

## Adjudicator Promotion in Asian Region

Toshihiko Omoto

Professor, Graduate School of Management, Kyoto University

Yukinobu Hayashi

General Manager, PPP/PFI Project Promotion Division, Nippon Koei, Co., Ltd.

Yoshihiko Yamashita, *\*(Speaker)*

Secretary General, Association of Japanese Consulting Engineers (AJCE)

### Abstract

The Conditions of Contract for Construction (so called Red Book) issued by International Federation of Consulting Engineers (FIDIC) has been widely used for the projects financed by Multilateral Development Banks (MDBs) and Japan Bank for International Cooperation (JBIC). FIDIC made a major revision of Red Book in 1999 and Dispute Adjudication Board (DAB) was introduced in the process of dispute resolution. MDBs published MDB Harmonized Edition as their standard bidding documents in 2005 based on FIDIC Red Book 1999.

New Japan International cooperation Agency (JICA) was established in Oct 1, 2008 as the results of merger between former JICA and former Japan Bank for International Cooperation (JBIC). New JICA has been in the process of introducing its Sample Bidding Documents with the use of MDB Harmonized Edition.

It is expected that the project employing DAB will be increasing. However, most of the FIDIC's qualified adjudicators are in the countries far from the Asian countries, hence it is essential to increase number of DAB adjudicators in the Asian region where most of JICA ODA loan projects are executed for smooth implementation of those projects. To cope with these requirements, former JBIC funded the study to Kyoto University and to AJCE. The major tasks of the study, among other things, were 1 ) Holding the seminars in and out of Japan including preparation of the seminar materials and 2 ) Study of the promotion scheme of DAB adjudicators in the Asian region.

As the part of study, seminars were conducted in Tokyo, Kyoto, Manila and Delhi. In addition, progress and proposal of the study, action plan in particular, were presented in ASPAC regional session, and ASPAC General Assembly Meetings in the 2009 FIDIC Conference. Proposal on the Action Plan for the promotion of adjudicators in the Asian region was supported favorably by those who attended the ASPAC meetings.

On 27 and 28th October, 2008, Kyoto University held "Inaugural Conference on Construction Law and Economic Circle in Asia and Pacific (CLECAP) "as the first step to establish a permanent centre which provides, among other things, education, training and accreditation of Dispute Adjudicator Board members.

### *Speaker:*

Yoshihiko Yamashita, Ph.D.

Secretary General,

Association of Japanese Consulting Engineers



(AJCE)

## **1. Dispute Adjudication Board Seminars**

### **(1) Objectives**

Seminars on Dispute Adjudication Board (DAB) were held in Tokyo, Kyoto, Manila, Delhi and Quebec for the following objectives

- To explain that dispute resolutions performed by DAB are increasing.
- To promote understanding of the basic knowledge of DAB.
- To explain practical examples of DAB and to enhance understanding of effect of DAB.
- To explain a framework of the promotion plan of adjudicators.
- To listen participants' opinions on DAB operation, after which will be used as references for drafting promotion plan.

### **(2) Seminar Outcomes**

#### **1) Tokyo and Kyoto Seminars**

DAB Promotion seminars were held in July 11th and 18th, 2008 in Kyoto and Tokyo respectively. Programs of the seminars were i) Promotion Plan of DAB/ Adjudicators in Asian Region, ii) Detail explanation of DAB in FIDIC Conditions of Contract, iii) Practice of DAB and iv) Panel Discussion. One hundred thirty two participants attended for the seminars. They were from consulting firms, contactors, universities, national government, ODA clients, manufacturers, etc.

Survey was conducted in the form of questionnaire i) to understand participants' interest and awareness on DAB, ii) to find out understanding on DAB qualification criteria, iii) to find out potential adjudicator candidates, and iv) as the results, to draft adjudicator educating program. Fifty-one participants out of a total of 132 who attended either Kyoto or Tokyo seminar answered the questionnaire. Fifty-one % of the answers showed positive interest in DAB. Among those who were interested in DAB, 23 % of them thought that they would satisfy the qualification criteria set forth for FIDIC's president list of adjudicator. This means both self-development and assistance from outside are essential for adjudicators' promotion.

