

**Study on the Dissemination of Dispute Board
and
Development of Adjudicators
in the Asian Region**

Study Report

March 2012

Japan International Cooperation Agency

**Nippon Koei Co., Ltd.
Association of Japanese Consulting Engineers**

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ABBREVIATIONS

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

Chapter 1 Outline of the Study

1.1 Background of the Study

The Japan International Cooperation Agency (JICA) revised its “Sample Bidding Documents under Japanese ODA Loans - Procurement of Works” in June 2009, harmonizing the procurement process with other international organizations. It also adopted the “Conditions of Contract for Construction, MDB Harmonised Edition” issued by the International Federation of Consulting Engineers (FIDIC) in cooperation with multilateral development banks (MDBs). In the MDB Harmonised Edition, the Dispute Board (DB)¹ was introduced as a new resolution instrument for contract disputes.

There is a pressing need to cultivate DB adjudicators, especially in the Asian region where many of the recipient countries of JICA’s official development assistance (ODA) loans are located, for the smooth implementation of the projects financed by JICA, since the establishment of DB in the project is considered to be rapidly increasing. On the other hand, it is necessary for owners of the projects to understand the DB mechanism properly.

Under this situation, JICA has carried out the following studies as part of the preparation for the introduction and dissemination of DB in Japanese ODA loan projects:

- 1) In 2008: Study on the Promotion of DAB Adjudicators in the Asian Region
 - Survey on the use of DAB
 - Holding of DAB promotion seminars in Japan, India and the Philippines
 - Examination of effective measures for cultivation of adjudicators in the Asian region
- 2) In 2009: Study on the Introduction and Dissemination of DAB/Adjudicators in the Asian Region
 - Holding of DAB promotion seminars in Vietnam, Cambodia, Indonesia, Sri Lanka and Bangladesh
 - Development of a JICA training kit for adjudicator candidates
 - Drafting of qualification procedures for adjudicators (draft version)
 - Preparation of roadmap for introduction and dissemination of DAB in Japanese ODA loan projects
- 3) In 2010: Study on the Reinforcement of the Framework for Introduction and Dissemination of DAB/Adjudicators in the Asian Region
 - Case research regarding training and assessment of adjudicators in countries where such activities are already implemented
 - Survey on the actual status of DB operation in projects financed by MDBs which

¹ Dispute Adjudication Board (DAB), which was introduced in FIDIC Red Book 1999 edition, was redefined as Dispute Board (DB) in FIDIC MDB edition. The roles of DAB and DB are basically identical. In this report, DB is adopted in principle; however, DAB is used when referring to past events.

introduced DB in their projects earlier than JICA

- Trial adjudicator training and assessment workshops in Japan with assistance extended by JICA

Through the abovementioned studies, the following issues have been identified in order to strongly introduce DB in JICA loan projects:

- 1) Development of a DB manual, which describes all necessary information and processes for the establishment and operation of DB, is very useful for all stakeholders of JICA loan projects.
- 2) In order to raise awareness of DB in government organizations related to JICA loan projects, it would be very useful to conduct DB seminars in Asian countries.
- 3) In order to identify local adjudicators who have competent experience and skill, train candidates, and transfer knowledge regarding development of adjudicators, it would be very effective to hold adjudicator training and assessment workshops, such as those conducted in Japan in 2010, in the Asian countries which receive JICA ODA loans.

1.2 Purpose of the Study

This Study aims to improve the environment for enhancing the dissemination of DB and the development of adjudicators for JICA ODA loan projects by preparing the DB Manual, which deals with the function, setting-up and operations of DB, having dialogues with government offices related to JICA ODA projects in Vietnam, Sri Lanka, the Philippines and Indonesia, holding seminars for better understanding of DB in the same countries, and conducting a feasibility study on workshops for the development of local adjudicators in the future.

1.3 Study Team

The Study has been carried out through the joint venture between Nippon Koei Co., Ltd. and the Association of Japanese Consulting Engineers (AJCE). Consequently, the four members assigned to the Study are shown in Table 1.1.

Table 1.1 Study Team Members

	Position	Name	Organization
1	Team Leader/International Contract Expert (1)	Yukinobu Hayashi	Nippon Koei
2	International Contract Expert (2)	Toshihiko Omoto	Nippon Koei (Toshihiko Omoto Construction Project Consultant)
3	Contract Management Expert	Yoshihiko Yamashita	AJCE
4	Expert for Planning and Coordination	Yukari Shiimoto	Nippon Koei

(Source: Study Team)

In addition, the following two German experts experienced in dispute resolution were invited for the overseas survey as well as drafting of the DB Manual. Both of them have ample experience as adjudicators in international construction projects, and have participated as assessors in adjudicator assessment workshops held in Japan in 2010.

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

1.4 Time Schedule of the Study

The Study was carried out in five months from November 2011 to March 2012. The major events in the course of the Study are as follows:

- | | |
|---|--------------------------|
| 1) Contract Date | : November 25, 2011 |
| 2) Submission of Inception Report | : December 5, 2011 |
| 3) Submission of Materials for Overseas Survey | : January 5, 2012 |
| 4) Overseas Survey-I (Vietnam and Sri Lanka) | : January 10 to 19, 2012 |
| 5) Overseas Survey-II (Philippines and Indonesia) | : February 7 to 16, 2012 |
| 6) Dispute Board Seminar (Tokyo) | : March 6, 2012 |
| 7) Study Report Submission | : March 21, 2012 |

Chapter 2 Overseas Survey

2.1 Purpose of Overseas Survey

The overseas surveys in Vietnam, Sri Lanka, the Philippines and Indonesia have been conducted to fulfill the following purposes:

- 1) Delivering DB seminars
 - To deepen understanding on DB for all concerned with JICA ODA projects
 - To explain JICA's endeavour to dissemination of DB based on its operational guidance
 - To explain key qualifications required for DB members
 - To explain the actual process for setting up the national list of adjudicators in Japan
 - To investigate on the questions raised by concerned parties regarding the DB system through the question and answer session in the seminar and questionnaire survey.
- 2) Dialogue with government offices and arbitration centers
 - To deepen the understanding of DB
 - To explain JICA's policy on introduction of DB in JICA-financed projects
 - To investigate barriers in promoting DB and their possible countermeasures
- 3) Dialogue with FIDIC member associations (MAs) for setting up their national list of adjudicators
 - To investigate the outline of each MA
 - To investigate past activities regarding training of FIDIC contracts
 - To share experience of setting up of national list of adjudicators in Japan
 - To confirm their intention for creation of a national list

2.2 Itinerary of Overseas Survey

The overseas survey was made in two trips, as shown below.

1) Overseas Survey I

Table 2.1 Itinerary of Overseas Survey I

Date		Stay	Task
10 Jan. 2012	Tue	Arrival in Hanoi	Meeting with JICA Vietnam Office (17:00-18:00)
11 Jan. 2012	Wed	Hanoi	DB Seminar (8:00-12:30) Meeting with MPI (14:00-15:30)
12 Jan. 2012	Thu	Hanoi	Meeting with VECAS (9:00-12:30) Meeting with VIAC (14:00-16:00)
13 Jan. 2012	Fri	Hanoi	Meeting with MOF (14:00-15:30)
14 Jan. 2012	Sat	Hanoi to Colombo	

Date		Stay	Task
15 Jan. 2012	Sun	Colombo	
16 Jan. 2012	Mon	Colombo	Meeting with MOFP (10:00-11:00) Meeting with SLNAC (14:30-15:30)
17 Jan. 2012	Tue	Colombo	DB Seminar (10:00-16:30)
18 Jan. 2012	Wed	Colombo	Meeting with ACESL (9:00-12:00) Meeting with JICA Sri Lanka Office (13:30-14:30) Meeting with MOFP (15:30-16:30)
19 Jan. 2012	Thu	Return to Japan	

(Source: Study Team)

2) Overseas Survey II

Table 2.2 Itinerary of Overseas Survey II

Date		Stay	Task
7 Feb. 2012	Tue	Arrival in Manila	Meeting with JICA Philippines Office (16:00-17:00)
8 Feb. 2012	Wed	Manila	Meeting with GPPB (9:30-10:30) Meeting with ADB (11:00-13:00) Meeting with DOF (16:00-16:30)
9 Feb. 2012	Thu	Manila	DB Seminar (10:00-16:30)
10 Feb. 2012	Fri	Manila	Meeting with CECOPHIL (9:00-12:00) Meeting with NEDA (14:00-15:00)
11 Feb. 2012	Sat	Manila to Jakarta	
12 Feb. 2012	Sun	Jakarta	
13 Feb. 2012	Mon	Jakarta	Meeting with JICA Indonesia Office (11:00-12:00) Meeting with LKPP (14:00-15:00)
14 Feb. 2012	Tue	Jakarta	DB Seminar (10:00-16:30)
15 Feb. 2012	Wed	Jakarta	Meeting with INKINDO (10:00-12:00) Meeting with BAPPENAS (14:00-15:00) Meeting with UKP4 (16:00-17:00)
16 Feb. 2012	Thu	Return to Japan	

(Source: Study Team)

2.3 Dispute Board Seminar

2.3.1 Seminar Program

Local dispute resolution experts were invited in the seminar as guest speakers to improve the understanding of participants and to enhance interactive exchange of opinions among all attendees.

