



Dispute Board Manual

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Japan International Cooperation Agency

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DISPUTE BOARD MANUAL

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Preface

Japan International Cooperation Agency (JICA) publishes its Standard Bidding Documents (SBD) that are recommended to be used by the Executing Agencies under projects financed by Japanese ODA Loans from 2012. The most frequently used SBD are for Procurement of Works (SBD Works), which contain the General Conditions of Contract of the *Multilateral Development Bank Harmonized Edition (FIDIC MDB Harmonized Edition)* of the Conditions of Contract for Construction, prepared by *International Federation of Consulting Engineers (FIDIC)* together with a number of the MDBs on 2010.

The FIDIC MDB Harmonized Edition, as one of its features, has a provision on setting up of a standing Dispute Board (DB) as default. The DB is a board set to be impartial from the Employer, the Contractor or the Engineer, and the members, or *the adjudicators*, repeatedly visit the sites to give advices or decisions in order to settle contractual disputes, preventing them from escalating into arbitration or litigation. JICA recognizes the DB as a mechanism for sound contract management rather than conflict settlement procedures, and deems the cost for the DB eligible to be financed by the Loan.

However the promotion of the DB faces some problems. There are problems from the supply side, such as insufficient number of experts who may serve as adjudicators, as well as from the demand side, such as unwillingness among the stakeholders to set up DB due to lack of experiences and knowledge on DB. JICA has been working on these issues; for the problem of the supply side, JICA has developed the training tools for adjudicators and assessment guidelines, and conducted the assessment workshop in collaboration with *Association of Japanese Consulting Engineers (AJCE)* at the time, which consolidated to *Engineering and Consulting Firms Association (ECFA)* on April, 2016. It helped AJCE establish the National List of Adjudicators in Japan officially recognized by FIDIC.

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 FIDIC MDB Harmonized Edition.

Further, in the Japanese fiscal year (JFY) 2017-2018, JICA conducted a survey “Application of Dispute Board for Project Funded under Japanese ODA Loan”. The survey showed that Executing Agency who have applied DB are largely satisfied with its result. Given the satisfaction of the Employer and to further encourage the enforcement of DB, the revised policy on DB was issued on November, 2018, whose changes are prescribed in detail in this manual.

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.

Loan Procurement Policy and Supervision Division
Infrastructure Engineering Department
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1. Introduction

This Manual is intended to assist the user in successful implementation and operation of the Dispute Board (“DB”) required under Clause 20 of the Conditions of Contract for Construction (MDB Harmonised Edition) 2010. Those Conditions are referred to in this Manual as the “FIDIC MDB Conditions”. (MDB is an abbreviation for “Multilateral Development Bank”.)

The format of this Manual is a main text kept brief so that it serves as an “Executive Summary”, supplemented by Appendices to provide detailed guidance and assistance regarding each topic of the main text.

The DB has proven to be a remarkably successful method of avoiding and resolving contract disputes without use of arbitration or litigation, often before completion of construction, and thus is advocated by JICA. However, as with any aspect of Contract administration, the DB method requires careful and timely attention to assure that it is established and operated as conceived.

The unique feature of the DB, and a major reason for its success, is that it is a tool for *prevention* of disputes, and if a formal dispute cannot be prevented, that the dispute is decided by the DB as quickly as possible, so that all concerned can maintain focus on successful completion of the Contract. No other method of dealing with contract disputes has this prevention feature.

The DB concept has been used by the MDBs (and many bilateral development agencies) since 1995, and by many privately-financed developments. In few cases where a DB has failed to avoid arbitration and litigation it has been traceable to the contract Parties’ lack of understanding of the DB concept (or the concept of FIDIC form as such) and its proper implementation and operation.

There is a concept of an “ad hoc” DB which is established only after the Parties have failed to settle a disagreement amicably and seek to establish a DB after they already are in dispute. This ad hoc DB lacks the most important feature which is the function of prevention of disputes. Under the standing DB, the Parties can obtain DB’s informal opinion which assist them in reaching an amicable settlement. The ad hoc DB also frequently leads to problems because by the time the effort is made to establish a DB there is very little that the Parties can agree due to the intensity of the dispute.

It is strongly recommended not to use an ad hoc DB. Reasons include: An ad hoc DB is unable to assist the Parties to *avoid* formal disputes; it has no familiarity with the Contract or the

Works and thus will take longer to reach its Decisions than a standing DB; Typically it is created only late in the performance of the Contract, or even after Completion of construction (thus leading to the expense of prolonged retention of Performance Security of the Contract). It is intended for use on only a single dispute or set of disputes and if, established before the Completion the “ad hoc” normally does not remain in service for the remainder of the construction period and it often is necessary to establish a new DB for later disputes, leading to unnecessary delay and costs as new individuals have to become familiar with the Contract and the Works. Hence, only standing DBs are dealt with in this Manual.

Further, in the Japanese fiscal year (JFY) 2017-2018, JICA conducted a survey “Application of Dispute Board for Project Funded under Japanese ODA Loan”. The survey showed that Executing Agency who have applied DB are largely satisfied with its result. Given the satisfaction of the Employer and to further encourage the enforcement of DB, the revised policy on DB was issued on November, 2018, whose changes are prescribed in detail in this manual.

2. Brief explanation of Dispute Board (DB)

The DB is an essential member of the Contract team whose purpose is to assist the Parties and the Engineer to *prevent* disagreements from becoming formal Disputes. If a formal Dispute cannot be avoided, the DB makes a Decision on the Dispute which is binding on both Parties and the Engineer. The Decision must be given immediate effect, even if a Party decides to refer the Dispute to arbitration under the Contract.

To serve its purpose, the DB must be established at the beginning of the Contract, *before* there are any disagreements, and it should continue working until the Performance Certificate is issued after the Defects Notification Period has expired. The Parties must NOT wait until they are in disagreement with each other before establishing the DB and starting its operation.

All DB members are to be chosen by agreement of both Parties. The DB cost is shared equally by the Parties. The DB can be a single person but for larger, more complex, contracts a 3-person DB is recommended. Always the DB members should be experienced in the type of construction involved in the Contract, and in the administration of such contracts. The DB must be independent of both Parties, and cannot have any ties to either of them nor to the Engineer.

The DB performs its functions by a combination of (i) scheduled periodic visits to the Site and (ii) the study of information sent by the Parties to the DB during the intervals between its periodic Site visits. It is essential that the DB is established as soon as possible after the Contract is signed, and that the DB starts its Site visits at, or immediately after, the start of construction on Site.

