



Forum

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MAY 2012

Japan International Cooperation Agency's Efforts for Promotion of the Use of Dispute Boards in the Asian Region

By Toshihiko Omoto

Japan International Cooperation Agency (JICA) adopted the FIDIC MDB Harmonised Edition (2006) (hereinafter “MDB Conditions”) in 2009 as the Conditions of Contract to be included in its Sample Bidding Documents for Japan’s Overseas Development Agency (“ODA”) loan projects. This of course involved the use of DBs to prevent and resolve disputes.

JICA had expectations that the use of DBs would have several favourable results: dispute prevention (or rapid resolution of those which could not be prevented); dissuasive effect on unreasonable behaviour of the Parties to the Contract; enhanced capacity of the Employer in terms of contract management; improvement of the Employer’s reputation; and, more participation by good competitors in the bidding process.

In these circumstances, it was expected that the projects employing DBs would be increasing in the Asian region. However, the DB concept is still new to most recipient governmental authorities, local consultants, local contractors and other concerned groups such as arbitrators and lawyers. Also there are few qualified DB adjudicators in this region. Therefore, JICA decided to make efforts in the Asian region for wider understanding of the DB concept and for training of DB adjudicators.

The programme started in 2008. Kyoto University (represented by Professor Toshihiko Omoto), AJCE (Association of Japanese Consulting Engineers, represented by Director General Dr. Yoshihiko Yamashita), and the prominent consulting engineering firm Nippon Koei (represented by Mr. Yukinobu Hayashi)

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“JICA had expectations that the use of DBs would have several favourable results: dispute prevention (or rapid resolution of those which could not be prevented); dissuasive effect on unreasonable behaviour of the Parties to the Contract; enhanced capacity of the Employer in terms of contract management; improvement of the Employer’s reputation’ and, more participation by good competitors in the bidding process.”

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President's Page

Dear Members, Supporters and Friends of the DRBF,

Also this year is full of activities of the DRBF and its members with the purpose of expanding the understanding of the benefits of DBs and subsequent use of the DB procedure to avoid and, where inevitable, resolve disputes contemporaneously and efficiently.

Dick Appuhn and Andy Griffith conducted a two-day workshop in Lusaka, Zambia on 16 and 17 February that covered Contract Management and DAB Procedures. The workshop was a joint effort of the DRBF and the Association of Consulting Engineers of Zambia (ACEZ). It was well received by some 30 participants. I would like to express the DRBF's appreciation for Dick's and Andy's efforts.

Many of us are getting ready to travel to Sydney to attend the 12th Annual International Conference there on 04 and 05 May and the preceding workshops. Considering the meticulous preparation by the Conference Committee and the Workshop Committee it promises to be an extraordinary event. Presentations will cover a wide range of aspects of the DB Process. Presenters are of highest professional standard and have in depth personal experience of the DB Process. This, together with the fame of Sydney and all Australia as a top tourist target will attract many also from outside of Down Under. The present number of registrants already indicates a new record in participation.

For the further events of this year please view the DRBF website regularly.

A new way of spreading the knowledge of the DB process has been initiated by Alina Oprea, our Country Representative in Romania, and Bogdan Oprea. They talk about "War and Peace in Construction" in a talk show in Rumanian TV. Alina has promised to share with us their ideas and experience through an article in this newsletter (see page 23). I am looking forward to learn from them. Meanwhile, Alina and Bogdan, please receive my appreciation for you inventiveness and devotion to our cause.

JICA, the Japanese International Cooperation Agency has now completed its "DB Manual", a very practical handbook for the users of the process and those who consider using it, but need more information. As far as I know this is the first ever handbook on DBs by a major Multilateral Development Bank. It contains also an important aspect regarding the funds for payment of the DBs, lack of which created mayor problems in projects in Europe. Contracts here contained a DB clause, but there was no provision of funds in the loan agreements of the Employer with the funding agency. In JICA funded projects the Employer's half of the DB cost will be paid out of a Provisional Sum, which is included in the construction contract, and hence funded by JICA. The new JICA Procurement Guidelines as well as the JICA DB Manual can be downloaded in the internet. I recommend strongly doing so.

Finally I express my hope to meet many of you in Sydney.

Until then,

A handwritten signature in black ink, appearing to read 'Volker Jurowich'. The signature is fluid and cursive, with a small mark above the first letter.

Volker Jurowich, President
DRBF Executive Board of Directors

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**Call for Nominations:
The Al Mathews Award**

The Dispute Resolution Board Foundation presents the prestigious Al Mathews Award each year to one or more DRBF members who have given exemplary service in advancing the use of the Dispute Resolution Board concepts and the DRBF. Nominations are solicited from the membership and by the president of the Executive Board of Directors. A framed proclamation and trophy will be presented to the recipient at the Dispute Resolution Board Foundation Annual Meeting and Region 1 Conference September 28-30, 2012 in New York, NY.

Send your nomination, including an explanation of why the nominee is deserving of the award, to:

Mail: Award Nominations/DRBF, 19550 International Blvd. So Suite 314, Seattle, WA 98188 USA

E-mail: info@drb.org Subject: Al Mathews Award Nomination

Entries should be postmarked no later than July 15, 2012

The distinguished list of past winners includes:

**Al Mathews
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**John Nichols
Peter H.J. Chapman
Bill Baker
Romano Allione
Harold V. McKittrick
Jack Feller
Richard Appuhn
Gwyn Owen
Robert Rubin
Graeme Peck**



**Forum Newsletter
Editorial Deadline**

Our readers love to hear DRB success stories, challenges facing the process, and the latest industry news and events. If you have new information about DRBs, DRBF members, or an article to share, please tell us! Contact Forum Editor Ann McGough by email at amcgough@drb.org.

Deadline for the May issue is

July 1, 2012

Executive Board of Directors

The members of the Executive Board of Directors are:

- Volker Jurowich, President
- Roger Brown, President Elect
- John C. Norton, Immediate Past President
- Murray Armes, Secretary
- James P. Donaldson, Treasurer
- Doug Holen, Director and President, Region 1 Board
- Richard Appuhn, Director and President, Region 2 Board
- Romano Allione, Past President
- James J. Brady, Past President
- Peter M. Douglass, Director, Past President
- Gwyn Owen, Director, Past President
- Joe Sperry, PE, Founder, Honorary Director

The Executive Committee meets monthly. Recent topics have included:

- Development of an international training kit.
- Outreach developments to new owners and industry sectors.
- Progress on DRBF tools such as the DB Database and Policy Manual.

Summaries of the Executive Board meetings are available to all DRBF members on the DRBF web site. To access the **Board of Directors Meeting Minutes Summary**, go to www.drb.org. Click on the **Member Login** button, and then click on **DRBF Board of Directors**.

Executive Board of Directors Meeting Schedule:

- May 6, 2012 in Sydney, Australia
- June 15, 2012 by conference call
- July 20, 2012 by conference call

The Boards of Regions 1 and 2 also meet on a monthly basis. Questions for the Executive or Regional Boards should be addressed to the Board President, care of:

Dispute Resolution Board Foundation
 19550 International Blvd. So., Suite 314, Seattle, WA 98188
 Phone: 206-878-3336 Fax: 206-878-3338 Toll free (US only) 888-523-5208
 Email: info@drb.org Web: www.drb.org

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- Doug Holen, President
- Deborah Mastin, President Elect
- Roger Brown, Past President
- Kurt Dettman
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Board of Directors

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- Murray Armes
- Christopher Miers
- Alina Oprea
- James Perry

Forum Editor: Ann McGough

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The *Forum* is published quarterly by the Dispute Resolution Board Foundation (DRBF). Any opinions expressed are those of the authors and do not necessarily represent the opinions of the DRBF.