The guest speakers, which are mostly country representatives of DRBF, were requested to give actual situations of construction disputes and their resolution mechanisms in each country.

In the seminar in the Philippines, a presentation was given by the Asian Development Bank (ADB) focusing on the present obstacles against dissemination of DB, and case examples of DB in ADB-financed projects.

In Indonesia, the Minister of Public Works, which is the owner of a number of infrastructure projects financed by JICA, delivered the opening address.

The list of guest speakers is shown in Table 2.3.

Table 2.3 Guest Speakers in DB Seminars

Country	Speaker	Title
Vietnam	Mr. Pham Van Khanh	General Director Ministry of Construction
	Mr. Vu Anh Duong	General Secretary Dispute Settlement at the Vietnam International Arbitration Center (VIAC)
Sri Lanka	Mr. Tilak P. Kolonne	Country Representative DRBF (Sri Lanka)
Philippines	Mr. Salvador P. Castro Jr.	Country Representative DRBF (Philippines)
	Mr. Hamid L. Sharif	Principal Director Central Operations Services Office Asian Development Bank
Indonesia	Dr. Sarwono Hardjomuljadi	Country Representative DRBF (Indonesia)

(Source: Study Team)

The invitation letter and seminar programs are shown in Appendices 2.1 and 2.2.

2.3.2 Seminar Materials

The outlines of presentations given by JICA and the JICA Study Team are as follows:

- 1) Basics of DB (by team leader)
 - JICA's activities for dissemination of DB
 - DB and JICA sample bidding documents
 - Types of DB and their features
 - Why DB is introduced in FIDIC contracts
 - Brief explanation of contract clauses related to DB in the FIDIC MDB Harmonised Edition

- 2) Practice of DB (by international contract expert (2))
 - General status of DB applications
 - DB procedures
 - Dispute prevention function of DB
 - Cost of DB
 - Benefit brought by DB
 - Enforceability of DB decision
 - Examples of DB operations
- 3) JICA's activities on dissemination of DB and its policy (by JICA)
 - Background of introduction of DB
 - Issues to be solved for dissemination of DB
 - Activities for DB demand side issues
 - Activities for DB supply side issues
 - JICA's policy on the establishment of DB in JICA ODA financed projects
 - Future activities contemplated by JICA
- 4) Key qualifications required of a DB member (by dispute resolution experts)
 - International institution/organization related to DB
 - FIDIC's support for operations of DB
 - Key qualifications required of a DB member
 - Useful tips for employers in applying DB
- 5) Creation of Japan's national list of adjudicators (by contract management experts)
 - Background of setting up of the AJCE national list
 - Qualification requirements
 - Procedure of training and assessment of candidates for adjudicator
 - AJCE's internal organization for administration of the national list
 - AJCE's internal rules for administration of the national list

The presentation materials are shown in Appendix 2.3.

2.3.3 Seminar Participants

About 320 people participated in the DB seminars in four countries. These participants are from government offices concerned with JICA ODA projects, consulting firms, contractors and law firms.

The breakdown of participants is shown in Table 2.4 below.

Table 2.4 Breakdown of Seminar Participants

Classification	Vietnam	Sri Lanka	Philippines	Indonesia	Total	
Government	42	46	30	62	180	56%
Consultant	6	4	13	9	32	10%
Contractor	6		3	1	10	3%
Law firm (including DRBF)	4	8	6	7	25	8%
Education				14	14	4%
Associations related to construction	2	11		2	15	5%
JICA		12	2		14	4%
ADB			6		6	2%
Others (including the JICA Study Team)	7	5	6	5	23	7%
Total	67	86	66	100	319	100%

(Source: Study Team)

2.3.4 Questions and Answers

The records of the question and answer session in the DB seminar are shown in Appendix 2.4.

The main questions and comments raised by the participants and their corresponding answers as given by the Study Team, including those exchanged in the meetings with government offices, are as follows:

Q1: When the country's legal system does not deal with DB, I think the DB's decision does not have a binding effect. What is your comment on this?

A1: The dispute resolution procedure with DB is agreed by contract parties based on the principle of "freedom to contract". We do not think the DB process has any conflict with the national legal system. If a law related to alternative dispute resolution (ADR) is available, it may support DB mechanism; however, it is not a prerequisite for effectiveness of the DB's decision. Furthermore, the successive process, including amicable settlement and arbitration, is stipulated in the FIDIC contract, when either party is dissatisfied with the DB's decision.

Q2: When either party is dissatisfied with the DB's decision, it can proceed with the arbitration. In this case, can the DB cost be regarded as wasted expense?

A2: According to statistics in the United States, only 2% of disputes referred to DB went to arbitration. This means that most of disputes were settled at the project site level and this fact should be well recognized. Furthermore, a standing DB is able to mitigate the outbreak of the

dispute by its dispute prevention function. The dispute may result in the delay of completion of the project entailing huge socioeconomic loss to a nation. The benefits brought by DB can be sufficiently justified by such reasons.

Q3: The cost of DB can be covered by JICA ODA loans?

A3: JICA considers that the DB cost is not a legal cost but a part of project management cost, therefore it is an eligible cost under JICA ODA loans. JICA will discuss the establishment of DB with the executing agency of the JICA ODA project during the project appraisal stage so that the cost allocation for DB will be ensured under the loan for upcoming projects.

Q4: It would be very effective to compile a report regarding the operations of DB in past projects in order to demonstrate the real benefits of DB for further dissemination of the DB system.

A4: This matter is also discussed in DRBF. It was noted as an outstanding issue in the promotion of DB.

Q5: Is DB well applicable in design-build or engineering, procurement and construction (EPC)/turnkey contracts?

A5: The DB system can be applied to any type of construction contract. The current versions of the FIDIC Yellow Book and Silver Book use ad hoc DB; however, it was said that the standing DB would be adopted in the upcoming revised versions.

2.3.5 Questionnaire Survey

A consciousness survey was conducted in the DB seminar using a questionnaire form, as given in Appendix 2.5. The questionnaire comprises of 1) evaluation of the DB seminar, 2) willingness to use DB, and 3) questions on DB procedure. The response rate was 62%. Appendix 6.2 shows a summary of the survey results.

Table 2.5 Response Rate on Questionnaire

Description	Vietnam	Sri Lanka	Philippines	Indonesia	Total
Number of participants	67	86	66	100	319
Number of respondents	44	68	47	39	198
Response rate	66%	79%	71%	39%	62%

(Source: Study Team)

1) Evaluation of DB seminar

The participants answered the five-grade evaluation based on interest level, usefulness and perspicuity of the seminar. As shown in Table 2.6, a very high appreciation was obtained for each category.

Table 2.6 Evaluation of DB Seminar

Question		Vietnam	Sri Lanka	Philippines	Indonesia
(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?				
	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%

(Source: Study Team)

2) Willingness to use DB

The willingness to use DB was surveyed based on the questions as shown in Table 2.7 below.

Table 2.7 Willingness to Use DB

Question		Vietnam	Sri Lanka	Philippines	Indonesia
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%

(Source: Study Team)

As shown in Table 2.7, more than half of the respondents were positive to adopt DB in the project. Also, most of the respondents who were negative to adopt DB in the project answered that they will adopt DB if certain issues are cleared.

The top three reasons indicated by “positive” respondents are as shown below. It is interesting

that the third ranking reason implies that many people consider the DB cost a reasonable expenditure.

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

The top three reasons indicated by “negative” respondents are as shown below. The major concern among these respondents is the cost of DB.

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

Appendix 2.7 shows the records of questions and comments on the DB process that were given by the respondents of the questionnaire. These comments were taken into consideration in drafting the DB Manual.

2.4 Discussion with Government Offices

2.4.1 General

During the overseas survey, meetings were held with 1) government offices which are closely related to JICA ODA projects, 2) ADB, and 3) arbitration centers in order to discuss the adoption of DB in JICA ODA projects and explain JICA’s policy for the operations of DB.