#### **2) Delhi Seminar**

The Seminar was held on Aug 22<sup>nd</sup> 2008 in the India Habitat Center of New Delhi... This seminar was held in support of Mr. K.K.Kapila, the chairman of Consulting Engineers Association of India (CEAI). In this seminar, presentations were given by JICA, Prof. Omoto, Mr. Sharan, Director of the Ministry of Shipping and Road Transportation on the present condition of dispute resolution in construction contracts in India and AJCE. Participants were from CEAI secretariat and executives, consulting firms, private sectors, experts on dispute resolution, government sector, Japan Bank for International Cooperation. It was acknowledged that i) adjudication is not yet popular in India. Therefore, there is no adjudicator list at present, ii) Arbitration and the Court. Arbitrations are conducted in accordance with the Arbitration and Conciliation Act 1996, iii) recommendations given by the Dispute Review Board are not enforceable, and it becomes a challenging problem that a dispute resolution tends to be prolonged. CEAI agreed with promotion of adjudicators for international DAB and would like to provide necessary support.

#### **3) Manila Seminar**

This seminar was held on Aug 28<sup>th</sup> 2008, in the Linden Suites of Manila under the support by Mr. Salvador P. Castro, the Philippine representative of DRBF and executive committee member of ASPAC. A total of 111 persons attended the seminar. They were from DRBF, international financial institutions,

contractors, consultants, Judge, academics, Professional Association, law firms and experts of dispute resolution. Major part of the seminar was similar to those of Kyoto and Tokyo. It was observed that DAB concept has not been widely accepted in the Philippines and the government does not adopt DAB clause proactively at present.

#### **4) FIDIC Conference in Quebec, 2008**

During the 2008 FIDIC Annual Conference held in Quebec, Canada, Action Plan for the promotion of adjudicators in Asian region was proposed based on the outcomes of the past seminars. Firstly, meeting with FIDIC executives was held as to confirm objectives of the Action Plan if it is agreeable and supported by FIDIC. It was confirmed and supported by FIDIC executives; FIDIC president: Dr. John Boyd, FIDIC president elect: Mr. Gregs Thomopoulos, and FIDIC Managing Director, Mr. Enrico Vink.

Then, the Action Plan was presented to ASPAC General Assembly Meeting where majority of ASPAC Member Associations gathered. It was unanimously supported by Member Associations of ASPAC.

## **2. Promotion of DAB Adjudicators in the Asian Region**

### **(1) International Organization of DAB**

As international organizations related to DAB, there exist DRBF, FIDIC, ICC etc. They provide manuals or set up certification systems of adjudicators for the promotion of DAB. In addition, some of the other organizations that provide services of arbitration, mediation and other ADR have also recognized DAB as a new method of Dispute Resolution. They are supporting activities such as assisting introduction of DAB and, making its guidelines, etc.

### **(2) Promotion Plan of Adjudicators in the Asian Region**

The promotion plan of DAB adjudicators in the Asian region was elaborated by taking actual practices of these international organizations into consideration.

#### **Policy for Adjudicator Training**

Training of candidate adjudicators will be implemented based on the following policies.

##### a ) Candidates of the Training

In Japan and Asia, persons who are interested in DAB and satisfy the minimum requirements will be screened and considered as the candidates of the Training. The screening criteria would be i) experience in overseas projects, ii) proficiency in English, and iii) qualifications or experiences in contract management, dispute resolution, arbitration etc.

##### b ) Facilities and Places of Training

In order to undertake training program in Asian region, it is preferable to establish a new platform like a “training center” to support training, qualification certification, dissemination of information and other activities.

##### c ) Training Programs

For the training and continuous education of qualified adjudicators, development and implementation of three kinds of programs, i.e. i) the adjudicator training program, ii) continuous education program, and iii) DAB promotion program are required. Furthermore, the adjudicator training program would be composed of three sub-programs, i.e. “introduction program”, “basic program” and “practical program”.