The *Forum* welcomes articles on all aspects of Dispute Resolution Boards, and members are encouraged to submit articles or topics to the DRBF, attn: Editor.

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***Thank you for
your support!***

Call For Nominations: Executive & Region 1 Board of Directors

At the upcoming DRBF Annual Meeting & Conference in September, the Executive Board of Directors and the Region 1 Board of Directors will install new officers. The DRBF Election Committee invites all DRBF members to propose candidates to serve on either of these Boards. There is one open position on each Board, that of President Elect. To be considered, candidates must meet the following criteria:

- a. Each candidate must have a proposer and a seconder. Candidate, proposer and seconder must be members of the DRBF at least 3 years.
- b. The candidate must be, or commit to become, a sustaining member of the DRBF.
- c. A candidate for the position of President Elect (other than regular Board Member) must provide, with his/her CV, demonstration of having participated actively in the organization of the DRBF (be it as Board member, committee member or other).
- d. All candidates must supply a statement to the members with a summary of their professional background, which will be distributed to the membership with the invitation to vote.
- e. All DRBF members have a vote for the Executive Board. All Region 1 members have a vote for the Region 1 Board.
- f. Voting is done by e-mail, in advance of the Annual Meeting and Conference.
- g. The Elections Committee is the organizing body of the election.
- h. The President Elect serves for 3 years: President Elect, President, Past President.
- i. Terms start and end at the Annual Meeting and Conference, usually held in the fall each year.

Proposals may be sent to the DRBF office by email (info@drb.org), fax (206-878-3338) or letter to:

DRBF
Board of Directors Elections Committee
19550 International Blvd. So Suite 314
Seattle, Washington 98188 USA

Nominations are due by July 1, 2012

Ballots will be distributed in August.



Ethics in Today's World of DRBs:

During a project site visit by the DRB, the contractor complains that DRB Chair has been having ex parte telephone conversations with the owner about what the DRB's position would be on disputes should they be brought to a hearing.

By Jim Phillips Ph. D.

The question posed at the end of the last volume of the *Forum* prompted Allen Thompson to write in from Miami. I am delighted to hear from members and readers about questions posed because the purpose of this column to generate discussion and sharing of ideas so that better decisions regarding ethical issues can be reached in our practice. Please feel free to also write/call in with a question that you wish to be discussed here.

Allen's comment is, assuming these circumstances arose when all parties and the full DRB were present, he recommends placing the issue before the parties, the owner and contractor with the DRB present, and allow them discuss it and attempt to resolve it. At a minimum, Allen recommends replacing the Chair in the same manner he/she was named originally.

I totally agree with Allen's comment. The DRB Chair has lost her/his neutrality by having ex parte discussions with a party. Canon 2 of the Foundation's Code of Ethics specifically prohibits these types of communications. The circumstances in this question, in my opinion, go beyond the creation of **an appearance** of a conflict of interest. They clearly constitute one. If the DRB chair has been providing "insider" advice or predictions to the owner about the projected DRB Recommendations regarding ongoing disputes on the Project, there is a loss of trust by the contractor for the integrity of the process. Moreover, the foundation of the DRB process, respected neutral construction industry professionals providing advisory recommendations for the early resolution of project disputes, has been shattered.

Moreover, the DRB process emphasizes project relationships. At the beginning of each project on which a DRB is sitting, there is a certain amount of

trust building required, especially for owners and contractors who are not familiar with the process. The integrity of these relationships is built on the premise that all parties hear the same information at the same time from the Board, so there is no appearance of a conflict of interest or favoritism by any Board member toward any of the parties. These circumstances do not pass the smell test for a conflict of interest.

Canon 5 of the Code of Ethics provides that the "DRB shall impartially consider all disputes referred to it." DRB recommendations are to be based solely on the parties' positions articulated at formal or informal hearings, the contract documents, and oral testimony and argument. The idea that there is no hearing by "ambush," and that each party has the opportunity to rebut and refute the other's interpretation of the contract documents and the events that transpired on the project. These circumstances belie the DRB process.

The DRB Foundation's *Practices and Procedures* Manual address the issue of the DRB chair communications with the parties between regular meetings. Section 3.4.5 envisions the Chair performing necessary administrative functions, such as drafting meeting agendas and corresponding with other Board members. However, it anticipates communications from the Chair, **to both parties simultaneously**.

There have been situations in my practice as a Chair where there is a need for telephone conversations with the parties for such tasks as scheduling hearing dates, resolving questions about the briefing schedule of the position papers and other legitimate questions that arise between regular meetings. I have very rarely, if ever, not held conference calls with both parties in attendance to accomplish these tasks so there is no appearance of impropriety.

There may be circumstances where an ex parte communication may be warranted in health emergencies or project emergencies, but even then, content about disputes should never be discussed without all parties in attendance. If the discussion starts moving toward content the Chair should end the call immediately or make the effort to reach the other party and bring them into the call. If there are ex parte telephone calls, I immediately call the other party and explain the nature and purpose of the ex parte call. If the communication is by email, I advise forwarding the email to all parties immediately.

Again, the idea is to avoid ex parte communications entirely and the appearance of conflicts of interest and partiality. Full disclosure should occur if ex parte communications occur.

Thanks again to Allen for writing in.

NEXT ETHICS CHALLENGE

Assume that you sat on a DRB and some time after the project has been completed and final payment has been made, the owner's Project Manager telephones you to request that you provide a recommendation for him/her for a new job with another owner or contractor.

How should you respond?

Ethics Commentary or Question?

Please contact:

Jim Phillips
DRBF Ethics Committee Chair
P: 804-289-8192
E: jphillip@richmond.edu

DRBF 2012 Event Calendar

May 3-5

DRBF 12th Annual International Conference
Dockside Conference Centre, Darling Harbour
Sydney, Australia

May 31

**DRBF Northwest Regional
Conference and Workshop**
Radisson Gateway Hotel - SeaTac Airport
Seattle, Washington, US

September *TBA*

UK Member's Meeting
Charles Russell LLP
London, UK

September 28

**Training Workshops:
Administration & Practice
Advanced/Chairing
Introduction to International Practice**
Sheraton Hotel & Towers
New York, New York, US

September 29-30

**DRBF 16th Annual Meeting
and Conference**
Sheraton Hotel & Towers
New York, New York, US

November 5-7, 2012

DRBF Regional Conference & Workshop
InterContinental Hotel
Doha, Qatar

**Visit www.drb.org for
complete event details
and registration.**

Follow the Procedure!

Lawsuit against individual DB members in Dubai offers important lessons in DB implementation

By Gwyn Owen

This article serves as a dire warning to all DB practitioners, following the (on-going) case involving the individual Dispute Adjudication Board members on the Mazyood Giga vertical construction development project at the Goldcrest Towers site within the Jumeirah Lakes Towers (JLT) development in Dubai UAE.

Although the detail may well be in the public domain, I will not give you the background to the parties nor of the DAB members in this case, as it is the principle of the matter which is of interest to readers. However it is sufficient to state that the JLT development project is one of the world's major vertical development projects and certainly the subject contract was for the signature project at JLT in Dubai. At the time of its delivery and completion launch in February 2008, the press statements hailed the project as “state of the art” put together by a “dream team” of contractors and consultants.

The contract was formed using the FIDIC 1999 Red Book which provided for the formation of a three person DAB. Such a DAB was constituted and a number of referrals were made which culminated in around 14 decisions being delivered over a period of some 18 months and awarding the contractor a quantum in the order of US\$43M.