Table 2.8 List of Interviewed Organizations

Country	Organization
Vietnam	<ul style="list-style-type: none"> • Ministry of Planning and Investment (MPI) • Vietnam International Arbitration Centre (VIAC) • Ministry of Finance (MOF)
Sri Lanka	<ul style="list-style-type: none"> • Ministry of Finance and Planning (MOFP) • Sri Lanka National Arbitration Center (SLNAC)
Philippines	<ul style="list-style-type: none"> • Government Procurement Policy Board (GPPB) • Asian Development Bank (ADB) • Department of Finance (DOF) • National Economic and Development Authority (NEDA)
Indonesia	<ul style="list-style-type: none"> • National Public Procurement Agency (LKPP) • National Development Planning Agency (BAPPENAS)

Country	Organization
	• President Delivery Unit for Development Monitoring and Oversight (UKP4)

(Source: Study Team)

The records of discussions are shown in Appendix 2. The outlines of the discussions are described below.

2.4.2 Vietnam

1) Ministry of Planning and Investment (MPI)

- Discussion was made on the correlation between the nation’s legal system and the DB process. The Study Team mentioned that the DB process is a contractual agreement between parties and they consider it without any conflict with the legal system.
- With regard to the benefits brought by DB, the Study Team mentioned that DB functions to avoid disputes, as proven by statistics in the United States, and such dispute resolution achievement at site level should be recognized.
- MPI suggested that the implementation of a pilot project would be useful to prove the benefits of DB.

2) Vietnam International Arbitration Centre (VIAC)

- VIAC indicated that construction disputes have been increasing every year in Sri Lanka.
- About 120 arbitrators are registered in VIAC and about ten engineering and construction experts are available among them. These arbitrators might be good candidates for the national list of adjudicators in Sri Lanka.
- The principle of “freedom to contract” exists under the civil code of Vietnam, therefore such interpretation that DB has conflict with the national law can be considered invalid. (VIAC)
- Majority of the employers of ODA projects are the project management units (MPUs), however, their discretionary power is limited. The problem is that MPU often needs the approval of a higher authority in contract administration. (VIAC)

3) Ministry of Finance (MOF)

- MOF understands that the DB system has advantages such as 1) DB has dispute prevention functions, and 2) large expenditures needed for arbitration would be eliminated. However, some evidences are necessary to prove such benefits to the employer in order to convince project owners and promote DB. (MOF)
 - Discussion was made on correlation between the nation’s legal system and the DB process. The Study Team mentioned that the DB process is a contractual agreement between parties and the Team considers that it does not conflict with the legal system.
-

- The loan agreement becomes like a “law” after signing. If the use of DB is stipulated in the loan agreement, the adoption of DB will be increased with absolute certainty. (MOF)

2.4.3 Sri Lanka

1) Ministry of Finance and Planning (MOFP)

- MOFP raised questions whether DB is necessary because the arbitration process is provided in the contract for resolution of dispute. The Study Team responded that DB has a dispute avoidance function (which arbitration does not have), and DB can resolve disputes much faster than arbitration if a dispute arises between the contract parties.
- The Study Team suggested that the suspension of site visits by DB or termination of the DB agreement can be examined in order to save costs when the contract parties recognize that a dispute would not likely happen.
- In reply to the question regarding the appointment procedure of DB members, the Study Team explained its procedure to MOFP.

2) Sri Lanka National Arbitration Center (SLNAC)

- In Sri Lanka, construction works have been increasing after the civil war has settled down, and consequently, the arbitration for construction contracts has also increased. SLNAC has members related to the construction industry including the National Construction Contractor Association and Chamber of Construction Industry of Sri Lanka. (SLNAC)
- SLNAC indicated its interpretation that the DB process would not conflict with the domestic legal system if DB is specified in the contract as an agreed dispute resolution mechanism.
- In response to the question from the Study Team regarding the binding effect of arbitration award, SLNAC responded as follows:

“The public court sometimes judges adequacy of arbitration proceedings, however we think it will not judge appropriateness of arbitral award itself. A special court which ensures observation of arbitral award by contract party is established in the commercial court in Sri Lanka.”

2.4.4 Philippines

1) Government Procurement Policy Board (GPPB)

- The Study Team made a presentation on the DB process and a seminar handout on JICA’s activities for the promotion of DB.
- The Study Team mentioned that a retainer fee for DB is set once a month in some cases in order to save costs. The Study Team also pointed out that the project owner should well recognize the huge economic losses associated with delay in the completion of infrastructure

projects, which is often caused by contractual dispute.

- GPPB suggested that it would be very effective to compile a report regarding the operations of DB in past projects which demonstrated the real benefits of DB in order to further promote the DB system in a more convincing manner.
- According to GPPB, the Philippines has a law regarding ADR as well as arbitration law. GPPB understands that there exists no conflict between DB and the domestic legal system based on the principle of freedom of contract. (GPPB)

2) Asian Development Bank (ADB)

- ADB often recognizes that project owners are somewhat reluctant to adopt DB in projects financed by ADB. The biggest concern of the owner is the cost burden associated with the appointment of DB. (ADB)
- ADB highly appreciates JICA's proactive effort for the dissemination of DB thus far. ADB and JICA have common issues related to DB as financier. ADB would like to coordinate with JICA for the future promotion program of DB. (ADB)
- ADB understands that the majority of adjudicators have an engineering background, and that the quality of adjudicators is a critical requirement for the success of the DB system. The cultivation of local adjudicators would be a significant challenge which will result in the reduction of the DB cost. ADB also recognizes that the quality of engineers is important to minimize dispute. Furthermore, it is also important to increase bank staff's depth of understanding of DB. (ADB)
- Although ADB does not have a lot of experience on DB operations in its projects so far, they would like to introduce their experience of DB in the Ghazi Barotha Hydropower Project in Pakistan in the DB seminar. (ADB)
- After the meeting with the Principal Director of the Central Operations Service Office of ADB, the JICA Study Team delivered a presentation on JICA's activities and future approach for the dissemination of DB to the bank staff..

3) Department of Finance (DOF)

- According to DOF, although they recognize that the notable advantage of DB is dispute avoidance, most of the contract parties seem not to sufficiently understand how the DB process is actually implemented.
- DOF has learnt that the DB cost will be covered by the JICA ODA loan. It is important to include the DB cost in the individual project budget without fail for realization of the DB process.
- JICA intends to ensure setting up the standing DB in large-scale projects at least.

4) National Economic Development Authority (NEDA)

- NEDA welcomes JICA's proactive effort for promoting DB in JICA-financed projects.
- At first, JICA would like to ensure setting up the standing DB in contracts with value exceeding one billion Japanese yen (about 10 to 15 projects per year). For this, JICA would like to discuss with related government offices for the adoption of the DB system during project appraisal and to secure allocation of the DB cost in the project budget. (JICA)
- The function of dispute avoidance brought by DB should be more appreciated, although some project owners decline to adopt DB in their projects. It should be recognized that DB is a project management tool rather than a legal instrument. Also, DB can be recognized as a kind of insurance for the project. The Study Team understands that there exists no conflict between DB and the domestic legal system based on the principle of freedom of contract. (Study Team)

2.4.5 Indonesia

1) National Public Procurement Agency (LKPP)

- A good understanding on the benefits of DB by the Ministry of Finance would be important for the dissemination of DB in Indonesia, though LKPP well recognizes the advantages of the DB concept. The proactive support of the academic sphere is important too. LKPP was glad to hear that several universities would participate in the DB seminar. (LKPP)
- In Indonesia, there is a law dealing with ADR, which was enacted in 1999 (Law No. 30). LKPP understands that no inconsistencies exist between DB and the domestic legal system based on the principle of freedom of contract. (LKPP)
- The ultimate target of DB operation is the avoidance of disputes, and this aspect is largely different from arbitration. In addition, it should be recognized that contractor's risk would be mitigated by the existence of DB at the project site, thus contributing to lower bid prices. (Study Team)
- How does JICA consider the development of the national lists? (LKPP)

During the overseas survey this year, the Study Team had meetings with FIDIC MAs in four Asian countries in order to investigate their intention and organizational structure for the development of their own national lists. JICA will be prepared to support setting up the national lists depending on the result of the survey. (Study Team)

2) National Development Planning Agency (BAPPENAS)

- The Minister of Public Works delivered the opening address in the DB seminar. This would be a big push to encourage the use of DB, since the Ministry of Public Works administers a lot of infrastructure projects in Indonesia. (BAPPENAS)

- The Study Team would like to point out that competitiveness in bidding would be stimulated by introduction of DB in the contract. And, its cost should be regarded as necessary management cost for the project. (Study Team)
- It should be noted that fairness and transparency are essential requirements for the body who would administer the national list of adjudicators. (BAPPENAS)

3) President Delivery Unit for Development Monitoring and Oversight (UKP4)

- It should be recognized that DB is a project management tool rather than a legal instrument for dispute resolution. (Study team)

UKP4 understands such aspects, however, the biggest concern of the executing agency of the project is the cost burden of DB appointment. (UKP4)

It can be considered that FIDIC added new benefits to its contract with the introduction of DB. Typical examples of the added benefits are dispute avoidance and quick resolution of dispute. The huge economic loss derived from the late completion of an infrastructure project should also be taken into consideration. The contractual dispute sometimes results in the late progress of construction works. In order to enjoy such benefits, the user of DB should pay for it. The Study Team considers that the parties can obtain sufficient benefit from such investment which is not purely additional cost. (Study Team)

- UKP4 would like to see actual examples of DB operation and its benefit. The dissemination of DB would be accelerated if such information is available. (UKP4)

2.5 Discussions with FIDIC MAs

2.5.1 Meeting Agenda

The Study Team had meetings with the following FIDIC MAs in four countries to examine the possibility of establishing their national lists.