Users sometimes express concern that the DB provisions will not be in accordance with the laws of their country. This may reflect a misunderstanding of the DB process. The DB process is a contract administration process for avoidance of formal disputes which otherwise would be referred to arbitration under the FIDIC MDB Conditions. The DB Decisions on formal disputes presented to it become final and binding on the Parties unless either Party gives timely Notice of Dissatisfaction with the Decision. If such Notice is given timely, the dispute will proceed to arbitration to seek a final and binding arbitral Award, in accordance with the Sub-Clause 20.6.

Users are encouraged to discuss the DB provisions of Clause 20 with their legal advisors prior to issuing the Invitation to Tender. It would be very rare that any fundamental legal problem would arise from use of the DB system. The DB system has been vetted by the MDBs in many countries of the World with various legal systems -- common law, civil law, Islamic law, and mixed legal systems. However, if a fundamental legal problem is encountered, the user is

requested to advise the Financier of the problem immediately and before issuance of the Invitation to Tender.

JICA's Policy on application of DB

On November 2018, JICA has updated its policy on application of Dispute Board in the projects financed under Japanese ODA Loans. As a result, the principle of cost sharing of Dispute Board between the Employer and the Contractor has been updated.

DB cost is broken down into two categories, Regular Cost and Non-Regular Cost. Regular Cost refers to; Monthly retainer fees of DB member, daily fees of DB members for regular site visits and all expenses of regular site visits of DB members. Non-Regular Cost refers to additional fees incurred because of dispute resolution. Taking in mind the dispute prevention function of DB, interpreted as a part of Project Management of the Employer, Regular Cost will be borne by the Employer while the Non-Regular Cost will be borne evenly by the Contractor and the Employer. The change of Dispute Board Policy is summarized under the table below;

Comparison of JICA's Dispute Board Policy		
Type of DB	Policy Before Nov. 2018	Policy After Nov. 2018
Standing DB with 3 members	Contracts having Civil work being not less than 10 billion JPY, and Special Terms for Economic Partnership*1 (STEP) Projects	All Contract amount being not less than 10 billion JPY
Standing DB (1 or 3 members)	Civil Contracts having Civil work involving works with the estimated amount being not less than 5 billion JPY and less than 10 billion JPY	All Contracts being not less than 3 billion JPY and less than 10 billion JPY
Standing DB is recommended	Civil Contracts having Civil work with the estimated amount being less than 5 billion JPY	All Contracts with the estimated amount being less than 3 billion JPY
STEP Projects *1: STEP was introduced in July 2002, with a view to raising the visibility of Japanese ODA among citizens in both recipient countries and Japan through best use of advanced technologies and know-how of Japanese firms. For detail please see link below; https://www.jica.go.jp/english/our_work/types_of_assistance/oda_loans/step/c8h0vm000053zae9-att/operational_rules.pdf		
	Policy Before Nov. 2018	Policy After Nov. 2018
Project Cost	The whole DB cost shall be included in the project cost and loan amount	Same as on the Left
DB Cost Sharing	Total amount of DB cost shall be borne evenly by the Employer and the Contractor.	Full Regular cost (monthly retainer fee and costs for periodical site visits) shall be borne by the Employer. Half of non-regular cost (cost for additional site visits in case of dispute referral to DB) shall be borne by the Employer and the other half of the non-regular cost shall be borne by the Contractor.
Provisional Sum for payment of DB Cost in Bill of Quantities	The DB cost of the Employer (half of the Total amount of DB cost) should be included in the Provisional Sum of the Contract.	Full Regular cost and Half of non-regular cost shall be included in the Provisional Sums of the Contract.
Disbursement Procedure	The Contractor would first Pay the full amount of the DB cost and the Contractor will invoice for half of its DB cost to the Employer. The Employer will then request JICA for disbursement.	For the Regular Cost the Contractor would Pay its full amount and will submit the invoice for full of Regular Cost to the Employer. For the Non-Regular Cost the Contractor would Pay its full amount and will invoice half of its cost to the Employer. The Employer will then request JICA for disbursement.

3. Consideration at Pre-Implementation Stage

Before implementation of the Contract it is important for a Borrower to make adequate and sufficient financial arrangements for the cost of a DB. It is important to allocate the DB costs by the Employer or the Financier, and it is eligible in case of Japanese ODA Loans as discussed in Appendix 3. Inclusion of DB costs is diagrammed in Appendix 3.1 and assistance in estimating cost of the DB is included in Appendix 3.2.

Another important part of the planning is to assure that the Invitation to Tender and any pre-Tender meetings with the Tenderers highlight the DB and its inclusion in the Project team from at the outset of construction. Inclusion of this Manual in the information distributed with the Invitation to Tender is recommended.

4. Consideration at Preparation of Tender Documents

When the consultant and the Employer prepare the Tender documents, attention must be given to DB matters which must be decided at this stage.

- **Contract Data**

The Employer is required to complete the document entitled “Particular Conditions – Part A: Contract Data” prior to inviting Tenderers. This is the form designed to assure that the consultant and the Employer provide the necessary information to Tenderers. The form is referenced in several places in the General Conditions of Contract. This is the reason for the form’s references to correspond to individual numbered Sub-Clauses of those Conditions. The specific Contract Data which relates to DB is attached as Appendix 4.1 for the readers’ easy reference. The Employer (and the consultant) should be aware of the fact that most of the required indications and data have to be inserted individually. Appendix 4 has further guidance regarding completion of the form (FIDIC MDB Conditions).

- **Bill of Quantities: inclusion of Provisional Sum for payment of Employer’s Share of DB Costs**

It is important to cover the cost of the DB by including it in the project budget, and that a mechanism be in the Contract Agreement with the Contractor to enable disbursement to the Contractor of the Employer’s one-half share of all payments to the DB member(s). This sharing is prescribed by the third paragraph from the end of section 6 of the Appendix to Clause 20 of the FIDIC MDB Conditions. For details on the principle of Cost Sharing for projects under Japanese ODA Loan please refer to JICA’s policy on application of Dispute Board in Page 4.

Detailed discussions of the use of the Provisional Sum for this purpose is in Appendix 4.3

5. Selection of DB members

The Parties must appoint the DB within the time limit set in Part A of the Particular Conditions, or the appointing authority named in Part A will select the DB, as outlined in Sub-Clause 20.3.

The contractual requirements to be met by each DB member are:

- The member shall be experienced in the type of work, which the Contractor is to carry out under the Contract
- The member shall be experienced in the interpretation of contract documentation
- The member shall be fluent in the Contract language for communications defined in the Contract

Selection of DB members is a very important process and deserves the user's top management's attention. Also, early and persistent attention must be given to reaching agreement on appropriate persons, determining their availability, suitability, and then agreement to serve. This takes considerable time. Suggestions for successful selection are in Appendix 5.