DAB Decisions 1 – 8 took between 100 and 300 days to produce. They each consisted of around 60 pages of reasoning and determinations which were arrived at after months of detailed submissions, meetings and hearings. Collectively they awarded the contractor a sum of around US\$13M. At this point the Employer elected to sue the DAB members and attempt to have their decisions set aside by court action. It claimed that under local law the DAB agreements were in effect service contracts and due to alleged breaches of that contract the members

were required to repay all of their fees, the employers legal costs, the court costs and interest. At this time the contractor was not involved in the court proceedings. The claim against the DAB members at that time was in a sum in excess of US\$1.5M.

Undeterred by the court case, the DAB elected to continue with their duties and proceeded to consider the contractor's further referrals 9 to 14 on an *ex parte* basis. By doing so they impliedly represented to the contractor that their decisions would be enforceable under the FIDIC conditions. These new decisions awarded the contractor a further US\$29M.

Initially and in summary the DAB's defences in court to the employer's claims were that under the FIDIC terms, any dispute or claim arising from the Dispute Adjudication Agreement should go to arbitration. Furthermore, under the limitation of liability clause within their individual DAAs each member was not liable to either party for any refund of fees or to claims by third parties. They also pleaded that the 84 day referral period limit had been impliedly set aside by the parties due to their continued participation in the process. On a preliminary point the court held that the DAA's terms did not contain an arbitration clause as it was not expressly part of the Agreement and had not been specifically or physically signed as such. A mere mention of the incorporation of a term found in another document or contract was not deemed sufficient under local jurisprudence to render its inclusion into the specific DAA. The court also held that the same principle applied to the retainers and fees paid to the DAB as the incorporation of the FIDIC General Conditions of DAA were not physically included into the Agreement and hence also did not form part of the DAA contract.

The court having now established its own jurisdiction proceeded to consider the merits of the case. It appointed a “technical expert” who considered that

the limitation of liability clause within the DAA was effective to bar the recoveries sought by the employer. Hence the employer's case was lost. The stress levels of the DAB members must have been diminished at this point in time, but such euphoria was to be short lived.

The contractor had not been part of the initial court action and had not been paid any of the DAB's decided sums of US\$43M and had paid 50% of the DAB's fees for the first 8 referrals and 100% of the fees for the remaining 6 referrals as well as meeting its own legal and support costs. The contractor's ability to arbitrate the disputes and recover the sums which the DAB had found to be due was now also either lost or in question as the original 84 day DAB period had expired with seemingly no agreement to extend it and due to the considerable further period having expired any arbitration was placed possibly beyond reach as *inter alia* the limitation period to serve a valid Notice of Dissatisfaction had lapsed.

Could it get any worse? Well, yes it could. It transpires that in this jurisdiction there was no "several liability" provision in the DAB's retainer terms. Accordingly each DAB member was fully liable for the related liabilities of the other members arising out of the common undertaking. Such provisions have been generally legislated out in most countries, but clearly not in all jurisdictions, including this one. The contractor sought legal advice and has now confidently proceeded in a new action against each DAB member to recover not only its losses in all of the DAB proceedings but also its loss of opportunity in arbitration. This is a significant multimillion dollar action and its instigation, if not its outcome, will (or should) send shudders of fear down the spine of any DAB member who does not strictly follow the procedural rules. This court action continues at this time and its outcome is not as yet known.

It is clear that in this case the DAB should not have proceeded to consider referrals 9 – 14 *ex parte* while the outcome of the court action for referrals 1 – 8 was as yet unknown. They could initially have been considered to be in some way affected or even biased by the legal action taken against them personally by one of the parties that had elected not to be part of the subsequent 6 referrals. Furthermore it

was apparent that the local court now had jurisdiction over the contractor's claims and that the DAB had been negligent in exceeding the 84 day time limit set by the FIDIC terms. Seemingly the DAB could not in this case extend the 84 day period merely by the implied agreement of the parties simply due to their continued participation in the process. It was found by the local court that the FIDIC Sub Clause 20.4 requires that although the DAB may propose another extended period it was for the parties to approve any such other period. It is therefore recommended that any new period should be defined both by a specific date and time period and recorded as an express agreement to be effective in some jurisdictions. It has transpired from the first case that as a starting point it is arguable that each of the DAB's decisions that were delivered in a period in excess of 84 days was in fact invalid.

On a final note of caution to any practitioner on an international stage, it must be imperative that the agreed procedures should be followed and should any change become necessary such as an extension to the referral time period, then such change is to be expressly agreed and be recorded as such in a form which is adequate for the local jurisdiction. Furthermore it is also imperative that any prospective DAB member should ensure that if the local law requires it, then any term or condition to be incorporated into the DAA should be physically part of that agreement and signed as such. It seems that in some jurisdictions the incorporation of a term in another contract by reference only may not be sufficient. Practitioners are also advised to ensure that the default provisions of Clause 8 and 9 of the FIDIC General Conditions of DAA are adequate to ensure protection against suit.

Gwyn Owen can be reached by email at gwyn@easynet.co.uk.

DRBF Arrives in Lusaka

By Dick Appuhn

At the invitation of the Association of Consulting Engineers of Zambia (ACEZ) the Region 2 Training Committee under the direction of Chris Miers dispatched Andy Griffiths and Dick Appuhn to Lusaka to conduct a two-day training workshop. The event took place on 16 and 17 February of this year.

The programme was aimed at contract management procedures and the use of dispute boards under the FIDIC and MDB Harmonized Conditions of Contract for Construction. The event was well received and attracted nearly 50 delegates mainly from Zambian institutions. Several members of the African Development Bank mission Procurement Division

in Lusaka attended as did representatives of the local consulting engineering and contractors communities. The event also attracted interest in the Engineering College of the University of Zambia and was attended by persons giving instruction in contract management.

The African Development Bank mission in Lusaka through Suzanne Rattray of the representative ACEZ invited the DRBF to provide in-house training for its Procurement and Operations staff in the use of Dispute Adjudication Boards in contracts financed by that agency. The event will be open to other AfDB missions in the Region. Chris Miers is working with Suzanne with the aim of organizing that event later this year.

Northwest Regional Conference and Training Workshop May 31, 2012 - Radisson Gateway Hotel - Seattle, WA

This one-day conference and workshop covers the essential elements for a successful DRB process, starting off in the morning with the DRBF's essential Administration and Practice training. The afternoon conference will include presentations from an owner's and contractor's perspective with their views on "The Best Alternative to a Negotiated Settlement - Using the DRB Recommendation" as well as a panel of contractors and owners discussing such hot topics as "Meeting Frequency," "Lack of DRB Member Training," "Boards with Inexperienced DRB Members," "Use of Informal Hearings," "Conflicts of Interest," and "Quality of Written Recommendations." The afternoon session will also include a group discussion of mock cases.

Agenda

7:30 - 8:00 **Registration and Continental Breakfast**

8:00 - 8:30 **Introductions and Overview**

Morning Session: Administration & Practice Workshop A workshop designed for new practitioners, designed to educate participants about what DRBs are, how and why they work, and how they can be incorporated into a project.

8:30 - 10:00 **Administration & Practice Workshop** Parts 1 - 4, topics include What is a DRB?; Recommended Elements for a DRB; DRB Ethics; and DRB Selection

10:00 - 10:15 Coffee break

10:15 - 12:00 **Administration & Practice Workshop** Parts 5 - 9, topics include DRB Operations; Disputes; DRB Hearings; DRB Report; Three-Party Agreement, Guide Specification, and Operating Procedures

12:00 - 1:00 Lunch for all participants

Afternoon Session: Regional Conference

1:00 - 2:00 **The Best Alternative to a Negotiated Settlement - Using the DRB Recommendation**

2:00 - 2:15 Coffee break

2:15 - 3:45 **Panel Discussion:** Owner, contractor and legal representatives will discuss meeting frequency, conflicts of interest, lack of DRB member training, inexperienced DRB members, use of informal hearings, and quality of written recommendations.