Table 2.9 List of FIDIC MAs

Country	FIDIC MA	URL
Vietnam	Vietnam Engineering Consultant Association (VECAS)	http://www.vecas.org.vn/
Sri Lanka	Association of Consulting Engineers, Sri Lanka (ACESL)	http://www.acesl.org/
Philippines	Council of Engineering Consultants of the Philippines (CECOPHIL)	http://www.cecophil.com/
Indonesia	National Association of Indonesian Engineering Consultants (INKINDO)	http://www.inkindo.org/

(Source: Study Team)

The agenda of the meeting is shown below and the records of discussion is attached in Appendix 2.9.

- 1) Outline of FIDIC MA
- 2) Issues on the Establishment of the Adjudicator National List
 - (1) Activities on FIDIC Contract Documents in Each MA
 - (2) Availability of National List
 - (3) Potential Candidates for Adjudicator
 - (4) Establishment of National List
 - (5) Challenges and Measures for Realization of National List
 - (6) Implementation of Joint Seminar in Asian Region

2.5.2 Outline of FIDIC MAs

An outline of FIDIC MAs is summarized in Table 2.10 below. They have been operating for 15 to 40 years.

Table 2.10 Outline of FIDIC MAs

Country	Vietnam	Sri Lanka	Philippines	Indonesia
Name	VECAS	ACESL	CECOPHIL	INKINDO
Year of Establishment	1995	1980	1976	1970
No. of Member Firms	220	13	24	7,379
No. of Employees	about 50,000	about 1,100	about 3,500	about 35,000
Operational Body	Executive Board Committees Secretariat	Executive Board Secretariat	Executive Board Committees Advisory board secretariat	Executive Board Committees Secretariat

(Source: FIDIC MA)

The activities of each MA are described in Table 2.11. All of them aim at raising the status of consulting engineers and capacity building.

Table 2.11 Activities in Each FIDIC Member Association

Member Association	Summary of Activities
VECAS (Vietnam)	<ol style="list-style-type: none"> 1) Enhance regional activities by establishing five regional offices in the North, Mekong Delta and Central (north, central, south) areas besides Hanoi and Ho Chi Minh City. 2) Promote capacity building by establishing a training and educational center wherein foreign trainers will be invited. 3) Increase the number of medium and small size member firms, since majority of the member firms are large government affiliated firms at present.

ACESL (Sri Lanka)	<ol style="list-style-type: none"> 1) Promote and disseminate FIDIC contract documents. 2) Help enhance capacity building of members through training and seminars on FIDIC contract documents. 3) Promote global collaboration with other FIDIC Mas. 4) Enforce the midterm activity plan which includes the preparation of the national list.
CECOPHIL (Philippines)	<ol style="list-style-type: none"> 1) Raise the status of consulting engineers. 2) Promote cooperation between clients and member firms. 3) Promote collaboration among civil engineering (CE) related firms 4) Promote the interest of civil engineers. 5) Contribute to the economic growth of the nation.
INKINDO (Indonesia)	<ol style="list-style-type: none"> 1) Enhance the qualifications and capacity of members. 2) Participate in the planning and development process in public work projects. 3) Raise the status of consulting engineers. 4) Promote collaboration among members. 5) Create a viable business environment. 6) Enhance participation in domestic and international projects. 7) Comply with ethics and code of conduct in consulting services.

(Source: FIDIC MA)

2.5.3 Issues on the Establishment of the Adjudicator National List

1) Activities on FIDIC Contract Documents of Each MA

All MAs have been striving to promote and disseminate FIDIC contract documents and the DB mechanism through seminars and translation of such documents. These efforts would contribute to understanding and raising the awareness of DB.

Majority of the trainings on FIDIC contract documents are related to the FIDIC Modules, as shown in Table 2.12 below.

Table 2.12 Track Record of FIDIC Contract Training Course

MA	FIDIC Module 1	FIDIC Module 2	Others
VECAS (Vietnam)	Seminars on FIDIC Modules are not held (VECAS)		FIDIC Contract Seminar (2003)
ACESL (Sri Lanka)	Year seminar was held 2008	Year seminar was held 2009	Module 3 (2010)
CECOPHIL (Philippines)	2008 and 2009	2010	Module 4 (2011) Module 3 (to be held in 2012)
INKINDO (Indonesia)	2008 and 2010	2010 and 2011	Silver Book (2011)

(Source: FIDIC MA)

(Notes)

- 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) Availability of the Adjudicator List

Sri Lanka is the sole country wherein the adjudicator and arbitrator lists are available. Therefore, it is quite significant that each FIDIC MA establishes its own national list.

In Sri Lanka, the adjudicator lists are available for the following organizations. However, adjudicators on the lists are not assessed through an established criteria; therefore, the credibility of these lists is questionable.

- 1) Institution of Engineers, Sri Lanka (IESL): The list is disclosed to the public, Members are all engineers
- 2) Institute for Construction Training and Development (ICTAD): The list is not disclosed to the public

Accordingly, ACESL intends to create its own national list based on an established criteria such as the FIDIC Adjudicator Guidelines or the AJCE Adjudicator Procedural Rules and Guidelines.

3) Potential Candidates for Adjudicator

A concrete number of potential candidates for adjudicator could be grasped after each MA specifies its qualification criteria, such as the AJCE's Adjudicator Procedural Rules and Guidelines. Each MA expressed that the potential of adjudicator candidates is high.

A concrete number of potential adjudicator candidates could be grasped after each MA specifies its qualification criteria based on such as AJCE's adjudicator Procedural Rules and Guidelines. Though all MAs expressed high potential of adjudicator candidates, it is difficult to grasp the actual situation at this moment. Despite of such uncertainty, if we focus on familiarity and practice of Alternative Dispute Resolution (ADR), FIDIC contract documents, and English language in the countris, Sri Lank and Philippines may have higher potential in qualified adjudicator candidates comparatively.

Table 2.13 Familiarities with ADR, FIDIC Contracts and English Language

Subjects	Vietnam	Sri Lanka	Philippines	Indonesia
Familiarity and practice of ADR		O	O	
Existence of DRBF local organization		O	O	O
Existence of arbitration organization	O	O	O	O
Existence of FIDIC MA	O	O	O	O
Application and practice of FIDIC contract in the domestic projects		O		
Familiarity with English language		O	O	

(Source: Study Team)

At present, there is no professional engineer (PE) qualification in Vietnam. VECAS has been collaborating with the Ministry of Construction to submit a bill for the PE law, which would be enacted by 2014. Domestic qualifications equivalent to PE, PE obtained in a foreign country, experience in international projects that have introduced FIDIC contract documents, etc. could be considered relevant qualifications. Therefore, the availability of PE qualifications itself will not become an obstacle.

In Sri Lanka, national qualifications such as chartered engineer, architect, lawyer, etc. will be considered as relevant qualifications.

Similarly in Indonesia, national qualifications such as PE and architect exist.

In the Philippines, though PE qualification does not exist, qualifications such as registered civil engineer (similar to chartered engineer), senior structural engineer (which requires six years of professional experience after graduation from the university), quantity surveyor, architect, lawyer, etc. exist. In addition, many engineers studied in the United Kingdom or the United States, and obtained their CE or PE qualification there.

4) Establishment of National List

All MAs are positive about establishing National List. As they make reference on high potential of candidate adjudicators, it is expected that establishment of National List would be realized by overcoming the challenging issues as described in the subsequent section 5).

5) Challenges and Measures for Realization of National List

(1) Challenges

Training seminars and workshops on FIDIC Modules 1, 2, 3 and 3A, which target potential adjudicator candidates, are necessary.