When the DB member(s) have been appointed, a formal written agreement must be made among the Employer, the Contractor, and each individual DB member. This is often called the "Three-Party Agreement (or Tripartite Agreement). This agreement includes the form of agreement itself, plus the General Conditions of Dispute Board Agreement and the Procedural Rules which form part of Clause 20 of the FIIDC/MDB Conditions. It is important that this agreement be concluded with each DB member separately as quickly as possible so that the DB member(s) begin work, become familiar with the Contract Documents and make an initial early Site visit. Sample forms of agreement with the DB member(s) are found in Appendix 5.3 and 5.4.

6. Remuneration of DB Members

This matter is dealt with in detail by the Appendix to Clause 20 of the FIDIC MDB Conditions. Broadly, payment is made by the Contractor and the Contractor is reimbursed the Employer's one-half share by the use of a special Provisional Sum in the Bill of Quantities. Remuneration is by payment of the agreed fees, plus reasonable expenses. Details are discussed in Appendix 6.

7. Site Visits

Site visits are the most important activity of the DB because it can best perform its function of seeking to prevent formal disputes during these visits. Regular Site visits are to be at least 70 days apart, but no longer than 140 days apart. The precise timing is to be agreed between the DB and the Parties. It is very important that all of the Employer, the Engineer, and the Contractor attend DB Site Visits, and remain at the Site until the delivery of the Site Visit Report. It is strongly recommended that representatives of the Employer and the Contractor during Site Visits have the authority to discuss and agree resolution of any disagreements which have arisen over any matters of Contract application or interpretation.

When the DB visits the Site, it tours the Site with the Parties and the Engineer to see the current status and progress of the Works. Problematical areas are given special attention: for example, geological (rock) conditions encountered in the excavation of a tunnel. Also the DB joins in discussions with the Parties and the Engineer, and where appropriate, sub-contractors and suppliers. Thus the members become and remain conversant with the progress of the Works and the DB can discuss face-to-face with the Parties and the Engineer any issues, including disagreements which have arisen, and assist the Parties and the Engineer in seeking to avoid any formal dispute.

Detailed guidance on the timing and the conduct of these Site visits is in Appendix 7.

8. Information provided to the DB during Intervals between Site Visits

In order to perform its duties, the DB needs to receive information regarding the Contract on matters arising during the intervals between scheduled Site Visits. This can be seen in Procedural Rule 4 of the Annex to the Appendix to Clause 20 of the FIDIC MDB Conditions, which reads:

The Employer and the Contractor shall furnish to the DB one copy of all documents which the DB may request, including Contract documents, progress reports, variation instructions, certificates and other documents pertinent to the performance of the Contract. All communications between the DB and the Employer or the Contractor shall be copied to the other Party. If the DB comprises three persons, the Employer and the Contractor shall send copies of these requested documents and these communications to each of these persons.

Detailed guidance is contained in Appendix 8.

9. DB Informal Opinions

At any time the Parties may jointly request the DB to give informal opinions or recommendations. The DB's informal views can be of much value to the Parties and the Engineer. They are not binding on anyone, including the DB. Simply, they are a way to acquire the experienced and expert views of the DB member(s) without the time and expense of obtaining a binding Decision. The Parties (and the Engineer) can continue negotiation based on the DB's informal opinion to reach an amicable settlement. No informal opinion forecloses the Parties from bringing the same problem to the DB for further discussion or if necessary, making the matter a subject of a formal Referral of a Dispute.

Detailed discussions are given in Appendix 9.

10. Referral and DB Decision

Referral triggers the start of a formal Dispute which must be decided in a binding form by the DB. Referral should only be made if serious negotiations have failed, and the DB has been unable to assist the Parties and the Engineer through attempts such as informal opinions to avoid the time and cost of a Referral and the subsequent DB proceedings, which typically include detailed written submissions and a hearing, and, if requested by the DB, post hearing written submissions.

Unless the Parties resolve the dispute by negotiations after Referral, the DB will issue a Decision which is binding and with which the Parties are obliged to comply immediately (also refer to Chapter 2). Either Party may give timely Notice of Dissatisfaction with the Decision and in due course refer the dispute to arbitration under the Contract arbitration agreement. However, unless and until the arbitral Tribunal decides otherwise, the DB Decision remains binding and the Parties are obliged to comply with it. It should be noted that if neither Party gives a Notice of Dissatisfaction within the time limit, the DB Decision becomes final and binding.

It should be noted that Sub-Clause 20.4 of the FIDIC MDB Conditions makes it clear that the DB shall be deemed to be not acting as arbitrator(s), thus there are only few procedural requirements in the Referral process. Further guidance is given in Appendix 10. The whole procedure of dispute resolution under the FIDIC MDB Conditions is diagrammed in Appendix 10.1

11. Sub-Clause 20.5 Compulsory Minimum “Amicable Settlement” Period

After the DB Decision if either Party files a timely Notice of Dissatisfaction with the Decision, then although the Parties are obliged to comply with the Decision immediately, and continue to do so unless and until the Decision is modified by an arbitral Tribunal appointed under the Contract arbitration agreement, no request for arbitration may be filed until the completion of a minimum compulsory period of 56 days of amicable settlement efforts. After such a long process, why?

Various reasons have been suggested, such as: (i) to assist the representative of either Party in establishing the organizational decision to give the representative the authority to settle amicably; (ii) to provide a “cooling off” period; (iii) to give the Parties a “last chance” to avoid further prolongation of the Dispute and all of the extra expense of establishing an arbitral Tribunal to review and decide the Dispute.

Whatever the purpose of Sub-Clause 20.5 of the Conditions of Contract, what should the Parties do during the “Amicable Settlement” period? If the highest level executive of each Party has not been involved in previous efforts to resolve the dispute without referring it to arbitration, that should occur at this point of time. Sometimes this is done by having a half-day or full day “mock arbitration” or “mini-trial” in front of the top executive of each Party, who then adjourn for private discussion aimed at amicable resolution. Often the Parties agree upon a skilled mediator to work with the parties’ senior executives to guide them of amicable resolution. Further background on these and similar dispute resolution devices such as various kinds of ADR (Alternative Dispute Resolution) can be found at www.iccwbo.com Also, some time the Parties simply consider carefully what the DB Decision has said, and explore whether they can use parts of the Decision to negotiate a mutually acceptable compromise.

The Parties should note that there is *no time limit* on such further negotiation; what is given is just a *minimum* duration.

12. Arbitration

Arbitration of construction disputes is expensive, lengthy, and destructive to the corporate effort required for successful completion of a project. It also is destructive to commercial relationships between an Employer and a Contractor. It is to be avoided whenever possible. If it is unavoidable, various considerations are required when using the MDB Conditions. They are discussed in Appendix 12.