3:45 - 4:30 **Case Studies**

4:30 **Close of Conference**

Register today at www.drb.org - Calendar of Events page

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Murray Armes

Contact details are available on the DRBF website: www.drbf.org

Interested in becoming a Country Representative?
Contact Coordinator Andy Griffiths at andyg@goba.co.za

(continued from page 1)

formed a joint venture to carry out the programme. These three representatives made a Study Team led by Professor Omoto.

In year 2008, a fact-finding survey was conducted by the Study Team with various organizations to confirm the present status of DB utilization, existing training for fostering DB adjudicators, and the possibility of cooperation with existing organizations which were training of DB adjudicators. The visited organizations included: King's College, University of London; the UK Institution of Civil Engineers and the UK Association of Consulting Engineers. The Study Team also participated in the 8th DRBF International Conference and DRBF Training Workshop, and had a meeting with DRBF Asian Group at Cape Town, South Africa.

JICA also conducted DB promotion seminars in Kyoto, Tokyo, New Delhi and Manila. Surveys were conducted in Kyoto and Tokyo in the form of a questionnaire to understand the participants' awareness of, and interest in the use of DBs, and how they assessed themselves in satisfying the DB qualification criteria. This was done to identify potential adjudicators and to assist the Study Team in deciding whether to recommend that JICA establish a program of training for aspiring adjudicators. The Study Team participated in the ASPAC General Assembly Meeting at the FIDIC Annual Conference in Quebec, Canada, and presented a draft action plan on promotion of the use of DBs in the Asian region. On this occasion Study Team exchanged views with FIDIC Executives, Dr. John Void (President), Mr. Gregs Thomopoulos (President elect) and Mr. Enrico Vink (Managing Director) and obtained positive response for FIDIC's cooperation for JICA promotion of the DB concept.

In year 2009/2010, JICA achieved two major goals: preparation of a "Training Kit for Adjudicators" and "Guidelines for Implementation of Qualification Procedure for DB Adjudicators". In addition, JICA conducted DB promotion seminars and surveys with Japanese ODA loan recipient agencies in Phnom Penh, Hanoi, Jakarta, Dhaka, and Colombo.

On the Training Kit, Mr. Gordon Jaynes assisted JICA very much. The Kit consists of a sample programme for a 5-day Training Workshop, a training text with a large set of PowerPoint slides to accompany the text, plus attachments including a sample Three Party Agreement for engaging a DB member, and a sample Site Visit Report. Also included is a set of notes for the trainer regarding the training text, as well as a sample hypothetical scenario for use in a case study as part of the training.

Also prepared was a "Guideline for Implementation of Qualification Procedure of DB Adjudicators" developed for the FIDIC Member Association or other accrediting organization to assess potential DB adjudicators and list those who have passed the assessment on a National List. (AJCE, FIDIC Member Association of Japan, created its qualification procedure and Japanese National List in May 2011 based on this Guideline.)

In year 2010/2011, JICA conducted a Training Workshop and a subsequent Assessment Workshop in Tokyo for Japanese candidates who wished to be listed in the Japanese National List of DB Adjudicators. FIDIC and DRBF fully supported the two Workshops and sent highly qualified trainers and assessors. Trainers consisted of Mr. Gordon Jaynes, Mr. Dick Appuhn and Professor Toshihiko Omoto. Assessors consisted of Mr. Volker Jurowich, Dr. Sebastian Hök and Professor Toshihiko Omoto. As a result, 10 out of 19 candidates have passed the assessment and 7 of them have applied for listing on the National List.

JICA conducted a survey of the status of National Lists of DB Adjudicators in Poland, Germany, and Romania before conducting the Tokyo Training and Assessment Workshops.

JICA also conducted survey to study the current status of the use of DB with the Multilateral Development Banks and the DRBF. The Study Team visited the Asian Development Bank (ADB, Manila), World Bank (Washington DC) and the Inter-American Bank (IDB, Washington DC). The general outcome of the survey was that the Banks were not involved in the use of DB and therefore they did not grasp the status of the use of DB. The Study

Team also had a meeting with DRBF at JICA USA Office in Washington DC. in which Mr. Harold V. McKittrick (Former DRBF President) explained in depth about the activities of DRBF and reported that DRBs were widely used in the US construction industry and most of the disputes (if not prevented) were resolved without use of arbitration or litigation.

In year 2011/2012, the JICA Dispute Board Manual has been developed by the Study Team with the assistance of Mr. Volker Jurowich, Dr. Sebastian Hök, and Mr. Gordon Jaynes. This manual was prepared to assist all the stakeholders in the successful operation of DB, by giving concise and practical guidance on how to implement and operate successfully a DB. This Manual is intended for use not only by JICA and Borrowers from the Japanese ODA but also by any other users of DBs, including other financing agencies, Employers, Engineers, and Contractors.

JICA also conducted DB seminars and surveys on the possibility of establishing National Lists of DB adjudicators in Vietnam, Sri Lanka, Indonesia, and the Philippines. In the seminar in the Philippines, Mr. Hamid L. Sharif, Principal Director of Central Operations Services Office of the Asian Develop-

ment Bank (ADB) gave a presentation focusing on the present obstacles against the dissemination of DB and expressed the view that ADB would make efforts to disseminate the DB concept and would like to cooperate with JICA in this regard.

In year 2012/2013, it is expected that JICA will have a Training Workshop and an Assessment Workshop at one location in Asia, for example in Manila, by gathering candidates who are to be selected from Asian countries, and the FIDIC Member Associations are expected to establish a National List in each country. It is also expected that JICA will select some projects of good size as "Pilot Projects" in which a DB would be properly established and operated through use of the guidelines and training materials which have been developed by JICA.

It should be mentioned that the DRBF Country Representatives assisted JICA for the successful seminars and surveys in each country. JICA and the Study Team wish to express appreciation to all who assisted their activities and would like to ask for their continuous cooperation in the future.

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JICA Manual Available Online

DRBF members may be interested to know that Japan International Cooperation Agency (JICA) has developed its guideline for the users of a Dispute Board as "JICA DB Manual" and up-loaded onto its website as follows:
http://www.jica.go.jp/english/operations/schemes/oda_loans/oda_op_info/guide/index.html

JICA states in the preface of the manual: "This manual is prepared to assist all the stakeholders in setting up the DB, by giving concise and practical guidance on how to set up and manage the DB; it is thus not intended to be used only for Japanese ODA Loan projects. It should be noted that, though JICA has other SBDs such as Procurement of Plant, Design, Supply and Installation and Procurement of Small Works which also involve DB or adjudicators in their clauses, this manual adopts FIDIC MDB Harmonized Edition (2010) as its basis and all the clauses mentioned in the manual corresponds to those in MDB Harmonized Edition."

"This is an open-sourced material and any questions and/or suggestions on the manual for its further improvement are most welcome at any time. Regardless of whether the project is financed by JICA or not, JICA wishes all the users, including the Financiers, the Executing Agencies, the Consultants, and the Contractors, great success in their projects."

JICA welcomes any questions and/or suggestions on the manual for its further improvement by contacting:

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WELCOME TO NEW DRBF MEMBERS

MEMBER ADDITIONS JANUARY THROUGH MARCH 2012

Simon Aronsohn
London, UK

Andrea Barsanti
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Cluj Napoca, ROMANIA

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Addis Abeba, AACA ETHIOPIA

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Do you know someone interested in joining the DRBF?

The DRBF attracts new members as the DRB process advances into new industries and regions throughout the world. Help us expand by sharing information with your colleagues. Complete membership information can be found on the DRBF web site (www.drb.org) or contact the main office for details.

