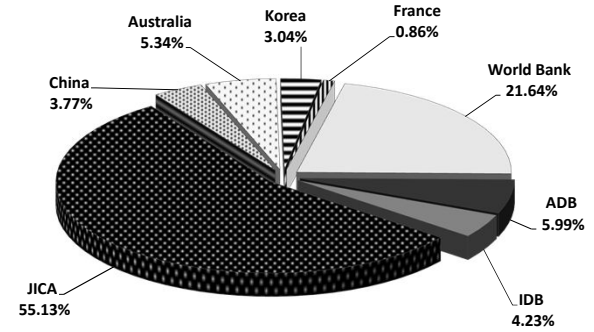
Construction Disputes and Alternative Disputes Resolution in Indonesia

Dr. Sarwono Hardjomuljadi
 ASEAN Chartered Professional Engineer
 FIDIC International Accredited Trainer
 DRBF Country Representative for Indonesia



JICA-FIDIC-DRBF
 Jakarta, February 14, 2012

BILATERAL AND MULTILATERAL LOAN for Public Works Sector (as per December 31, 2011)



Main Causal Factors of Construction Disputes in Indonesia



Based on the study conducted by Sarwono (2010)^[2] by distributing the questionnaires among the employers (45), consultants (40) and contractors (42), it was found that:

The contractual claims as well as the non-contractual claims led to disputes in Indonesia are due to the **different interpretation on clauses** in the conditions of contract, among them the most often are clauses about **possession of site** and **changes in design/variations**.

The Employer has the largest role in the succeed of a construction project, starting from the pre-contract strategy, the selection of conditions of contract and the commitment in executing the selected conditions of contract.



FIDIC MDB Harmonised Major Works (Construction) Contract Conference
Renaissance Hotel, Brussels, Belgium
27 – 28 January 2011

The problem of different interpretation of the contract is not only faced by the non-English speaking countries but also by the English speaking people, not merely due to the inadequate capability in interpreting the contract and/or legal terms, but also due to **the certain intention** of the party/parties.

The philosophy of **Clause 2.1 [Right of Access to the Site]** should be understood by the parties involved in the execution of the contract and the wording in the contract clauses should be interpreted correctly.

The Changes in Design is also accommodated by FIDIC GCC for Construction **Clause 13 [Variations and Adjustment]**. Engineer has an important role in Changes in Design.



FIDIC MDB Harmonised Major Works (Costruction) Contract Conference
Renaissance Hotel, Brussels, Belgium
27 – 28 January 2011

Clause 3.1 Engineer's Duties and Authority

FIDIC Construction 1999 **Clause 3.1 Engineer's Duties and Authority**
The Engineer may exercise the authority attributable to the Engineer as specified in or necessarily to be implied from the Contract. If the Engineer is required to obtain the approval of the Employer before exercising a specified authority, the requirements shall be as stated in the Particular Conditions. **The Employer undertakes not to impose further constraints on the Engineer's authority, except as agreed with the Contractor.**

FIDIC MDB 2010 **Clause 3.1 Engineer's Duties and Authority**
The Engineer may exercise the authority attributable to the Engineer as specified in or necessarily to be implied from the Contract. If the Engineer is required to obtain the approval of the Employer before exercising a specified authority, the requirements shall be as stated in the Particular Conditions. **The Employer shall promptly inform the Contractor of any change to the authority attributed to the Engineer.**



Under the FIDIC MDB Harmonised Edition (2010), The Employer is allowed to change the authority of the Engineer and then inform the contractor, but under the FIDIC for Construction (1999), the Employer has an obligation not to impose "further constraints on the Engineer's authority except as agreed with the Contractor." This change is assumed as giving more power to the Employer.



FIDIC World Annual Conference 2011
Davos, Switzerland October 2 – 5, 2011

2.1 Right of Access to the Site

The Employer shall give the Contractor right of access to, and possession of, all parts of the Site within the time (or times) stated in the Contract Data.

The right and possession may not be exclusive to the Contractor.