- [Contract Data](#)

The guidance for this is contained in Appendix 12.

- [Consideration required](#)

The users probably are aware of the cost of international commercial arbitration, especially as arbitration of disputes under construction contracts almost always involves the use of lawyers and technical experts. This tends to create very heavy cost in addition to the fees and expenses of the arbitrators and the administration charges of any administering organisation (Appendix 12.1 is the fee scale of ICC arbitration). Typically, arbitration Tribunals award a large part (sometimes all) of the costs of the “winner” against the “loser”, so very large sums of money (in additions to the amounts of the claims in the arbitration) are at risk in the process. Arbitration could be a “last resort”, but it should be held only after careful evaluation of risk by senior management of the parties. Such evaluation should include consideration of written advice of legal counsel of likely legal fees and expenses which will be at risk.

Additionally, it should be noted that some of the MDB provisions in Sub-Clause are unique and different from the standard FIDIC 1999 Edition of the Conditions for Construction. Legal advice should be taken on whether to make any amendment to the MDB text when preparing the Tender Documents, having in mind some of the uncertain provisions. For example, study on (a) vs (b) of Sub-Clause 20.6, Arbitration, makes it clear that there is an important difference in arbitral procedure which depends upon whether the Contractor is “foreign” or “domestic”, but there is no definition of those terms. For example, if a Contract is in, say, Madagascar, and the Contractor is a Madagascar company owned entirely by a French company, is that Madagascar company “foreign” or “domestic”? If the Contractor is a joint venture between a wholly French company and a wholly Malagasy company, is the Contractor “foreign” or “domestic”?

Also, (b) says the place of arbitration shall be the city where the headquarters of the appointed arbitration institution is located. The “place of arbitration” often determines the law which will be applicable to procedural issues in the arbitration: for example, if the arbitration is under

ICC Rules, the “headquarters” may be in Paris (its traditional “headquarters”) but perhaps it could be Hong Kong (where a newer “regional” headquarters of ICC is based) as the place of arbitration: the former would likely bring French law as the applicable procedural law; the latter would bring Hong Kong law. Further, an institution’s headquarters might be more expensive and less convenient than another location selected by the Parties. These are complex legal issues and users should have legal advice from practitioners with extensive experience in international arbitration before deciding accepting the Sub-Clause as written. The important point to remember is that under the second sentence of Sub-Clause 20.6, the Parties are free to agree whatever suits their wishes, and the time to resolve that is before the Contract is formed, not after a formal dispute has arisen!

- **New Specific Provision in the updated Standard Bidding Document of JICA**

The updated Standard Bidding Document (Works, Version 2.1) of JICA published on October 2019, which contains the General Conditions of Contract of the Multilateral Development Bank Harmonized Edition (FIDIC MDB Harmonized Edition), incorporates the following specific provision which takes into consideration, the FIDIC’s Construction Contract 2nd Ed (2017 Red Book) referring to the enforcement of the Dispute Board decision by way of summary or other expedited procedure.

Standard Bidding Document (Works, Version 2.1) :

Sub-Clause 20.7 Failure to Comply with Dispute Board’s Decision

“In the event that a Party fails to comply with any decision of the DB, whether binding or final and binding, then the other Party may, without prejudice to any other rights it may have, refer the failure itself directly to arbitration under Sub-Clause 20.6 [Arbitration] in which case Sub-Clause 20.4 [Obtaining Dispute Board’s Decision] and Sub-Clause 20.5 [Amicable Settlement] shall not apply to this reference. The arbitral tribunal (constituted under Sub-Clause 20.6 [Arbitration]) shall have the power, by way of summary or other expedited procedure, to order, whether by partial award, an interim or provisional measure or award (as may be appropriate under applicable law or otherwise), the enforcement of that decision.”

APPENDICES

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Appendix 3: Consideration at Pre-Implementation Stage under Japanese ODA Loan

3.1 Whether or not to use DB for the Project? financed under Japanese ODA loan

Construction always brings unexpected disagreements among the Parties, and thus setting up of the DB is strongly recommended. In case of Japanese ODA Loans, JICA basically requires the Employer to establish a Standing DB for all Contracts regardless of its size. Notably for contracts with 3 billion Japanese Yen and more and especially for contracts of 10 billion Japanese Yen and more a 3-person DB is recommended.

3.2 Can DB cost be financed under Japanese ODA Loan?

In case of Japanese ODA (Official Development Assistance) Loan, the DB cost is considered to be an essential cost for the project implementation, thus it is an eligible cost under Japanese ODA loan.

3.3 How is the DB cost allocated in the loan?

Before concluding loan agreement, the Financier usually conducts an appraisal of the project to determine whether it is suitable for financing. The appraisal is made with careful examination of the feasibility study (F/S) and implementation program (I/P) prepared by the Borrower for the loan. The examination of project costs is one of the most important elements of project appraisal.

Thus it is important for the Employer to include the estimated DB cost in the project costs. Accomplishing this is hereinafter described.

3.4 What should be taken into account to decide the number of DB members? (1 or 3?)

The Employer must decide the number of DB members prior to the Invitation to Tender.