Though FIDIC Modules 1 and 2 were carried out in most of the subject countries in the past, it

is reasonable to think that some of the potential candidates would not have taken these training seminars. Therefore, the implementation of a comprehensive training seminar and workshop similar to that of JICA in 2010, i.e., FIDIC Modules 1, 2, 3, and 3A, is expected to be held prior to the adjudicator assessment. If the implementation of all FIDIC modules is difficult, it would be a reasonable option to carry out FIDIC Modules 3 and 3A (DB) to those candidates who completed FIDIC Modules 1 and 2. Subsequently, the adjudicator assessment could be conducted.

In order to guarantee the quality of such training, workshop and assessment, it is essential to invite competent trainers and assessors such as accredited trainers of FIDIC and members of the FIDIC President's List of Approved Adjudicators. However, the cost burden to MAs is quite heavy for implementing these programs.

With regard to maintaining National List, FIDIC MAs intend to appoint a body in charge of National List; however, its structure and operational system are subject to future task.

In order to sustainably maintain National List, FIDIC MAs need to continuously implement training and workshop by themselves or ask candidates to participate in training program offered by FIDIC with their own expense. In case FIDIC MAs invite trainers from overseas for training program, this option may impose a large financial burden to candidates. Therefore, support from financial institutions could be quite effective in facilitating the first adjudicator assessment and associated training programs.

(2) Measures for Realization of National List

Because of the challenges as described above, support from financing institutions such as JICA, ADB, etc. is indispensable.

In addition, support from FIDIC would be effective for the selection of competent trainers and assessors. Support of AJCE to FIDIC MAs in drafting the adjudicator procedural rules and guidelines could be quite effective.

6) Implementation of Joint Seminar in the Asian Region

All FIDIC MAs are positive about holding a joint seminar and workshop on FIDIC modules and adjudicator assessment in the Asian region. Though the MAs primarily want to hold seminars and workshops in their respective countries, they are also willing to participate in seminars and workshops in another country.

Chapter 3 Dispute Board Seminar in Japan

3.1 Seminar Program

The “Seminar for Dissemination of the Dispute Board for ODA Loan Projects (Subtitle: Briefing of the Dispute Board Manual)” was held in Tokyo on March 6, 2012. The purpose of this seminar is to provide an overview of the DB Manual (draft version) and to exchange views on it.

In the seminar, the activities of JICA for the dissemination of DB were presented in the introductory session, and the outline of the DB Manual was explained in the main session. The seminar programs are shown in Attachment 3.1.

3.2 Seminar Materials

The outline of the presentation in the seminar is as follows:

- 1) JICA’s activities towards the dissemination of DB
 - JICA’s sample bidding documents and DB
 - Challenges for dissemination of DB
 - JICA’s effort
 - AJCE national list of adjudicators
- 2) Brief explanation of the DB Manual
 - Concept of DB
 - Purpose of the manual
 - Contents of the manual

The presentation materials are shown in Attachment 3.2.

3.3 Seminar Participants

The announcement of the seminar was informed to the Overseas Construction Association of Japan, Inc. (OCAJI) and AJCE. There were 87 participants to the seminar, the number of which based on classification is presented in Table 3.1 below.

Table 3.1 Number of Participants in the DB Seminar in Tokyo

Classification	No. of Participants
Contractor	32
Consultant	33
Law firm	2
Association related to construction industry	6
JICS	4
JICA	4

Classification	No. of Participants
Others (including the Study Team)	6
Total	87

(Source: Study Team)

3.4 Questions and Answers

The following questions and answers were exchanged in the seminar (C: Comments, Q: Question, A: Answer):

C: “The manual seems to be very useful for the employers of the contract to understand the substance of DB. I wish the publication could have been made much earlier.” (Participant)

C: “I think the FIDIC MDB 2010 edition realizes more fairness as compared to the MDB 2006 edition in arbitration clause for example. I hope that JICA will incorporate the MDB 2010 edition into its sample bidding documents soon.” (Participant)

C: “JICA is planning to revise the procurement guidelines in April of this year, and consequently revision of the sample bidding documents is scheduled to be made. We would like to examine the noted points at that time.” (JICA)

C: “This manual will be opened to the public on the JICA website, and we welcome any comments anytime, based on which we would like to improve it continuously.” (JICA)

C: “Considering small-scale projects, we consider that there is a room for discussion whether we should eliminate ad hoc DB or not. This is a matter for continued examination.” (JICA)

C: “When thinking about the ad hoc DB, the possibility of a one person standing DB is worth considering.” (Study Team)

Q: “In the selection of DB members, it could be possible that their appointment is postponed due to the disagreement between the appointing parties. In such a case, it seems to be easily resolved if JICA or the Japanese government will play a lead role between them.” (Participant)

A: “In case of disagreement, we have to ask the appointing entity for nomination of the DB member according to the contract.” (Study Team)

Q: “Is it justifiable for the contractor to pass on the full amount of the DB cost to the employer? It is difficult for the contractor to estimate the DB cost, when half of the DB cost is required to be included in the overhead cost.” (Participant)

A: “Such procedure does not seem to comply with the principle of cost sharing of the DB cost between the employer and the contractor. Compared with the arbitration cost, it is much easier to make an accurate cost estimate for the DB process.” (Study Team)

“If the full DB cost is claimable to the employer, the moral hazard might be induced by the

endless referral of dispute to the DB by the contractor.” (JICA)

Q: “What is the position of the engineer during a hearing? Does he become a responding party in the hearing?” (Participant)

A: “A dispute is often caused by the determination of the engineer. In that case, the engineer would certainly be asked to be present at the hearing.” (Study Team)

Chapter 4 Brief Explanation of the Dispute Board Manual

4.1 Purpose of the Manual

The purpose of the DB Manual is to assist all concerned to understand properly the function, setup and operation of the DB when it is used for a project. In order to achieve this purpose, the DB Manual was designed to guide in the estimation of the cost of the DB, selection of DB members, the process of the DB's site visits, the mechanism of payment of remuneration to DB members and so on.

The Team Leader and International Contract Expert (2) prepared the framework of the DB Manual. The International Contract Expert (2) drafted the entire DB Manual which was then reviewed by two dispute resolution experts. The draft was finally reviewed by Mr. Gordon Jayens who contributed in making JICA's DB training kit. Accordingly, the DB Manual was kept at a high standard of quality.

4.2 Structure of the Manual

The DB Manual consists of two parts. The first part is the executive summary. It assists top-level management of governmental bodies, which are the borrowers of JICA's loans and the like, in grasping the whole picture and the flow of the DB process. The second part consists of the appendices which help practitioners to fully understand the detailed process of the DB.

A brief explanation of the DB Manual is given below. The detailed guide is provided in the appendices, each of which has the same number of the section.

Acknowledgement

This part acknowledges the contribution of individuals, and JICA expresses its appreciation to them.

Preface

This is a message given by JICA to the readers of the manual.

1. Introduction

The introduction shows the purpose of the DB Manual. The particular feature of DB, which is for the prevention of disputes, is highlighted. It was pointed out that ad hoc DB lacks this feature and that care must be taken when using it. JICA welcomes other financing agencies and private entities to use the DB Manual.

2. Brief Explanation of DB

The DB concept is briefly explained to refresh the knowledge of those who are already aware of it as well as to inform those who do not know it.

3. Consideration at Pre-implementation Stage

This part provides a guide for the implementing authority to understand what should be done at the time of planning a project. It includes a flowchart showing what to do at the time of planning and appraisal of a project, with inclusion of the DB cost in the project cost. The cost of DB can be estimated by taking into account the number of DB member(s) and the duration of the project. Two examples of cost estimates are shown in the relevant Appendix. The first example involves a DB with three international members in a project which is complex and has a long period of completion. The second example involves a DB with one local member for a project which is rather simple and has a short period of completion.

4. Consideration in Preparation of Tender Documents

This part shows what information are required to be included in the tender documents when the employer prepares them with assistance from the consultant. The employer must fill in the form provided in the Particular Conditions – Part A: Contract Data. These data include the date by which the DB shall be appointed, the number of DB member(s) (1 or 3), the appointing entity or official in case the parties fail to appoint DB members, etc. A provisional sum for payment of remuneration and reasonable cost to DB must be provided in the bill of quantities to enable the employer to reimburse from the contractor for the employer's share.

5. Selection of DB Members

A guide is provided in this part for selecting the DB members. A flowchart on the procedure of selecting DB members is shown including the procedure of selection by the appointing entity. Explanation is given on the agreement of DB remuneration and three-party agreement.

6. Remuneration of DB Members

The procedure on payment of remuneration and reasonable expenses to DB members is explained.