If, under the Contract, the Employer is required to give (to the Contractor) possession of any foundation, structure, plant or means of access, the Employer shall do so in the time and manner stated in the Specification. However, the Employer **may withhold any such right of possession until the Performance Security has been received.**



If no such time is stated in the Contract Data, the Employer shall give the Contractor right of access to, and possession of, the Site ***within such times as required to enable the Contractor to proceed without disruption in accordance with the programme submitted under Sub-Clause 8.3 [Programme].***

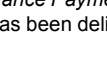


8.1 Commencement of Works

Except as otherwise specified in the Particular Conditions of Contract, the Commencement Date shall be the date at which the following ***precedent conditions*** have all been fulfilled and the Engineer's notification recording the agreement of both Parties on such fulfilment and ***instructing to commence the Work is received by the Contractor:***



- (a) signature of the Contract Agreement by both Parties, and if required, approval of the Contract by relevant authorities of the Country;
- (b) delivery to the Contractor of reasonable evidence of the Employer's Financial arrangements (under Sub-Clause 2.4 [*Employer's Financial Arrangements*]);
- (c) except if otherwise specified in the Contract Data, effective access to and possession of the Site given to the Contractor together with such permission(s) under (a) of Sub-Clause 1.13 [*Compliance with Laws*] as required for ***the commencement of the Works;***
- (d) receipt by the Contractor of the Advance Payment under Sub-Clause 14.2 [*Advance Payment*] provided that the corresponding bank guarantee has been delivered by the Contractor.



Project Stages

The notice to proceed is given, and the contractor begins the work.



The first few months are usually the best time period for the contractor and the employer. "Honeymoon Period."
People are excited about a new project, the stress level is not yet high and pressure has not yet set in among people.



As the project progresses further, problems start to surface and the atmosphere starts to change.
The Honeymoon continues only until the contractor submit his first claim and the employer rejects it.



Owners think the contractors always want to cheat them, whereas contractors think the owners always try to squeeze the contractor for having more work for less or even no money.



Construction Disputes Resolution in Indonesia



- The best dispute resolution mechanism is **amicable settlement**.
- Oftenly the amicable settlement could not be reached
- The negotiation even utilizing the third party **mediation**.

• **Dispute Board**

• **Arbitration**

• **Litigation**



Obstacles in using DB in Indonesia are:

1. “Legal base”
2. “Payment / cost”
3. “Power of DB decision”
4. “Bad experiences”
5. “DB, Arbitration, Litigation”
6. “Standing or Ad-hoc DB”



1. Legal base (understanding of the legal base).



**Related Regulation in Indonesia
Undang-undang No. 30 / 1999
Re: Arbitrase dan Alternatif Penyelesaian Sengketa**

Bab I Ketentuan Umum Pasal 1 Butir 10

Alternatif Penyelesaian sengketa adalah lembaga penyelesaian sengketa atau beda pendapat melalui prosedur yang disepakati para pihak, yaitu penyelesaian di luar pengadilan dengan cara konsultasi, negosiasi, konsiliasi, atau *penilaian ahli*.

Bab II Alternatif Penyelesaian Sengketa PAsal 6 Butir 1

Sengketa atau beda pendapat perdata dapat diselesaikan oleh para pihak melalui *alternatif penyelesaian sengketa* yang didasarkan pada itikad baik dengan mengesampingkan penyelesaian secara litigasi di Pengadilan Negeri.

Bab II Alternatif Penyelesaian Sengketa PAsal 6 Butir 7

Kesepakatan penyelesaian sengketa atau beda pendapat secara tertulis adalah *final dan mengikat* para pihak untuk dilaksanakan dengan itikad baik serta wajib didaftarkan di Pengadilan negeri dalam waktu paling lama 30 hari sejak tanggal penandatanganan.

Catatan:

Undang-undang ini mengatur penyelesaian sengketa yang secara tegas mencantumkan dalam perjanjian kontraknya bahwa semua sengketa atau beda pendapat yang timbul atau mungkin timbul dari hubungan hukum tersebut akan diselesaikan dengan cara arbitrase atau melalui alternatif penyelesaian sengketa.

2. Payment / cost (amount and source of finance).



Questions about the existence, the financing and the cost of DB:

1. How is the financing?

The cost of DB is not included in the GOI budget and the loan itself?