Dispute Boards in Malaysia

Recent Changes in the Dispute Resolution Framework

By Sundra Rajoo¹, DRBF Country Representative for Malaysia

The most recent and exciting report from Malaysia this year is no doubt in the form of another alternative dispute resolution method aimed specifically for the construction industry. Malaysia is soon to follow the likes of the United Kingdom, Australia, New Zealand and Singapore in introducing the concept of statutory adjudication to the construction industry. The Construction Industry Payment and Adjudication Bill 2011 (CIPA) having recently passed through a first reading² in Parliament is poised to be enacted in April/May 2012.

The construction industry themselves, namely the Construction Industry Development Board (CIDB) and the Master Builders Association Malaysia (MBAM) have been pushing the government to enact this piece of legislation since 2003 to address the cash flow problems plagued by the industry. Delayed payment, non-payment and conditional payment namely 'pay when paid' and 'pay if paid' have been identified as the main bane of the construction industry. The main reason for this is because construction projects especially mega projects are stretched over long periods of time and involves a large sum of monetary payment per progress payment. Hence any delay or payment on condition would inadvertently have a huge impact on the construction project.

The introduction of the proposed Act is to overcome critical cash flow issues in the construction industry. It aims to remove the practice of conditional payments ('pay when paid' and 'pay if paid') and reduce payment default by establishing a cheaper, speedier system of dispute resolution in the form of adjudication. To this extent, the parties will be subjected to compulsory adjudication or statutory adjudication. This would mean that both parties will be brought into the adjudication process which is dictated by the provisions of CIPA.

According to the provisions of CIPA every construction contract made in writing that relates to construction work carried out in Malaysia would be affected by the regime of adjudication.³ This would essentially mean that if you have entered into a construction contract and there is a

problem with regards to payment, an adjudication process can be commenced either by you or against you.⁴ A construction contract can be a construction work contract and or a construction consultancy contract.⁵ The provisions of CIPA does not however, affect natural persons entering into a construction contract in respect of a building wholly intended for his own occupation and is four storeys and below.⁶

The cornerstone of adjudication is to hurry along cash flow and facilitate payment in the construction industry. Parties are free to opt for arbitration or court litigation to deal with the legal matters concerning the same. CIPA simply provides a statutory right for the parties to demand payment for work done and to create a simple process to ensure that a decision and payment is made. This of course is in the form of adjudication as a process. In fact, the parties can commence adjudication and concurrently arbitrate or litigate the matter as well. Naturally the adjudication process will be terminated if the dispute is decided by arbitration or the court before the adjudication decision can be made. If however, the adjudication decision comes first then it is a binding decision and payment must be made.

This form of dispute is not something new or related solely towards mega construction projects alone. Experience from other countries showed that the consequences of payment default can result in insolvencies. Several countries in the world namely the United Kingdom, several States and Territories in Australia, New Zealand and Singapore have taken these problems to heart and have enacted specific legislation to deal with disputes of this nature in the construction industry. The United Kingdom enacted the Housing Grants, Construction and Regeneration Act 1996, Australia saw the advent of the Building and Construction Industry Security of Payment Act 1999 amended in 2022 (NSW), Building and Construction Industry Security of Payment Act 2002 (Qld), Construction Contracts Act 2004 (WA), Construction Contracts (Security of Payment) Act 2004 (NT), New Zealand enacted the Construction Contracts Act 2002 and Singapore

¹ Director, KLRCA

² 1 December 2011

³ Section 2 CIPA - Application

⁴ Section 7 CIPA – Right to refer dispute to adjudication

⁵ Section 4 CIPA - Interpretation

⁶ Section 3 CIPA – Non application

ushered in the Building and Construction Industry Security of Payment Act 2004.

The Malaysian Construction Industry Payment and Adjudication Bill 2011

Although construction disputes can be solved by either going to court or arbitration, the parties are keen for an alternative form of dispute resolution. One that is contemporaneous, speedy and economical. Enter adjudication as a method of dispute resolution. Adjudication is a means of dispute resolution that allows a party (the claimant) who are owed monies under a construction contract to promptly obtain payment from the respondent, based on an assessment of the merits of the claim by an appropriately qualified and independent adjudicator.

The adjudication process is prescribed by the proposed CIPA Act itself. Unlike arbitration or mediation, adjudication does not require the parties' agreement for the process to begin. As such, once either party opts for adjudication it becomes a compulsory process wherein both parties are involved whether they agree to or not. In the United Kingdom, the adjudication process was described by Tony Bingham as "[A] dispute management process, which dramatically improves upon litigation performance and save huge resources in public money. The UK Courts are relieved of mass expenditure. The new system of Adjudication is cost effective and recommended world-wide. This machinery coupled with the new Payment Provisions has improved UK construction beyond all expectations . . . even the lawyers are delighted, though surprised at its success."⁷

Adjudication is not a dispute resolution system that provides the adjudicator with the luxury of time to hear all the parties and listen to evidence in great detail akin to an arbitration or court trial. A list of powers granted to the adjudicator can be found in the Act.⁸ Some of the procedures adopted by the adjudicator, besides conducting a short trial would be to review the construction contract and other documents⁹ to decide whether there is compliance with the standard of work required by that contract. The Evidence Act 1950 does not apply to adjudication

proceedings under this Act.¹⁰ The adjudicator can also visit the construction site to investigate the dispute.¹¹ The adjudicator would then give a decision with the primary aim to alleviate cash flow problems between the disputing parties and to remove payment conditions¹² such as 'pay when paid' and 'pay if paid'.

Adjudication is a dispute resolution system that is intended to be simple and fast. The process as prescribed by the proposed CIPA Act is concise and the time accorded to the adjudicator to produce the written decision itself is forty five (45) days from the receipt of the adjudication reply or response unless the parties extend the time.¹³ The entire process promises an outcome within an approximate one hundred (100) day time frame from the day the payment claim is served until the decision is passed. This would ensure that the cash flow problems in the construction industry can be dealt with swiftly.

Hence although the role of adjudication is limited to these circumstances as prescribed by the proposed Act, the adjudicator provides fast justice to the parties. Adjudicators are to always act independently, impartially and in a timely manner. The principles of natural justice are strictly followed and if there is any conflict of interest, the adjudicator should resign from office unless the parties agree otherwise.¹⁴

Statutory adjudication has the following characteristics -

1. It is a mandatory and statutory process that does not require the agreement of the parties' to commence the process.
2. It offers a much faster process compared to arbitration and court litigation because the time frame is as prescribed by the proposed CIPA Act itself. It is the only form of dispute resolution that has a statutory time period in which the dispute must be resolved in forty five (45) working days from the receipt of the adjudication reply or response.
3. It provides a binding decision on a payment dispute.
4. The parties can choose their own adjudicator or request for the Director of KLRCA to choose an adjudicator on their behalf.¹⁵

7 Bingham T, Adjudication and Claim Settlement for the Construction Industry, Seminar, Kuching, Sarawak, 14 April 2001, < <http://www.nadr.co.uk/articles/published/Adjudication/ConstructionBetterBuilding.pdf>>, (accessed on 30 Jan 2012)

8 Section 25 CIPA - Powers of the adjudicator

9 Section 25(m) CIPA

10 Section 12(9) CIPA - Adjudication and decision

11 Section 25(h) CIPA

12 Section 35 CIPA - Prohibition of conditional payment

13 Section 12(2) CIPA - Adjudication and decision

14 Section 24 CIPA - Duties and obligations of the adjudicator

15 Section 21 Appointment of adjudicator

The focus is primarily and steadfastly on removing cash flow problems in the construction industry by helping move things along by dispensing fast decisions on payment disputes alone. It was never meant to be a process that allows the parties the luxury to ventilate every single proposition in great detail unlike litigation in court or arbitration for that matter. A dispute referred to adjudication can, at the same time that the adjudication is taking place, also be referred to mediation, arbitration or litigation.¹⁶ This does not bring the adjudication to an end or 'affect it'.¹⁷ However, if another form of dispute resolution determines the matters first, the adjudicator must terminate the adjudication.¹⁸

The Role of KLRCA in the new dispute resolution framework

KLRCA has been named the official adjudication authority in Malaysia by virtue of Part V of CIPA. As adjudication authority,¹⁹ KLRCA is responsible for the determination of the standard terms of appointment and fees of that adjudicator and the setting of the competency standard and the criteria required of an adjudicator in Malaysia. In setting the competency and criteria required for adjudicators in Malaysia, KLRCA has prepared an Adjudication Training Programme to enable proper certification for all future adjudicators. It is mandatory for all persons who are interested in providing adjudication services to partake in the programme.