7. Site Visit

The rules and requirements for the DB's site visits, as stipulated in the conditions of contract, are explained. The importance of the initial site visit is stressed. The meaning of and advice on the practice of regular site visits and site visit reports are explained.

8. Information to DB during Intervals between Site Visit

This explains what kind of information and what methods must be provided to the DB members during the intervals between site visits. The information should include monthly progress reports, updated program, important claim notices, variations, etc. The method of transmittal of documents includes email of soft copies and courier of hard copies.

9. DB Informal Opinions

This part points out that informal opinion/advice/recommendation has proved to be helpful for avoiding disputes. Informal opinion can only be provided when the parties agree to request for it from DB. The parties are free to accept it, since it has no binding power on the parties, or to continue or resume negotiations for an amicable settlement. The possibility of success in amicable settlement is considered high.

10. Referral and DB Decision

When a formal dispute cannot be avoided, it shall be referred to the DB for its decision. A flowchart on dispute resolution is shown in the relevant Appendix. The procedure of referral is very flexible and the DB is empowered to adopt procedures suitable to the dispute, avoiding unnecessary delay or expense. It is important for the parties to consider carefully the use of the suggested 84-day time limit.

11. Amicable Settlement

No request for arbitration can be filed until the completion of a minimum compulsory period of 56 days of amicable settlement efforts. It is considered that this period is expected to assist the representative of the employer in establishing, within the employer's authority, amicable settlement, and to give a "last chance" for the top-level management of the parties to review the dispute and settle amicably by use of "mini trial" or "mock arbitration" and the like.

12. Arbitration

This part shows what information are required to be included in the tender documents when the employer prepares them with assistance from the consultant. It is pointed out here that there are uncertain provisions in the conditions of contract as to whether arbitration is international or domestic, and also as to where the place of arbitration should be. The parties are recommended to consider the magnitude of expense and uncertainty of the result of arbitration before commencing arbitration.

Chapter 5 Measures for Dissemination of Dispute Board and Development of Adjudicators in the Asian Region

5.1 Continual DB Promotion Activities including DB Seminar

Since 2008, JICA has delivered 14 DB promotion seminars in Asian countries. More than 1,100 people have participated in such seminars.

Table 5.1 Track Record of JICA DB Promotion Seminars

No.	Date	Country	No. of Participants
1	July 2008	Japan (Kyoto)	9
2	July 2008	Japan (Tokyo)	123
3	August 2008	India (Delhi)	16
4	August 2008	Philippines (Manila)	111
5	November 2009	Cambodia (Phnom Penh)	77
6	November 2009	Vietnam (Hanoi)	157
7	January 2010	Bangladesh (Dhaka)	53
8	February 2010	Sri Lanka (Colombo)	105
9	February 2010	Japan (Tokyo)	73
10	January 2012	Vietnam (Hanoi)	67
11	January 2012	Sri Lanka (Colombo)	86
12	February 2012	Philippines (Manila)	66
13	February 2012	Indonesia (Jakarta)	100
14	March 2012	Japan (Tokyo)	87
	Total		1,140

(Source: Study Team)

The DB seminars held in Vietnam, the Philippines and Sri Lanka in 2012 were already the second for the said countries, as shown in Table 5.1 above. It was apparent that the awareness and understanding of DB of the participants have improved than the last time, as demonstrated by the level of questions raised during the seminar. The continual holding of DB promotion seminars will greatly contribute to raise the awareness on DB.

Since one of the major reason impeding dissemination of DB is inexperience of DB process by the stakeholders, actual cases should be increased. It is well-worth condiding that the financing agency of the ODA projects identifies a pilot project for introduction of DB. Furthermore, the presentation of Mock DB in the seminar will also greatly contribute to promote a more accurate understanding of DB among stakeholders.

5.2 Case Study on DB Operation

According to results of the questionnaire survey made this time, it was confirmed that many employers of the contract still have feelings of resistance in incurring the cost of DB. Although

most of them understand the benefits brought in by DB, as shown below, they are willing to obtain information and evidence which back up such benefits in actual projects. Such opinion was frequently heard at meetings with government officials and the DB seminars.

- Prevention of dispute
- Quick resolution of dispute
- Prevention of delay in progress of work and its completion (avoidance of national economic loss)
- Avoidance of arbitration
- Raising competition in the bid
- Improvement of investment climate

The preparation of a case study which demonstrates the benefits of DB in an actual project would be a very effective measure to convince the people to adopt DB in their projects. This is an issue for the future.

5.3 Close Coordination with MDBs

JICA and the Study Team had a meeting with a key person in the procurement section of ADB. This person was invited to the DB seminar held in Manila as a guest speaker. ADB highly appreciates JICA's proactive endeavors in the dissemination of DB and desires to coordinate with JICA in future programs. It would be very useful to effectively coordinate with MDBs including the World Bank in building an awareness program on DB, and an adjudicator development program to accelerate DB dissemination.

5.4 Creation of National Lists of Adjudicators in the Asian Region

In this Study, the procedure of development of Japan's national list of adjudicators, which was completed in 2011, was reported in the meetings with FIDIC MAs as well as in the DB seminars. This attracted a great deal of interest from the participants.

The intention of FIDIC MAs for setting up their national lists of adjudicators, as described in Chapter 2.5, is summarized as follows:

- 1) All MAs are willing to establish national lists.
- 2) It is considered that candidates for adjudicator are available in four countries. (Especially, Sri Lanka and the Philippines have high potential of producing adjudicators.)
- 3) All MAs are overburdened with the training and assessment expenses for the establishment of national lists.

Training and subsequent identification of qualified adjudicators would be greatly facilitated if JICA provides technical and financial support to MAs by making use of its experience gained in supporting the setting up of Japan's national list.

In this case, it would be more cost-efficient to carry out the adjudicator training and assessment workshops in one place by inviting applicants from the four countries. Manila could be a promising venue for such events in view of possible coordination with ADB.

The actual establishment and succeeding administration of the national list are fundamental requirements for providing support to implementation of training and assessment workshops by JICA, the FIDIC MAs are required to demonstrate such commitment beforehand.

The overall procedure towards the establishment of a national list is envisioned as follows:

- 1) Preparation of guidelines for applicants
First of all, the guidelines for applicants are to be prepared. The guidelines will contain the allowable number of applicants, qualification requirements, application documents, time schedule of training and assessment workshops, fee requirement, and deadline for application. The qualification requirements describe minimum experience and skills required to be possessed by the adjudicators, based on the FIDIC guideline. This would be criteria for selection of homogenous and qualified adjudicators. The completion of Module 1, Module 2 and DB training workshops will be a requisite condition to participate in the assessment workshop.
 - 2) Distribution of guidelines for applicants
JICA will distribute the guidelines to each MA. The MAs will then proceed with the selection of applicants who meet the qualification requirements.
 - 3) Submission of application documents
MAs will submit application documents to JICA before the deadline.
 - 4) Modules 1 and 2 workshops (for five days)
Modules 1 and 2 workshops will be conducted by JICA since some of the applicants may have not completed them yet.
 - 5) Preliminary screening of applicants
Following Modules 1 and 2 workshops, an interview and a simple paper test (a three choice test) will be carried out for the preliminary screening of applicants. The description of application documents will be confirmed through the individual interview. The number of qualifiers is limited to a maximum of 20 persons.
 - 6) Notice of results of preliminary screening
MAs will be notified of the results of the preliminary screening.
 - 7) DB training workshop (for five days)
The DB training workshop will be provided for applicants who passed the preliminary screening. The JICA DB training kit will be used in the workshop.
 - 8) DB assessment workshop
Following the DB training workshop, DB assessment workshop will be provided by three assessors
-

who form the assessment panel for adjudicator (APA).

9) Assessment by APA

After the DB assessment workshop, APA will determine the successful applicants who are eligible for registration in the national list. Since the success of DB largely depends on the quality of the adjudicators, the assessment should be conducted in a stringent manner.

10) Reporting of assessment results by APA

APA will report the assessment results to JICA.

11) Transfer of assessment results to MAs

JICA will transfer the assessment results to MAs.

12) Establishment of national lists

MAs will create their own national list in consideration of the assessment result.