##### d ) Qualification Requirements & Certification System

It is preferable that the qualification assessment (or examinations) is carried out by CLECAP. The assessment is subject to availability of facilities and reliable examiners while keeping impartiality of the assessment process. Following the results of assessment, FIDIC Member Associations such as AJCE will promote and maintain National List.

e ) Lecturers for Training-the-trainers

Potential candidates of the lecturers would be DAB adjudicators, lawyers, arbitrators, expert practitioners etc. The lectures should be familiar with FIDIC's contract documents and have abundant practical experiences in contract management and dispute resolution. Based on the importance in practical experience, experienced practitioners on DAB should be appointed as lecturers. In addition, it will be desirable to recruit lecturers in the Asian region from economical aspect.

f ) Training Fees

To implement trainings, following costs are necessary: i) establishment and operation of the training body, ii) development of education materials, and iii) implementing seminars and training courses. The training body needs to cover the costs such as lectures' remuneration, qualification examination and operational costs. If these costs are covered by students' tuitions only, the students' burden might be so heavy that they may lose incentive. Therefore, it would be most practical to find ways for financial support from JICA or other financial institutions.

### **(3) Action Plan**

Based on the above, Prof. Omoto and Mr. Hayshi (AJCE) proposed the Action Plan in ASPAC GAM, FIDIC Quebec Conference, 2008 as shown below which was unanimously supported by ASPAC MAs:

<p><b>Action Plan I: Establishment of new organization for training and assessment of adjudicators</b></p> <p>I-1 : Establishment and maintenance of new organizations</p> <p>I-2 : Hold Seminars and training workshops</p> <p>I-3 : Hold introduction seminars for promotion of DB in the Asian region</p> <p>I-4 : Disseminate information to persons and candidates who are interested in DAB; hold conference regularly (e.g., every year)</p> <p>I-5 : Conduct qualification screenings of adjudicators in the Asian region</p> <p><b>Action Plan II: Support the maintenance of FIDIC adjudicators' National List</b></p> <p>II-1 : Maintain FIDIC National List in Japan</p> <p>II-2 : Support maintenance of FIDIC National List in the Asia</p> <p>II-3 : Support nomination of DAB based on the National List</p>
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### **3. Challenges on the Promotion of Adjudicators**

Regarding execution of DAB promotion programs, challenges are listed as below:

### 1) Implementation of Education Linked to Practice

In practice of DAB, not only the knowledge of contract and technology, but also abundant experience in dispute resolution is indispensable. FIDIC places importance on practice in qualification examination and training. Education program in this study also proposes to formulate lectures that are based on practice and relevant case studies as much as possible. In addition, it is indispensable to actually experience adjudication in projects.

Therefore, it is important for candidates to actually participate in projects which adopt DAB as trainees and experience DAB training. It is also important to secure such practical projects. In addition, it is recommended that many practitioners are invited as lecturers for training as well as seminars and workshops.

### 2) Cooperation with FIDIC and DRBF

Present DAB promotion and dissemination programs are linked to FIDIC's promotion of National List. As the DRBF is also studying qualification, registration and listing, it may conflict with those of FIDIC. It is a great concern to eliminate double qualifications/ standards, so as to maintain mutual collaborative relationships.

### 3) Financial Issues

Funding from lenders like JICA and other public and private development banks is indispensable for the activities of newly proposed training organization. It is necessary to estimate initial and operating costs for the training organization from the planning stage and to request JICA and other financing institutions for sounding the possibility of financing. It is important to resolve financing issues as it is essential subject for successfully operating the program.

### 4) Enhancement of Awareness of Stakeholders including Clients

In developing countries, bilateral contracts and firm implementation of the contracts are uncertain as compared with those in developed countries. It is feared that even if DAB clauses are integrated in contract documents, owners may twist DAB terms in their favors, which lead to the consequences that DAB may not function effectively. There are cases as observed in India that the DAB system conflicts with domestic law and culture. In order to function positive and effective use of DAB, not only owners but also all the persons working for projects such as contractors and consultants need to strengthen awareness. In order to remediate constraints between institutional frame works of DAB, law and culture, they have to be compromised each other.

Therefore, as mentioned in the action plan, it is important not only to promote and continue education of DAB, but also to hold introductory and continuing seminars for all the stakeholders. In addition, it is necessary to examine by legal experts how DAB functions with reference to laws in each country.

## **4. Establishment of New Organization for Training and Assessment of Adjudicators**

The Graduate School of Management, Kyoto University has a sub-organization named the Management Research Center which performs various research activities. Under this Research Center, establishment of "Construction Law & Economics Circle in Asian & Pacific Rim (CLECAP)" is being planned. The kick off Conference was held on 27-28 Oct, 2008 at Kyoto University, Japan. With the strong support from the conference participants including JICA, AJCE, and FIDIC's president list of adjudicators, the CLECAP successfully launched its journey.