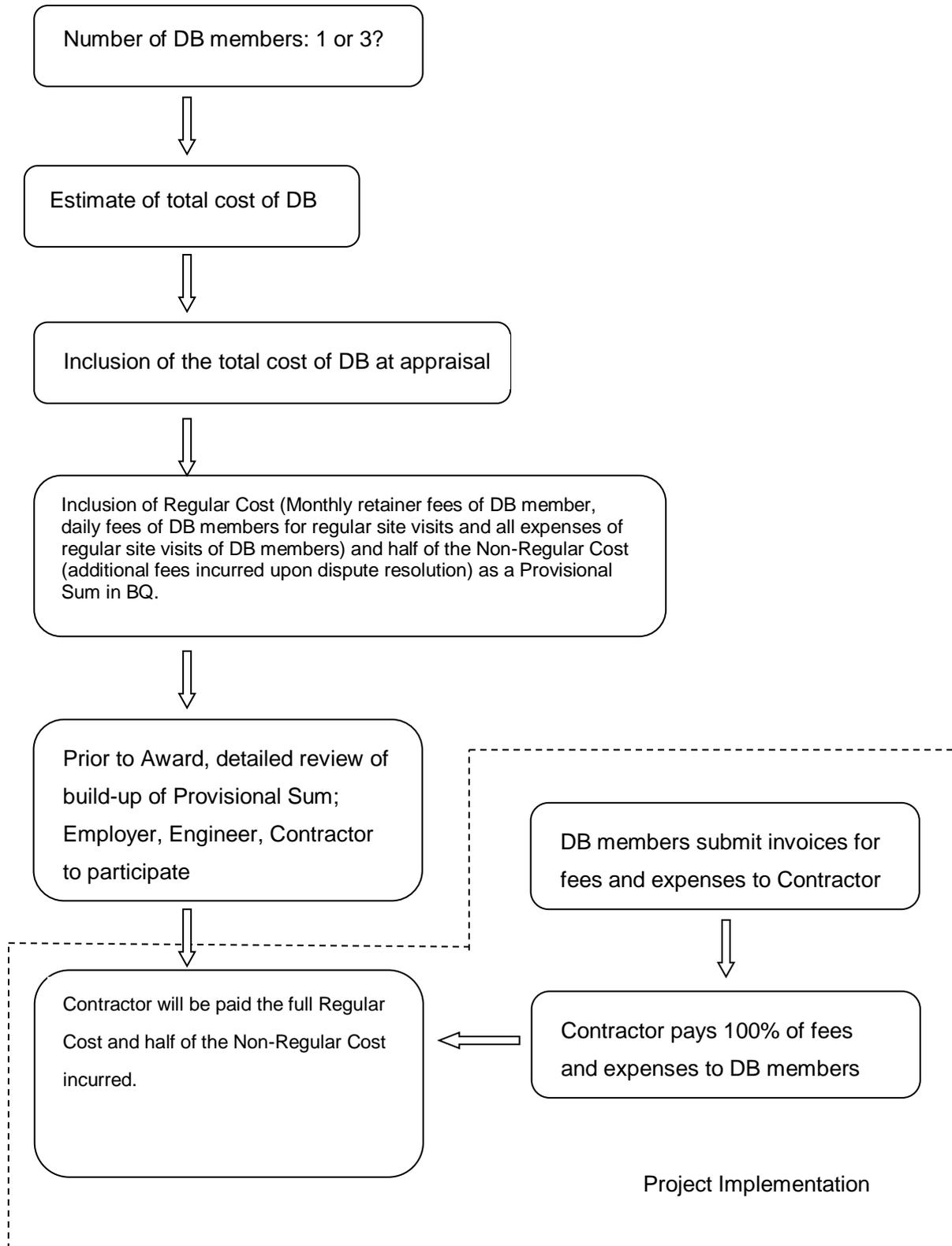
It is recommended that a 3-person DB should be provided for a project with a Contract Price exceeding the equivalent of 3 Billion Japanese Yen and especially for Contract of 10 Billion Japanese Yen and more under Japanese ODA Loan.

Comparison of JICA's Dispute Board Policy		
Type of DB	Policy Before Nov. 2018	Policy After Nov. 2018
Standing DB with 3 members	Contracts having Civil work being not less than 10 billion JPY	All Contract amount being not less than 10 billion JPY
Standing DB (1 or 3 members)	Civil Contracts having Civil work involving works with the estimated amount being not less than 5 billion JPY and less than 10 billion JPY	All Contracts being not less than 3 billion JPY and less than 10 billion JPY
Standing DB is recommended	Civil Contracts having Civil work with the estimated amount being less than 5 billion JPY	All Contracts with the estimated amount being less than 3 billion JPY
Standing DB with 3 members	Special Terms for Economic Partnership*1 (STEP) Projects	Special Terms for Economic Partnership (STEP) Projects
STEP Projects *1: STEP was introduced in July 2002, with a view to raising the visibility of Japanese ODA among citizens in both recipient countries and Japan through best use of advanced technologies and know-how of Japanese firms. For detail please see link below; https://www.jica.go.jp/english/our_work/types_of_assistance/oda_loans/step/c8h0vm00053zae9-att/operational_rules.pdf		
	Policy Before Nov. 2018	Policy After Nov. 2018
Project Cost	The whole DB cost shall be included in the project cost and loan amount	Same as on the Left
DB Cost Sharing	Total amount of DB cost shall be borne evenly by the Employer and the Contractor.	Full Regular cost (monthly retainer fee and costs for periodical site visits) shall be borne by the Employer. Half of non-regular cost (cost for additional site visits in case of dispute referral to DB) shall be borne by the Employer and the other half of the non-regular cost shall be borne by the Contractor.
Provisional Sum for payment of DB Cost in Bill of Quantities	The DB cost of the Employer (half of the Total amount of DB cost) should be included in the Provisional Sum of the Contract.	Full Regular cost and Half of non-regular cost shall be inserted in the Provisional Sums
Disbursement Procedure	The Contractor would first Pay the full amount of the DB cost and the Contractor will invoice for half of its DB cost to the Employer. The Employer will then request JICA for disbursement.	For the Regular Cost the Contractor would Pay its full amount and will submit the invoice for full of Regular Cost to the Employer . For the Non-Regular Cost the Contractor would Pay its full amount and will invoice half of its cost to the Employer . The Employer will then request JICA for disbursement.

3.5 How to estimate the DB costs under Japanese ODA Loan?

DB costs include the fees and reimbursable expenses of each Member and these are discussed in detail in Appendix 3.2.

Appendix 3.1: Flow chart for inclusion of DB costs in project budget under Japanese ODA Loan



Appendix 3.2: DB Cost estimate under Japanese ODA Loan

The principal cost of a DB is the fees of the members. The MDB Conditions do not prescribe a particular amount for a DB member's fee. The MDB Conditions set forth a structure for a fee in two parts: a Retainer Fee, which, briefly, covers all the work by the DB member not covered by the second part, the Daily Fee. Briefly, the Daily Fee is for Site visits and works on formal disputes referred to it for decision and not accomplished during a Site visit.

The other cost of a DB is its expenses. Under the Retainer Fee concept, most of the costs are minimal, such as expenses of photocopying and long distance telephone calls, document courier service, postage; however if any DB member is not resident in the country of the project, significant expense can arise from air fares and perhaps hotel accommodations.

Typically, DB members invoice for fee in advance, and often for convenience of all concerned, invoices for fee are issued quarterly in advance, and expenses are invoiced as early as possible after being incurred. As most DB members are self-employed often air fares are invoiced in advance, and hotel accommodation will be requested to be arranged by the Contractor or the Employer if discounted rates can be obtained. Also, sometimes the DB asks that the hotel charges be paid directly to the hotel by one or both of the Contract Parties.

It depends on the laws whether the members of the DB shall invoice VAT. In some countries VAT laws assume that the services of a DB member are to be given at its respective domicile.

Any taxes properly levied in the Country (the country where the project is situated) on payments made to the member are to be reimbursed to the member. This includes any assessment of income tax liability in the country against a member who is resident outside the country.