APPENDICES



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,



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"> JICA's Activities on Promotion of Dispute Board Basics of Dispute Board 	Mr. Yukinobu Hayashi Nippon Koei Co., Ltd.
8:50 – 9:30	40'	<ul style="list-style-type: none"> Practice of Dispute Board (advantage of Dispute Board and its case study) 	Prof. Toshihiko Omoto Kyoto University FIDIC President's List Adjudicator
9:30 – 9:50	20'	<ul style="list-style-type: none"> Common Disputes during Construction in Vietnam 	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"> Dispute Settlement at the Vietnam International Arbitration Center (VIAC) 	Mr. Vu Anh Duong Attorney-at-Law, General Secretary VIAC
10:20 – 10:40	20'	<ul style="list-style-type: none"> - Dispute Board - JICA's Experience, Initiatives and Way Forward 	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"> Key Requirements for Adjudicators 	Mr. Volker Jurowich President of Dispute Resolution Board Foundation (DRBF)
11:30 – 11:55	25'	<ul style="list-style-type: none"> Creation of National List of Japanese Adjudicators 	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.

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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"> JICA's Activities on Promotion of Dispute Board Basics of Dispute Board 	Mr. Yukinobu Hayashi Nippon Koei Co., Ltd.
10:55– 11:45	50'	<ul style="list-style-type: none"> Dispute Board Practice (advantage of Dispute Board and its case study) 	Prof. Toshihiko Omoto FIDIC President's List Adjudicator
11:45 – 12:15	30'	<ul style="list-style-type: none"> Construction Dispute in Sri Lanka 	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"> Dispute Board : JICA's Experience, Initiatives and Way Forward 	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"> Key Requirements for Adjudicators 	Mr. Volker Jurowich President of Dispute Resolution Board Foundation (DRBF)
14:45– 15:15	30'	<ul style="list-style-type: none"> Creation of National List of Japanese Adjudicators 	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

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.

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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.

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

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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.

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DISPUTE BOARD SEMINAR

Seminar Program

Date & Time : 9 February, 2012 (Thursday), 10:00 to 16:30
 Venue : Ballroom II
 6th 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"> JICA's Activities on Promotion of Dispute Board Basics of Dispute Board 	Mr. Yukinobu Hayashi Nippon Koei Co., Ltd.
10:50 – 11:35	45'	<ul style="list-style-type: none"> Dispute Board Practice (advantage of Dispute Board and its case study) 	Prof. Toshihiko Omoto Kyoto University FIDIC President's List Adjudicator
11:35 – 12:05	30'	<ul style="list-style-type: none"> Construction Dispute in Philippines 	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"> Construction Disputes in ADB financed Projects 	Mr. Hamid L. Sharif Principal Director, Central Operations Services Office Asian Development Bank
13:35 – 14:05	30'	<ul style="list-style-type: none"> - Dispute Board - JICA's Experience, Initiatives and Way Forward 	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"> Key Requirements for Adjudicators 	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"> Creation of National List of Japanese Adjudicators 	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.

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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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"> JICA's Activities on Promotion of Dispute Board Basics of Dispute Board 	Mr. Yukinobu Hayashi Nippon Koei Co., Ltd.
11:00– 11:50	50'	<ul style="list-style-type: none"> Dispute Board Practice (advantage of Dispute Board and its case study) 	Prof. Toshihiko Omoto Kyoto University FIDIC President's List Adjudicator
11:50 – 12:20	30'	<ul style="list-style-type: none"> Construction Dispute in Indonesia 	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"> Dispute Board : JICA's Experience, Initiatives and Way Forward 	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"> Key Requirements for Adjudicators 	Dr. Götz-Sebastian Hök FIDIC President's List Adjudicator
14:50– 15:20	30'	<ul style="list-style-type: none"> Creation of National List of Japanese Adjudicators 	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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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

Japan International Cooperation Agency

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.

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.

Appendix - 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

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3

JICA Sample Bidding Documents (SBD) and Dispute Board

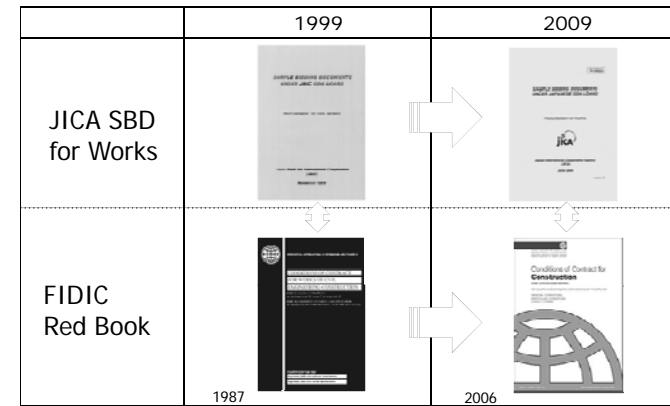
	JICA SBD	Version (year)	Conditions of Contract	Dispute Resolution (First Step)
1	Works	1.1 (2009)	FIDIC MDB harmonized edition	Dispute Board
2	Plant Design, Supply and Installation	1.0 (2010)	ENAA form	Dispute Board
3	Small Works	1.0 (2010)	MDB original	Adjudicator

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4

JICA SBD for Works and FIDIC Contracts



JICA Dispute Board Seminar 2012



Issues for Dissemination of Dispute Board

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)

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)

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)

Definition in FIDIC Gold Book 1st 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)

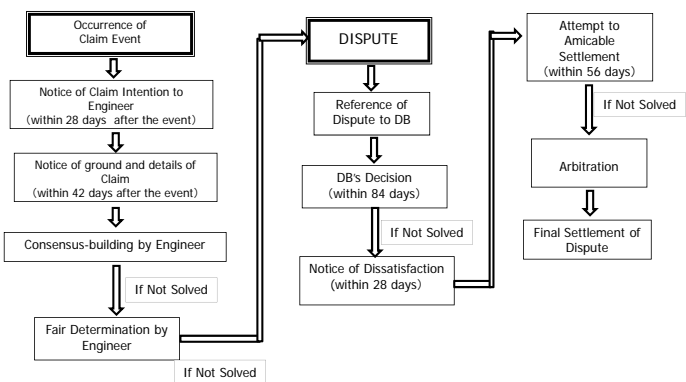
Description in FIDIC MDB edition (2006)

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.



Claim and Dispute Resolution Process under MDB edition (1)



Claim and Dispute Resolution Process under MDB edition (1)

- 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



ADR (Alternative Dispute Resolution) and DB

- 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



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

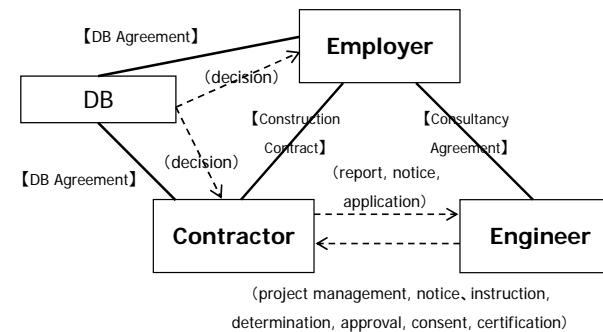


Comparison : Full-term and Ad-hoc DB

	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
Tot	19	23	11	28	18		201

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
Tot	1	2	25	44	27		201

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
Tot	19	18	5	27	30		201

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
Tot	24	16	3	24	32		201

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
Tot	14	18	6	24	37		201

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



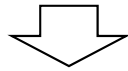
Why DB is introduced in FIDIC Contracts

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 1/2 of the amount.



Procedural Rules

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



The End

Thank you for your attention!



Appendix - 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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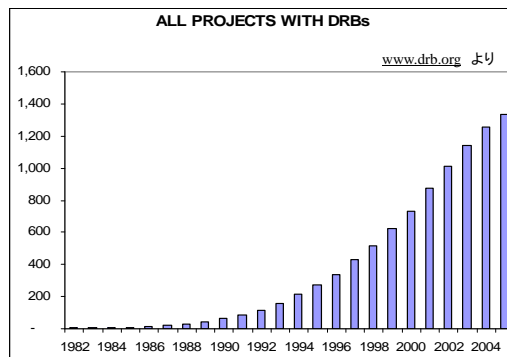
Today's Topics: Dispute Boards

- 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

- 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 DB
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 PROJECT

Employer: [Name] Contractor: [Name] Member: [Name]

Whereas the Employer and the Contractor have entered into a contract (Specifically the "Contract Documents" are the: [Name])

It is hereby agreed that the Employer and the Contractor jointly appoint the Member to act as one of the three persons who are jointly called the DB.