The Adjudication Training Programme would consist of specific lectures on the workings of the proposed CIPA Act, specific lectures on key legal areas/key areas in construction matters, training on writing adjudication decisions and a written examination which includes the drafting of a mock adjudication decision. Those who have successfully completed the KLRCA Adjudication Training programme will be awarded with a Certificate of Adjudication and would be eligible to apply to join the panel of KLRCA Adjudicators.

The criteria to be an adjudicator would include a relevant degree or diploma, a certain number of years' experience in the building and construction industry and a Certificate of Adjudication from KLRCA. This would effectively ensure that the quality of adjudicators is of the highest standard possible.

KLRCA has also been tasked with providing administrative support for the conduct of adjudication and any functions as may be required for the efficient conduct of adjudication as prescribed by the proposed Act. The centre has also been tasked with making recommendations to the Minister in the making of Regulations²⁰ and exemptions²¹ though the decision ultimately lies with the Minister. Conversely, the KLRCA in carrying out its functions under Section 32 shall obtain policy directions from the minister charged with the responsibility for legal affairs in Malaysia.

Statutory adjudication: The right solution?

At the end of the day, parties who are compliant with their construction contract have no need to fear. However, parties who are non-compliant would now be subject to statutory adjudication as the aggrieved party will as mentioned above, trigger the adjudication process. The more pertinent question at this stage, is whether this new form of statutory adjudication is the key answer to solving disputes for the construction industry?

CIPA is at the first reading stage, and the full impact of the proposed Act is yet to be known. Lessons from other countries seem to suggest that adjudication is an effective method and their construction industry has benefitted from it. Literature from Australia, United Kingdom, New Zealand and Singapore has indicated a successful, swift and cost-effective resolution of disputes in each relevant jurisdiction (Dancaster, 2008²², Uher & Brand 2008²³, Kennedy-Grant, 2008²⁴, and Chan, 2006²⁵). In the UK, adjudication is now being used more extensively than anticipated (Kennedy, 2006²⁶). Claimants are satisfied to a high degree with the NSW adjudication scheme. In

16 Section 37 Relationship between adjudication and other dispute resolution process

17 Section 37(2)

18 Section 37(3)

19 Section 32 Functions of KLRCA

20 Section 39 CIPA - Regulations

21 Section 40 CIPA - Exemptions

22 Dancaster, C. (2008), Construction Adjudication in the United Kingdom: Past, Present, and Future. *Journal of Professional Issues in Engineering Education and Practice*, 134 (2), 204-208.

23 Brand, M. C., & Uher, T. E. (2008). Review of the Performance of Security of Payment Legislation in New South Wales.

RICS Construction and Building Research Conference 2008 (COBRA 2008). Dublin: Royal Institution of Chartered Surveyors (RICS).

24 Kennedy-Grant, T. (2008). Adjudication: The New Zealand Position. *Construction Law Journal*, 24 (5), 382-409.

25 Chan, P. C. (2006). Security of Payment Legislation - Case of a Blunt but Practical and Equitable Remedy. *Journal of Professional Issues in Engineering Education and Practice*, 132 (3), 248-257.

26 Kennedy, P. (2006), Progress of Statutory Adjudication as a Means of Resolving Disputes in Construction in the United Kingdom. *Journal of Professional Issues in Engineering and Education Practice*, 132 (3), 236-247. p 244.

New Zealand, anecdotal evidence suggests that there has been a positive change in the culture of payment since the introduction of adjudication under the Construction Contracts Act 2002 (Kennedy-Grant, 2008). Similarly in Singapore, adjudication as underpinned by the Building and Construction Industry Security of Payment Act 2005 has had a positive impact on the industry players' mind set towards payment.²⁷

Many believe that adjudication is a new layer to the methods of dispute resolution in Malaysia. It is definitely not a pre-condition to a court litigation, arbitration or mediation for that matter, nor does it prevent parties from using those forms of dispute resolution means including a dispute review board. For all intents and purposes it does not replace the existing dispute resolution systems but merely adds on to it. It provides the parties with another useful form of dispute resolution which promises to be fast, cheap and effective.

The employers and those in the construction industry or related industry must be well prepared to handle the effects of the proposed Act whether commencing an adjudication or defending themselves against an adjudication action. Certain sectors of the industry felt that more could have been done. Be that as it may, what is important is that the problems highlighted by the parties in the construction industry are being dealt with seriously.

Dispute review board and CIPA 2011: A comparison in terms of effectiveness as a dispute resolution mechanism

In order to analyse the effectiveness of statutory adjudication, a comparative review will be conducted with the dispute review board (DRB) as an anchor for the analysis.

Both CIPA and the DRB are created and promoted by the players of the construction industry itself. No other dispute resolution mechanisms share this common bond but for CIPA in the form of statutory adjudication and the DRB in the form of a pre-contractual agreement.

Both statutory adjudication and a dispute review board are concepts created to alleviate problems in the construction industry. The main difference is that statutory adjudication operates upon a payment dispute coming into effect whereas a dispute review board operates from the outset of a construction contract to prevent a dispute from occurring.

In comparing these two concepts, the key issues of applicability, processes and the presiding umpire over the matter will be reviewed. The idea of the comparison is to explore both concepts as a method of dispute resolution and determine whether the same outcome is achieved at the end of the day.

Applicability

First and foremost, CIPA statutorily dictates the applicability of the provisions. The proposed Act is only invoked if a payment dispute has arisen whereupon the adjudication process commences. The proposed Act applies to every construction contract²⁸ made in writing relating to construction work carried out wholly or partly within Malaysia including Government contracts.²⁹ A DRB on the other hand promotes the principles of the freedom of contract. It is generally up to the parties whether they are serious about dealing with a future dispute. If the answer is in the affirmative, the contracting parties must take specific actions to facilitate the establishment and operation of a DRB the moment the contract has been executed. The dispute resolution process is not forced upon the parties unlike a statutory adjudication. Either way, the outcome is that a dispute resolution mechanism is available, either through a pre-emptive contractual decision or by statute. This would save the parties the need to opt for arbitration or litigation.

Processes

CIPA enables either the unpaid party or a non-paying party to refer the dispute arising from a payment claim to adjudication.³⁰ As such, this enables either party to bring an action in adjudication. Reference can be made to a research paper by M.E. Che Munaaim,³¹ where he stated that the key features of the effective operation of an adjudication regime is that firstly adjudication should be used

27 Teo, P. J. (2008). Adjudication: Singapore Perspective. *Journal of Professional Issues in Engineering Education and Practice*, 134 (2), 224-230.

28 The Bill is wide ranging and covers inter alia, the oil and gas industry, petrochemical, telecommunication, utilities, infrastructure, supply contracts, project and management.