Action needed: In order to support the use of DB, all cost incurred should be included in the loan so the possible budget cost could be stated in the contract, then provide a provisional sum or make an agreement with the lender stating that they will support the owner to finance the use of DB.

2. Why is the use of DB unpopular?

The Employer and the Contractor are reluctant to spend money before the occurrence of dispute.

Action needed: It is advisable that when dispute has not occurred (the standing time), DB will only receive a kind of retainer fee (starting from the contract signing until the dispute occurs) for services such as reading and analyzing information of potential dispute from parties, discussing through email or conducting meeting if necessary, to allow the DB becoming and remaining conversant with all project developments.

Minimum 3 days fee per month should be OK.

When dispute occurs, the hourly fee will then be applied.

The use of DB is actually more advantageous than the costly and lengthy dispute.

3. DB decision, whether it is final and binding or not?



Clause 20.4 Obtaining Dispute Board's Decision

Para 4..

The decision **shall be binding** on both Parties, who shall promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitral award as describe below.

Para 5

.....If either Party is dissatisfied with the DB's decision, then either Party may, within 28 days after receiving the decision, give **Notice of Dissatisfaction** to the other Party indicating its dissatisfaction and intention to commence arbitration.

Para 7

If the DB has given its decision as to a matter in dispute to both Parties, and no Notice of Dissatisfaction has been given by either 28 days after it received the DB's decision **shall become final and binding** upon both



BAB VII PEMBATALAN PUTUSAN ARBITRASE Undang undang 30 Tahun 1999 Pasal 70

Terhadap putusan arbitrase para pihak dapat mengajukan permohonan pembatalan apabila putusan tersebut diduga mengandung unsur-unsur sebagai berikut :

- a. surat atau dokumen yang diajukan dalam pemeriksaan, setelah putusan dijatuhkan, diakui palsu atau dinyatakan palsu;
- b. setelah putusan diambil ditemukan dokumen yang bersifat menentukan, yang disembunyikan oleh pihak lawan ; atau
- c. putusan diambil dari hasil tipu muslihat yang dilakukan oleh salah satu pihak pemeriksaan sengketa.



4. Bad experiences in the former project.



The case, *CRW Joint Operation v Perusahaan Gas Negara*, involved a contract between a publicly-owned Indonesian company (the employer) and an Indonesian joint operation (the contractor) for the construction of a pipeline. The contract was based on the FIDIC Conditions of Contract for Construction, 1999 (the Red Book) and was governed by Indonesian law.

The parties referred the dispute to a **single-person dispute adjudication board**, which valued the variations and ordered the employer to pay them. The employer refused to do so and issued a **notice of dissatisfaction** with the dispute adjudication board decision. The contractor then filed a request for arbitration with the ICC seeking to oblige the employer to **"promptly give effect" to the "binding" dispute adjudication board decision**, in accordance with sub-clause 20.4 of the Red Book.

The majority of the arbitral tribunal (chairman Alan Thambiyah and co-arbitrator Neil Kaplan CBE QC SBS) found that the dispute adjudication board decision was binding on, and to be given immediate effect by, the parties and that the contractor was entitled to immediate payment of the sum. The other co-arbitrator, H Priyatna Abdurrasyid, issued a dissenting opinion on separate grounds.

From an article in the December 8, 2011 issue of GAR by Christopher R. Seppälä

Subsequently, the employer obtained an order from the *Singapore High Court setting aside the award.*

The contractor appealed to the *Singapore Court of Appeal, which dismissed the appeal.* Although the courts based their respective judgments on somewhat different grounds, the assumption that a "binding" decision of a dispute adjudication board (that is, one that has been the subject of a notice of dissatisfaction) should not be enforced by arbitration, due to a perceived "gap" in sub-clause 20.7, featured heavily in their reasoning.

From an article in the December 8, 2011 issue of GAR by Christopher R. Seppälä



5. DB, Arbitration, Litigation, the understanding.



Advantages of Dispute Boards over arbitration and litigation are:

(1) timely

(2) less costly

Dispute Boards function: dispute avoidance and prevention function.

Dispute Boards provide the parties with the benefit of highly effective dispute resolution.