The Employer, Contractor and Member jointly agree as follows:

1. The conditions of this Dispute Adjudication Agreement comprise the "General Conditions of Dispute Adjudication Agreement" and "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 DB, and the following provisions. In these provisions words and constructions 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 on the DB.
4. The Employer and the Contractor jointly and severally undertake to pay the Member, in consideration of the services to be provided, 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: [Name] SIGNED BY: [Name] SIGNED BY: [Name]

For and on behalf of the Employer as For and on behalf of the Contractor as the Member

DATE: [Date] DATE: [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 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

- 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)

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

- 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-

- 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-

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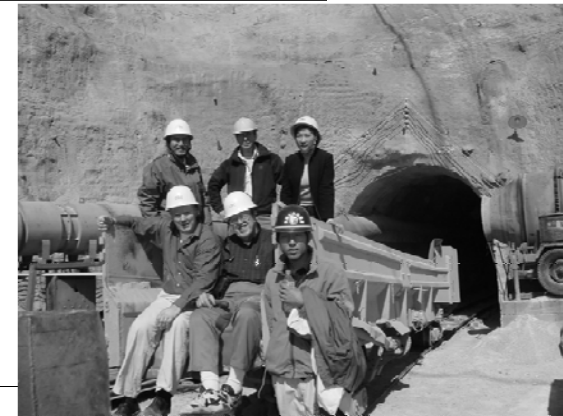
Cases of DB Cases of DRE (One-person DRB)

- 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

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 successful¹. In 1995 World Bank Standard Bidding Document published modified FIDIC² 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.

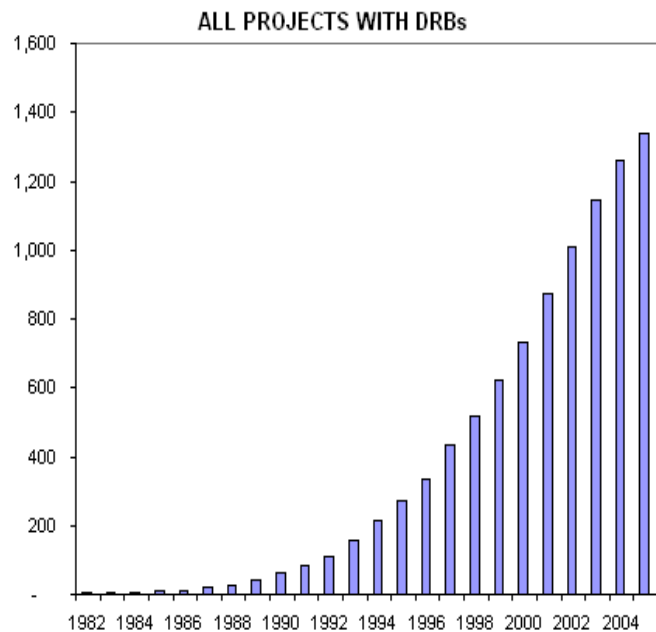


Fig-1

¹ 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

² 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 ICC³ 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

³ *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”⁴ In fact, it is reported that a few contracts in the IT industry have adopted this CDB.

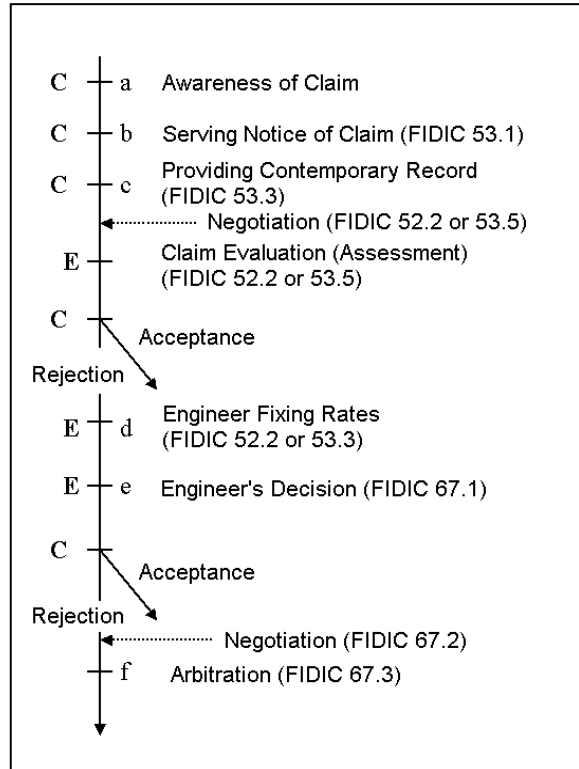


Fig-2: Claim and Dispute Procedure Under FIDIC Red Book 4th Ed.

⁴ Christopher Koch in his presentation at the DRBF 8th 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 4th edition 1987⁵, 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"⁶ 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 4th 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 Yellow⁷ and Silver⁸ 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

⁵ *Conditions of Contract for Works of Civil Engineering Construction*

⁶ *Clause 67; Settlement of Disputes*

⁷ *Conditions of Contract for Plant and Design-Build*

⁸ *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 DRBF⁹ 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

⁹ *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 website¹⁰. 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

¹⁰ <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**

Mr. Shokichi Sakata

**Deputy Director General for Planning and
Coordination, Financing Facilitation and
Procurement Supervision Department, JICA**

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

5

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

6

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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Key Requirements for Adjudicators


Mr. Volker Jurowich

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

Dr. Götz-Sebastian Hök

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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Japan International Cooperation Agency & FIDIC

FIDIC Contracts (Step by Step)

FIDIC Trainings

FIDIC Assessment

FIDIC President's List

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Japan International Cooperation Agency & FIDIC

The Dispute Board Federation

DBF organises FIDIC trainings and Dispute Resolution trainings

DBF has published a Code of Ethics

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Japan International Cooperation Agency & FIDIC

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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Japan International Cooperation Agency & FIDIC

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.

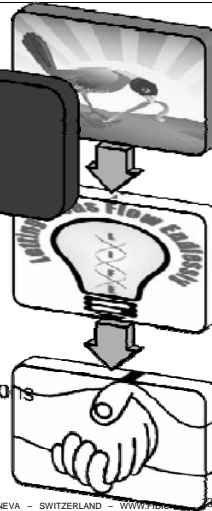
Soft Skills are very important

- 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

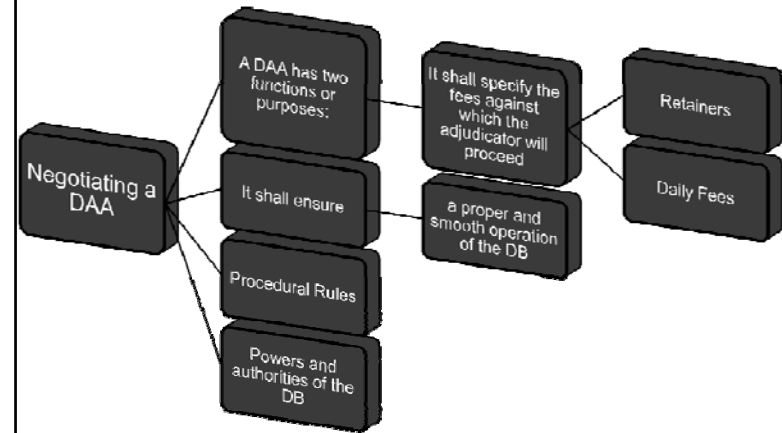
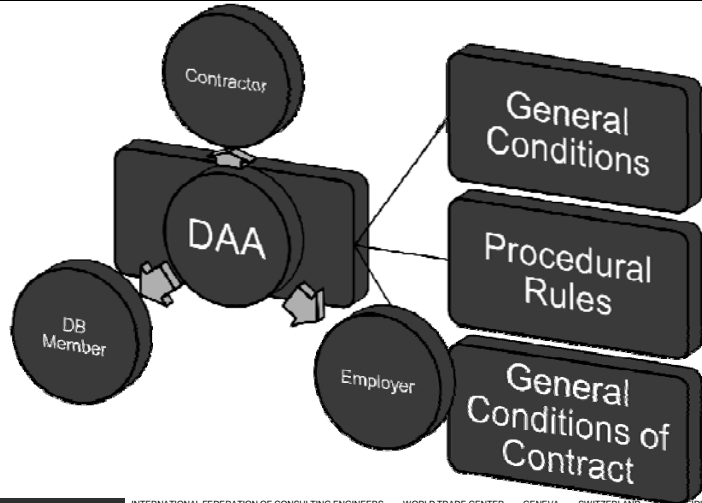
- Go to the DB
- Apply for interlocutory relief

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

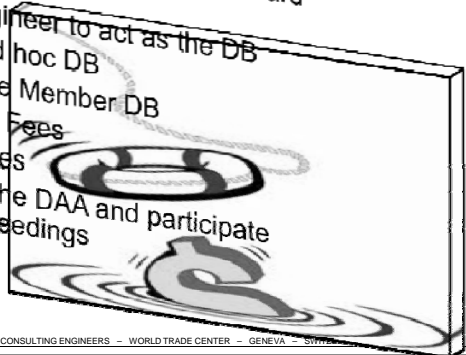
Case Study

- 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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