29 Section 2 CIPA - Application

30 Section 7 (1) CIPA - Right to refer dispute to adjudication

31 Che Munaaim, Key Features to an Effective Adjudication Regime, AUBEA Conference, Melbourne July 2010, www.msdu.unimelb.edu.au/events/conferences/aubea2010/, (accessed 30 Jan 2012)

to help the right vulnerable parties which are contractors, subcontractors, consultants and suppliers. Employers may also be equipped with the right to adjudication to enable them to claim ex-contractual claims. In other words, adjudication should be accessible to both parties to prevent a severe imbalance. Similarly for a DRB, a dispute may be referred by either party according to the DRBF Practices and Procedures.³²

Understandably adjudication must be speedy however this does not mean that the entire system must be rushed. Compared to other jurisdictions in the world, which have a basic 28 day turnaround time for adjudicators to submit a decision, CIPA allows for a 45 day period. Thus providing ample time for careful consideration is granted. A DRB system also promotes an efficient dispute hearing by ensuring a prompt and economical system to handle the matter. Both systems seem to encourage a faster method of resolving disputes, though CIPA provides strict timelines that need to be complied with whereas a DRB is more flexible. In fact, in this context a DRB is more efficient in that it helps head off problems, and meets at the jobsite to deal with matters even before it can occur. As such there is no need for strict timelines after the fact.

A faster and efficient dispute resolution mechanism would no doubt save costs for the parties. The DRB process is very cost effective when compared with other methods of dispute resolution, and especially so if the high costs of arbitration or litigation is considered. Disputes are addressed soon after a problem arises between the parties. Early intervention greatly reduces costs for the parties in terms of legal and consultant fees, as well as the loss of productive project time for the owners and contractors. Conversely, statutory adjudication may not be able to save costs as effectively due to the tight timelines which may in fact cause higher costs as parties and lawyers are forced to prepare their responses or case in a very short timeframe.

The role of the adjudicator and the DRB is similar. The adjudicator has the authority³³ to conduct mini hearings, hear the parties out, focus on the documentation provided in the hearing, conduct site visits and ultimately come to a decision in the form of a written adjudication decision. A DRB involves a review which includes a hearing at which each party explains its position and answers questions. In arriving at a recommendation, the DRB consid-

ers the relevant contract documents, correspondence, other documentation, and the particular circumstances of the dispute. The outcome is a non-binding recommendation given by the DRB to the parties to resolve their dispute. The process of dispute resolution seems similar except that an adjudication decision is binding in the interim stage, meaning that it is binding until and unless a court or arbitration decision is given. A DRB recommendation however has lesser weight and is not binding.

Other jurisdiction have express stipulations against contracting out, in New Zealand there is Section 12 of the Construction Contracts Act 2002 whereas in Singapore there is Section 36 of the Building and Construction Industry Security of Payment Act 2004. There is no similar Section 40 which deals with the exemption exercised by the Minister, it appears to be little room is given for any attempt to contract out of CIPA. Perhaps the only avenue available to avoid the clutches of CIPA is by seeking an exemption from the Minister under Section 40 itself. The extent of this exemption appears to be from all or any provisions of CIPA as such it is a very wide power which needs to be exercised sparingly. A DRB on the other hand operates differently. As the DRB derives its authority from the contract, it is a given that the DRB can be dissolved via an agreement by both parties. In these circumstances, the dispute or future disputes would have to proceed to arbitration or litigation. Statutory adjudication on the other hand is an iron clad dispute resolution mechanism that protects the unpaid party.

An effective and important provision in CIPA is the prohibition of conditional payment following Section 35. Any conditional payment provision in a construction contract in relation to payment under the construction contract is void. This is as mentioned earlier the “pay when paid” and “pay if paid” clauses. This reverses the judicial decisions in cases such as *Pernas Otis Elevator CO Sdn Bhd v Syarikat Pembinaan Yeoh Tiong Lay Snd Bhd* (2004)5 CLJ 34 and *Asiapools (M) Sdn Bhd v IJM Construction Sdn Bhd & Ors* (2010)3 MLJ 7, as such effectively curbing the pervasive unfair cash flow risk transfer practice prevalent in the construction industry. A DRB lacks statutory force. However, a DRB mechanism is more conciliatory in nature and involves the parties negotiating and discussing the problems and devising methods to overcome such problems unlike a statutory mechanism that forces and dictates to the parties regardless of the situation.

32 The Dispute Resolution Board Foundation, Practices and Procedures http://www.drb.org/manual_access.htm (accessed 8 Mar 2012)

33 Section 24-27 CIPA

Key Question	Statutory adjudication	DRB
Operative date	After the dispute	Before a dispute
Option to choose ADR	No choice	Freedom to choose
Authority	By Statute	By Contract
Initiation of ADR	Either party	Either party
Speed	Fast	Fast
Cost in comparison	High	Low
Lawyers	Optional	No
Role of 'judge'	Inquisitorial	Inquisitorial
Avoiding the ADR	No contracting out	Can end the contract
Force of law	Statutory force	No statutory force
Binding	Temporarily binding	Not binding

Figure 1

Findings

A simple comparison indicates that there are both advantages and disadvantages of both these dispute resolution methods. Clearly a DRB is a pre-emptive method that is employed which appears to be an effective way to deal with problems that may arise during the construction contract. It is conciliatory in nature and promotes a better platform for discussion and negotiation which in the long run preserve the business relationship of the parties. However, it lacks the bite of law and the recommendation from the Board may not be effective as it is not binding on the parties but merely persuasive. Statutory adjudication, introduced by CIPA on the other hand, has the bite of law, though temporary, however it lacks the conciliatory nature of a proper ADR system. It is a hard hitting process which is focused and determined to solve cash flow problems in the construction industry and leaves the parties with little choice but to comply, rightly or wrongly. Reference to experience in other countries as noted earlier in this article, from the UK, clearly indicates that this no nonsense hard hitting legislation appears to have served its purpose. There seems to be a dip in matters going for arbitration or litigation in the industry which can only mean that the disputes have been settled at an earlier stage presumably via statutory adjudication.

Be that as it may, a DRB is an effective system to have as it 'nips the problem in the bud' and prevents any escalation of an issue into a full blown dispute. Perhaps, both statutory adjudication and a DRB method should

be employed by the construction industry. First a DRB method etched into the construction contract, guiding work along amiably and should there be payment issues that arise that cannot be solved then their statutory right under CIPA can be triggered to ensure a statutorily enforced decision.

Conclusion

The construction industry in Malaysia is seeing great transformation in its dispute resolution framework. Special attention is given to resolving the industry's main problem relating to timely payment. An effective, swift and robust dispute resolution is a need of the hour in ensuring that the industry grows at a world class level. A firm hand is required. The 'man of the hour' no doubt is the Construction Industry Payment and Adjudication Bill 2011.

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DRBF Kathmandu Colloquium

FIDIC, MDB and Dispute Boards: Successful Use in International Construction Contracts

By Sanjeev Koirala, DRBF Country Representative for Nepal

The aim of the Dispute Resolution Board Foundation (DRBF) is "fostering commonsense dispute resolution worldwide" by promoting the use of Dispute Boards (DBs). The Construction Industry in Nepal is also increasingly using the 1999 FIDIC Conditions of Contract and The Multilateral Development Banks, including The World Bank, the Asian Development Bank and Japan International Cooperation Agency (JICA) have adopted the FIDIC MDB Harmonized Conditions of Contract for Construction.

Hence, DRBF Kathmandu Colloquium was organized to promote the use of Dispute Board (DBs) which discussed the procedures and application of the dispute procedures under the FIDIC Conditions of Contract especially the current edition of the FIDIC MDB Harmonized Conditions for Construction, used by the World Bank, Asian Development Bank, Japan International Cooperation Agency and other multilateral and bilateral lenders and grantors of funds for development. The topic was clearly of widespread national interest. Approximately 50 delegates from different organizations attended the Colloquium.