Daily Fee

As noted above, there is no set amount required by the Harmonised Conditions. It should be set by a balanced consideration of the level and extent of experience, and particular expertise of the DB member, and the foreseen complexity of the Works under the Contract. Most prospective DB members are willing to quote a proposed Daily Fee, and are willing to discuss the proposal, although top class DB members do not offer "cut price" service. It is not good practice to make selection by accepting the lowest fee quotation offered. Selection should be based on quality and experience rather than price.

The Contract Parties and the Engineer all will have readily available a general indication of the cost of top level consultants as an indicator of what Daily Fee level for DB members is appropriate. The Harmonised Conditions indicate a "default" fee if the Parties are unable to agree a different fee, and

that is the amount (at the time being) of the daily fee for arbitrators under the arbitration system of the International Centre for Settlement of Investment Disputes (“ICSID”), a United Nations organ. That fee is available on the ICSID website, www.icsid.worldbank.org. As of 01 January 2012, that fee is US\$3000 per day.

It is observed that this amount is readily accepted by most DB members. However, in many instances, suitable DB members are willing to serve for less than that amount, but it is potentially unwise to seek to set a Daily Fee for less than one-half of the ICSID fee especially if DB members are sought from outside the country of the project, because it is likely to be difficult to attract top quality experts for any lesser amount. If more than one person is on the DB, it is good practice to pay each the same fee, although sometimes the Chairperson receives somewhat more than the other two members in recognition of the Chairperson’s duty of organising the internal operations of the DB; however, there is no “standard practice” on this point.

Retainer Fee

As of the time of publication of this Manual, JICA has observed that many DBs operate with a retainer at less than this amount, especially if the Daily Fee is at or near the ICSID daily fee for arbitrators. It may be that a DB member will be willing to accept twice the Daily Fee, or even a single day’s Daily Fee each month. Much will (and should) depend upon the complexity of the Contract. For example, the task (which is covered by the Retainer Fee) of studying the Contract and remaining familiar with it likely will be less time-consuming for a typical road project than it will be for a large hydroelectric project.; construction of a school is likely to be less complex than the construction of a hospital.

On both the Daily Fee and the Retainer Fee, it is to be remembered when deciding on fees that the Contract Parties are investing in the DB as a means of trying to avoid the much more costly and time-consuming process of international arbitration or litigation. To use an old English expression, it is important not to be “Penny wise but Pound foolish”.

DB Expenses

In considering these, it is important to note that there will be some costs arising from the Site visits, such as local transport and DB member sleeping accommodation (whether at Site or in a hotel) in addition to the airfare and such cost should be allowed for in the Provisional Sum discussed in the main text of the Manual at 4.2 (i). Hotel cost and local transport cost may be reduced if either the Contractor or the Employer can negotiate a special room rate for the DB members at a local hotel which then would accommodate all DB members on their visits

If DB members come from outside the country of the project, there also likely will be significant air fare expense for each such DB member, and while under the Appendix to Clause 20 of the Harmonised Conditions it will be at “less than First Class” it is likely to be unrestricted Business Class fare, which will be a significant cost if the duration of the Contract is lengthy, and the home cities of the DB members are far from the project Site. Such foreign DB members may also have significant local transportation expense to and from the airports in their home countries.

Budgeting technique

To assist in budgeting for the use of the DB, hypothetical examples have been prepared, one for a single person DB with a resident in the country for a relatively simple road project, and the other for a 3 person DB with three entirely foreign members for a complex hydropower project.

(i) **Sample Cost Estimate for a simple road project – 1 or 3Person DB**

- Daily Fee is US\$3,000/day and Retainer Fee is US\$3,000/month.
- Construction Term: 4 years
- Number of DB Member: 1 or 3
- Frequency of Site visits: 3 times each year, at intervals of 4 months, thus the visits will be conducted 12 times before TOC (taking-Over Certificate). This meets the conditions that intervals shall not be more than 140 days between the Site visits according to Procedural Rule 1 annexed to General Conditions of Dispute Board Agreement which is appended to MDB Edition. (This requires more than 5.1 times.)
- Termination: at the time of expiry of Defects Notification Period, one year after the TOC. Retainer Fee for this period is two thirds of the Retainer Fee before TOC. This reduction is because it is not expected that there will be further Site visits as construction will have been substantially complete when the TOC is issued. It also assumes that the Parties will have been diligent and that no claims or disputes are pending action by the DB at the time of the TOC, so that the only reason the DB would be required to do further work after the TOC is any possible dispute which arises during the Defects Notification Period.
- Suppose there will be 3 Referrals of formal Disputes to the DB during construction.

Cost estimate for the regular Site visits is shown below:

Cost Category		1-person DB	3-person DB
Monthly Retainer Fee	US\$3,000 x 48 months	US\$144,000	US\$432,000
Monthly Retainer during DNP	US\$2,000 x 12 months	US\$24,000	US\$72,000
Daily fee for Site Visits (3 days for Site visit, half day x 2 for travel)	US\$3,000 x 5 days x 12 times	US\$180,000	US\$540,000
Site Visit Expenses (Inland Transportation, accommodation, etc.)	US\$7,000 x 12times	US\$84,000	US\$252,000
Sub-Total (1)		US\$432,000	US\$1,296,000

Cost estimate for the referrals is shown below:

Cost Category		1-person DB	3-person DB
Additional Daily Fee at Regular Site Visits	US\$3,000 x 7 days x 3 times	US\$63,000	US\$189,000
Sub-Total (2)		US\$63,000	US\$189,000
Total	Sub-Total (1) + Sub-Total (2)	US\$495,000	US\$1,485,000

Although the costs of DB shall be shared by having the Employer bear Regular Cost (Monthly retainer fees of DB member, daily fees of DB members for regular site visits and all expenses of regular site visits of DB members) and half of the Non-Regular Cost (additional fees incurred because of dispute resolution) by the Employer and the Contractor bear the remaining half of the Non-Regular Cost, some Tenderers may include this cost in

their Tender prices while others may exclude this cost to keep their Tender prices competitive. In any event, the Employer shall include the total amount of the above in the cost estimation for the project at the time of appraisal by the Financier. When the Employer prepares Tender Documents with the consultant, one half of the above estimate should be included under the Provisional Sum. However, it should be noted that use of the Provisional Sum requires a prior instruction by the Engineer as mentioned in Sub-Clause 13.5 of the MDB Conditions. It may be necessary to let the Provisional Sum be used without prior instruction by the Engineer for the cost of the DB, to make the periodic payments faster and easier. A recommended wording to be included in the Particular Conditions to ensure this is included in Appendix 4.3 – Provisional Sum for Payment to DB.

Appendix 4: Particular Conditions – Part A: Contract Data (FIDIC MDB version)

The form entitled “Particular Conditions – Part A: Contract Data” should not be enlarged upon by adding further details to the form, except as absolutely necessary, and then with prior legal advice.