Dispute Boards resolve the disputes comparatively in much less time.

Dispute Boards resolution process costs are much lower than other process.



6. Standing and Ad-hoc DB, the understanding.



STANDING DAB

Advantages

All DB all the information on the project development since the beginning.

Once dispute occurred, the decision logically could be made by the DB in a relatively shorter time.

Pricewise may be more expensive

AD-HOC DAB

Advantages:

Cheaper



The appointment of three members DB is easier and less time consuming, because instead of one member whom should be agreed and approved by both parties, three member DB are consist of three member, one member proposed by each party respectively and the third, the chair appointed by the member. Commonly the member appointed by parties will try to find the respectable person whom recognised by them as person who have enough knowledge in the substance of construction process and having capability to coordinate the DB.



Suggested action:

1. Dissemination of DB to the higher level/decision maker.
2. Training on understanding and procedure of appointment of DB
3. Information that finally, using DB is less costly compared with no DB
4. Information that using DB is not conflicted with the Indonesian Law and Regulation
5. In order to support the use of DB, all cost incurred should be included in the loan, since so far, it is not included in the loan for construction.



Related Regulation FIDIC Conditions of Contract for Construction MDB Harmonised Ed. 2010 Clause 20 Claims, Disputes and Arbitration

Clause 20 Point 2 Appointment of the Dispute Board

The DB shall comprise, as stated in the Contract Data, either one or three suitably qualified persons ("the members"), each of whom shall be fluent in the language for communication defined in the Contract and shall be a professional experienced in the type of construction involved in the Works and with the interpretation of contractual documents. If the number is not so stated and the Parties do not agree otherwise, the DB shall comprise three persons.

If the parties have not jointly appointed the DB, 21 days before the date stated in the Contract Data and the DB is comprise three persons, each Party shall nominate one member for the approval of the other Party. The first two members shall recommend and the Parties shall agree upon the third member, who shall act as chairman.



Related Regulation
FIDIC Conditions of Contract for Plant and Design Build 1999
Clause 20 Claims, Disputes and Arbitration

Clause 20 Point 2 Appointment of the Dispute Board

The DB shall comprise, as stated in the Appendix to Tender, either one or three suitably qualified persons ("the members"). If the number is not so stated and the Parties do not agree otherwise, the DAB shall comprise three persons.

If the DAB is to comprise three persons, each Party shall nominate one member for the approval of the other Party. The Parties shall consult both these members and shall agree upon the third member, who shall be appointed to act as chairman.



Related Regulation
FIDIC Conditions of Contract for EPC/Turnkey 1999
Clause 20 Claims, Disputes and Arbitration

Clause 20 Point 2 Appointment of the Dispute Board

The DB shall comprise, as stated in the Particular Conditions, either one or three suitably qualified persons ("the members"). If the number is not so stated and the Parties do not agree otherwise, the DAB shall comprise three persons.

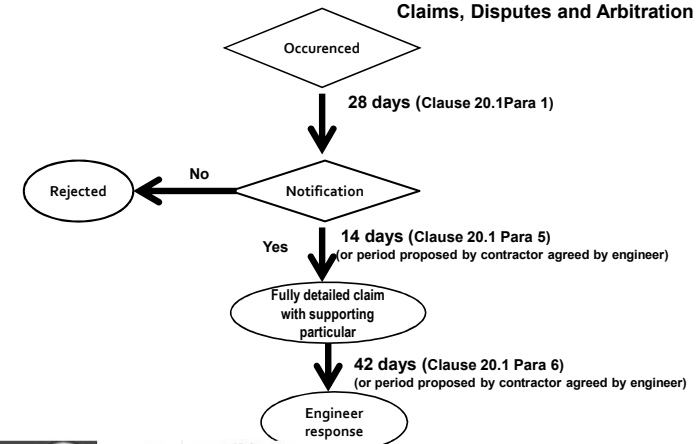
If the DAB is to comprise three persons, each Party shall nominate one member for the approval of the other Party. The Parties shall consult both these members and shall agree upon the third member, who shall be appointed to act as chairman.



capability of parties in handling the contractual problems



Clause 20, Claims, Disputes and Arbitration



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