The event took place at Hotel Hyatt Kathmandu Nepal starting 9.00am to 5.30pm and was followed by a cocktail reception at Rox Bar, Hotel Hyatt. The event was organized by registration fee of USD 120 per participation. The event management was done by Lama Construction Pvt. Ltd and sponsored by ICTC and Kantipur hardware.

Speakers from abroad and Nepal participated in the colloquium creating a fruitful environment for the dynamic discussion of the use of DB in Nepal from national and international as well as contractors and employers perspectives.

International guest speakers on the event were:

- Mr. Gordon Jaynes - Lawyer/Adjudicator, DRBF Charter Member and Member of the DRBF's first Board of Directors, London, UK
- Prof. Dr. Toshihiko Omoto - University of Kyoto, Japan and Country Representative of DRBF, Japan, FIDIC President's List of Approved Adjudicators.

CONFERENCE AGENDA

<p><u>Application of Dispute Boards in Nepal</u> <i>Mr. Dinker Sharma, Project Director, Urban and Transport Project, Ministry of Physical Planning and works.</i></p>
<p><u>Dispute Board-Relief or Burden? A perspective from Nepalese Contractor</u> <i>Mr. Ramesh Sharma MD Sharma and Company Pvt. Ltd Representative of Federation of Contractor Association of Nepal.</i></p>
<p><u>Legal Aspects of DB in Nepal-Recommendation or Decision</u> <i>Mr. I.C. Sharma, Lawyer/Adjudicator</i></p>
<p><u>"Three Party Agreement" and "Procedural Rules"</u> <i>Prof. Dr. Toshihiko Omoto, University of Kyoto, Japan and Country Representative of DRBF, Japan</i></p>
<p><u>JICA Cooperation in Nepal</u> <i>Mr. Sourab Rana, Program Officer, JICA, Nepal</i></p>
<p><u>"ADR Growing Internationally" and "Dysfunctional Boards and How to Avoid Them"</u> <i>Mr. Gordon Jaynes, Lawyer/Adjudicator, DRBF Charter Member and Member of the DRBF's first Board of Directors, London, UK</i></p>
<p><u>"The Comparative Time and Expense of International Commercial Arbitration"</u> <i>Mr. Gordon Jaynes, Lawyer/Adjudicator, DRBF Charter Member and Member of the DRBF's first Board of Directors, London, UK</i></p>

National guest speakers were:

- Mr. Dinker Sharma, Project Director, Urban and Transport Project, Ministry of Physical Planning and works.
- Mr. Ramesh Sharma MD Sharma and Company Pvt. Ltd Representative of Federation of Contractor Association of Nepal.
- Mr. I.C. Sharma, Lawyer/Adjudicator
- Mr. Sourab Rana, Program Officer, JICA, Nepal.

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

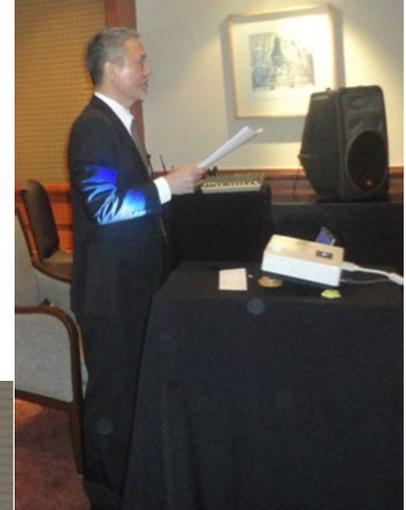
- Main obstacles in resolving disagreements while considering typical actions which escalate normal disagreements into formal disputes;
- Legal aspect of DB and problem of enforcement in Nepal;
- The challenges of operating clause 20 of the FIDIC conditions;
- Pathological DBs, considering actions which frustrate the effective use of DBs;
- Effective use of the DB process (ad hoc DBs, local Vs foreign DB members, use of retainers);
- The remuneration of DB;
- JICA Cooperation in Nepal and request for cooperation for strengthening and training of DB process in Nepal.

All the colloquium papers were supplied in folders to the participants which included:

- FIDIC MDB Harmonized Conditions of Contract for Construction (June 2010 Edition)
- Schedule of overheads used by the Colloquium Leaders
- A hypothetical case, which will be used in discussions between the Colloquium Leaders and the delegates.

The Colloquium was a success. Nevertheless the organizing team that worked for the success of this colloquium were: Sanjeev Koirala, Anish Baidya, Chhabi Lal Chauhan, Dev Kumar Acharya, Roshan Pradhananga, Rajesh Shrestha, Pasang Sherpa, Ritica Lacaul, Binaya Parajuli, and Prem Parajuli.

Sanjeev Koirala can be reached by email at Sanjeev.koirala@gmail.com



Dr. Toshihiko Omoto addresses delegates at the colloquium.



Dispute Boards and Construction Contracts now on TV!



By Alina Oprea, Member, DRBF Board of Directors, Region 2 and Country Representative for Romania

Now people can see and hear about Dispute Boards and construction contracts on TV!

AMIABIL TV, the first online television made exclusively of experts, consultants and specialists, professionals of the main areas of market professions in Romania, offered us the chance to talk about Dispute Boards, dispute prevention within construction contracts and about the construction contracts themselves...

Of course we, Alina Oprea and Bogdan Oprea, took this opportunity and enthusiastically proceeded, especially because the invitation come from a dear friend, Zeno Sustac, one of the main promoters and engines (I am an engineer, I can't help using technical words and ideas...) of mediation in Romania, a very positive person and true professional for whom "only the sky is the limit"! By the way, AMIABIL TV can be translated in English as "FRIENDLY TV".

Starting with the 7th of March 2012, on each Wednesday from 19.00 Romanian hour (and replayed each Thursday at 15.00 Romanian hour), together with guests from the construction and dispute prevention and settlement fields, we have the talk show "War and Peace in Construction" on these challenging subjects.

So far we have talked about general issues related to Dispute Boards and dispute resolution methods – especially Dispute Boards and arbitration. We extensively debated with Mrs. Crenguta Leaua, an experienced international arbitrator, the necessity of using the Dispute Boards and complying with its recommendations/decisions, and we talked about risks in the construction contracts. We will continue with subjects related to war and especially peace in construction contracts. Any suggestions and comments are welcomed either on the AMIABIL TV email addresses, office@amiabiltv.ro or contact@amiabiltv.ro or on our email addresses: alina.oprea.v@gmail.com or bogdan66@gmail.com.

The online broadcast, as well as recorded TV shows, can be viewed on the AMIABIL TV web site, www.amiabiltv.ro.

"AMIABIL TV - Watch the world through the eyes of our experts!" is written on their web site. Their online launch was on 5th of March 2012, and already over 25 sites have re-transmitted it in the first month of release. On April 6, www.amiabiltv.ro had page rank 4 on www.telenet-live.com. Good and passionate professionals work hard, but with pleasure, through their talk shows and on the technical side of the TV station to make this possible.

I will let you know about further developments. It is a great opportunity to promote Dispute Boards and their value for successful contracts and projects.





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Mark your calendar
and plan to join us
in the Big Apple!

**DRBF 16th Annual Meeting and Conference
Training Workshops on September 28, 2012
Conference on September 29-30, 2012
Sheraton Hotel & Towers ~ New York, New York**

Hosted for the first time New York City, the DRBF's 16th Annual Meeting and Conference will integrate practical experience shared by users of the DRB process with in-depth analysis of this evolving dispute resolution process. With an emphasis on the DRB's unique role in dispute avoidance as well as timely resolution, conference delegates will explore ethical and legal issues, lessons learned from existing DRB programs, and future expansion of the process. Participants will also engage in practical exercises that deepen understanding of the successful implementation and use of Dispute Boards.

Social functions include a welcome reception and the popular Al Mathews Awards Dinner, providing ample opportunity for interacting with conference participants, speakers and sponsors.

For more information, visit www.drb.org