- [Date by which the DB shall be appointed \(Sub-Clause 20.2\)](#)

It is strongly recommended to establish a DB as early as possible thus the Employer and the Engineer are advised to leave “28 days after the Commencement Date” as being the default deadline.

- [The Size of DB \(Sub-Clause 20.2\)](#)

The number of DB members will have been already decided by the Employer and the Engineer when the project appraisal was made by the Financier because this information is essential for the estimate of costs of the DB. Even if the Employer is tempted, for reasons of cost to have a 1-person DB, very careful consideration should be given to the benefits of having a 3-person DB because the cost increase is minimal when compared with the total value of the Contract, and will give the Employer the benefit of a deeper range of experience and expertise in the DB, and will assure that illness or injury of one person does not impede the operation of the DB.

- [Listing of potential DB sole Members \(Sub-Clause 20.2\)](#)

The form “Particular Conditions – Part A: Contract Data” has on its last page a blank space to be filled in by the Employer if a sole member DB has been chosen. This is to be used ONLY if a sole member DB is being used. If a 3 person DB is being used, the blank should not be completed.

If the Employer wishes to include a nominee or nominees, it must be understood that the names are suggestions only. The Tenderer is free to reject any or all of them because mutual agreement must be achieved on the identity of a sole member DAB. *If the Employer wishes to include a nominee or nominees, then the c.v. of each nominee should be included in the material sent with the Invitation to Tender, and the Tenderer should be invited to propose one or more nominees in its Tender, such proposal to be accompanied by the c.v. of each nominee.* This process of exchange of nominees should include checking with any prospective nominee to assure availability *and* lack of conflict of interest as among the Tenderer, the Employer, and the Engineer. c.v.s obtained should include details of previous experience on DBs and on the type of construction involved in the Contract.

If a Tenderer is of a different nationality than the Employer, best practice is that a sole member DB should be of a different nationality than either the Employer or the Engineer, to avoid any possible perception of bias based upon nationality.

If ‘None’ is entered in the blank, or if nominees are exchanged by the Invitation and the Tender, then the Employer, the Engineer, and the Tenderer should assure that during discussions prior to award of the Contract, agreement is reached on the identity of the person chosen, and that person *is available and suitable*, as described above.”

A sample letter to the prospective DB member for nomination is attached as Appendix 4.2. This letter should be sent out and acceptance should be obtained in time before putting nominees’ names in the Tender Documents.

It is important to each Party that its proposed DB member should be considered carefully before nomination. Neither Party should rely solely upon published lists of DB members or published lists of arbitrators and should perform “due diligence” in selection. Preferably this should include a personal interview with the intended nominee if not already well known to the Party; if cost prohibits face-to-face meeting, consideration should be given to using Skype, or at least telephone discussion.

Also, “due diligence” includes obtaining references, and making discreet enquiries, and for the Employer this should include discussion with the Engineer which has been selected to serve the Contract. The same “due diligence” concept applies to decision by the Parties on the Chairperson of a 3-person DB: even though both of the first two DB members chosen will have jointly suggested a person to chair the DB, each Contract Party should satisfy itself that the Chairperson proposed is satisfactory.

- **Third Party Appointment (Sub-Clause 20.3)**

It is essential that the DB implementation not be impeded or frustrated by failure to act of either Party, so it is required to name an appointing entity or official which will act if the Parties fail to act. There are many reputable organisations which offer this service, usually for a small fee. A list of these is attached in Appendix 5.1. It is suggested that such entity should not be of the nationality of either Party so that if it becomes necessary to refer to the appointing entity or official, there can be no suggestion of lack of impartiality of the appointer.

In case either Party intends to file a request for nomination of a DB member to an appointing entity it is strongly recommended to inform the appointing entity properly about the project and the requirements (in terms of experience, skills and profession) to be met by a future probable

DB Member. The appointing entities will take account of this information when making its choice.

It is noteworthy that the appointment by the appointing entity is usually final and binding on the Parties.

Appendix 4.1 Form of Contract Data relating to DB (FIDIC MDB version)

Appendix 4.2: A sample letter to the prospective DB members

DRAFT

Employer Letterhead

Dear Mr./Madam XXXX

Re: [Name of Project & identification of specific Contract name and number]; Dispute Board

We are in the process of obtaining Tenders for the above Contract, which we hope to conclude by approximately mm/yyyy, and at that time or immediately thereafter to establish a Dispute Board for the Contract. The Contract will have the FIDIC MDB Harmonised Conditions of Contract. Copies of Clause 20 of those Conditions, including its Appendix and the Annex to the Appendix are enclosed with this letter in case you are not familiar with those dispute resolution provisions.

Your name has been suggested as a potential nominee by us for consideration of membership in the DB. We would appreciate receiving your advice of whether you are interested in principle in such service, and your anticipated availability. If you are available and interested, please kindly forward your latest c.v. including specific experience relevant to the type of construction indicated by the above Contract title.

As you will see from the enclosures, the appointment of a person for DB service requires the agreement of the successful Tenderer, and its identity would be disclosed to you to assure that there is no conflict of interest in your performance of the proposed DB service. Also, you would be required to sign a written agreement with the Contract Parties.

Should you have any specific questions regarding our enquiry, please address them to the [email address/fax number] set out here.

Thank you for your consideration of this letter. May we please request your kind written response within 10 days of receipt.

Yours faithfully,

END DRAFT

Appendix 4.3: Provisional Sum for payment to DB (FIDIC MDB version)

- **Preparation of Provisional Sum**

The costs of DB will have been estimated by the Employer and the Engineer at the time of the appraisal of the project, and must be included in the Bill of Quantities by the Engineer and Employer as a Provisional Sum based on the estimate of cost of the DB. The Provisional Sum should be one-half of that estimate of cost which will be born by the Employer. (It is emphasized that the Provisional Sum should be only one-half of the estimated cost of the DB, even though the Financier's loan is to include 100% of the estimated cost of DB) Thus the Provisional Sum will be the source of the funds for payment of the DB. However, in order to ensure the payment to the DB members by use of the Provisional Sum, the General Conditions Sub-Clause 13.5 should be amended in the Particular Conditions. A recommended provision is as follows:

“Sub-Clause 13.5 shall be amended by adding at the end, ‘As an exception to the above, the Provisional Sum for the cost of the Dispute Board shall be used to pay to the Contractor of the Employer's one-half share of the invoices of the Dispute Board for its fees and expenses, in accordance with Clause 20. No prior instruction of the Engineer shall be required with respect to the work of the Dispute Board. The Contractor shall produce the Dispute Board invoices and satisfactory evidence of having paid 100% of such invoices as part of the substantiation of those Statements submitted under Sub-Clause 14.3 which contain requests for payment under the Provisional Sum toward the cost of the Dispute Board. The Engineer's certification of such Statements shall be based upon such invoices and such evidence of their payment by the Contractor.’

The process of the payment to DB members is shown in Appendix 1 too.

- **What shall be done during post-Tender discussion?**

The Employer and the Contractor together with the Engineer must jointly review the build-up of the Provisional Sum to assure that the Contractor understand the items and amounts in the Provisional Sum. Note that while the Parties can estimate what the fees (and for DB members resident outside the country, the air fares and hotel expenses) the actual cost may vary quite a bit depending upon what fees can be agreed with the DB and where any foreign DB member is based. The estimate should not overlook local transportation in a foreign DB member's country, for transport to and from the airport of departure. Allowance should be made for postage, long distance telephone, document reproduction, air courier service for documents, local transportation within the country of the project, use of Site accommodation and mess hall by

the DB during the regular Site visits. Some of these costs likely will arise not only for the DB itself, but for the Employer and the Engineer and their staffs. Allowance should be included for possible formal disputes which may require visits by the DB which are separate from the planned regular visits of the DB, and may lead to some off-Site meetings of the DB to prepare Decisions on formal disputes.

Also, it is important to include allowance for adequate durations for regular Site visits, which are likely to be at least 2 to 3 days, plus travel time from home base to Site and return.

As mentioned elsewhere in this Manual, if the Employer's contractual arrangements for the assistance of the Engineer do not include for assistance in connection with the operation of the DB, the cost of such assistance should be included here (and the contractual arrangements with the Engineer modified accordingly).

Appendix 5: Selection of DB members

The procedure of selection of DB members is shown in the flowchart of appointing DB members, Appendix 5.2.

5.1. Where can you find competent DB members?

The Parties are free to appoint a competent DB member whom they know from previous experience. However, if the Parties do not know particular persons who are competent as a DB member for the particular type of contract, there are various sources of suggestions, including of course the Engineer. Also, the FIDIC President's List of Approved Dispute Adjudicators, which is at www.fidic.org has a list, with c.v.s, of those persons who have passed scrutiny by FIDIC's Assessment Panel for Adjudicators in order to qualify for entry on the FIDIC President's List. Some of the national Member Associations of FIDIC, such as Engineering and Consulting Firms Association (ECFA) have National Lists. Please see Appendix 5.1.

5.2. Who should you choose as DB members?

The key to a successful DB is that DB members obtain respect from the Parties. In this consideration, it is a common practice that each of the Parties nominates a respectful candidate for a DB member from the same nationality whom they think as competent and reliable. This is a reasonable practice as far as the other Party approves and in this case the Chairperson must be someone from different nationalities of the Parties and the Engineer.

5.3. What shall be done if the other Party has rejected a proposed DB member?

Reasons should be given for any rejection of a proposed DB member, and those reasons discussed with the other Party. It may be that an alternative candidate can be agreed. Always it is preferable for the Parties to agree on each member of the DB, rather than have the selection made by a third Party. However if serious and good faith negotiation fail to meet the deadline in the Contract Data, then the MDB Conditions require that the DB shall be appointed by the appointing entity or official named in the Contract Data.

Sometimes the Parties exchange lists of candidates (of three potential members, for example), each list containing detailed c.v.s for each person on the list. Then each Party selects one from the list of the other Party. If all persons on the list are rejected or one Party is silent regarding the other Party's list, then one or both Parties should apply to the appointing entity or official for establishment of the DB.

5.4. What shall be done if the first two members fail to recommend or the Parties fail to agree to the recommendation by the date stipulated in the Contract Data?

Either or both Parties should apply to the appointing entity or official for the completion of the establishment of the DB. However, it is much better practice to achieve mutual agreement on the identity of DB members than to abandon mutual selection and leave the selection to a third party which has no ongoing connection with the performance of the Contract.

5.5. When and how to negotiate and agree on the Retainer Fee and Daily Fee with DB members?

In accordance with the paragraph 6, Payment of the General Conditions of Dispute Board Agreement, “if the Parties fail to agree on the retainer fee or the daily fee, the appointing entity or official named in the Contract Data shall determine the amount of fees to be used.” As a practice, when the Parties and/or the Engineer inquire the availability and willingness of the potential nominee, they ask for the nominee’s proposal for fees, unless the Employer and the Contractor have already agreed on a proposed fee structure for the DB member(s). Usually, on a 3 person DB, each DB member receives the same fee, although sometimes the Chairperson is given a somewhat larger fee to reflect administrative duties

Most importantly, the appointment of DB members should not be based on a price competition or any form of competitive tender. The Parties should select DB members who are the most suitable from the view point of quality, experience, competence and integrity. In this sense, the DB is comparable to independent technical advisory panel sometimes used on large or technically complex projects financed by MDBs’ funding.

5.6. Is there no DB in place if the Parties fail to agree on the DB members?

Sub-Clause 20.8 entitles the Parties to directly refer a dispute to arbitration if there is no DB in place. However, the wording presupposes that the Parties have undertaken all actions to appoint a DB before they may rely on Sub-Clause 20.8. Also, of course, the Parties will have deprived themselves of the *dispute prevention* function of the DB, and it is more likely that the Employer will find itself embroiled in the lengthy and expensive process of arbitration, the costs of which are most likely not eligible for financing by the Financier.

5.7. Agreement with DB members

- **Three Party Agreement**

The form of agreement is included in the MDB Conditions 2010. There are two types of sample forms, one for 1-person DB member and the other for each member of a 3-person DB. In case of a 3-person DB, the Parties should have such agreement made separately with each of the members. The sample forms are also attached as Appendix 5.3 and 5.4 for an easy reference.

- **Signing of Agreement**

The Dispute Board Agreement(s) are to be signed within 28 days after the Commencement Date of the Contract between the Employer and the Contractor. To meet this deadline it is common to use email or fax signatures, with original signed documents to follow in due course.

By this Agreement the Parties accept and are bound by the Procedural Rules in the Annex to the Appendix to Clause 20. The Procedural Rules give the DB broad and flexible powers to deal with formal disputes.

Appendix 5.1: Sources of potential DB members and Appointing Institutions

- Potential DB members Lists: The following are some organizations which provide lists of potential DB members.

FIDIC (International Federation of Consulting Engineers)

President's List of Approved Dispute Adjudicators at <http://www.fidic.org/>

National Member Association of FIDIC. Such as:

Engineering and Consulting Firms Association (ECFA), FIDIC Member Association

Japan National List of Dispute Adjudicators at

<http://www.ecfa.or.jp/japanese/AJCEHP/en/Adjudicator/Adjudicator.html>

VBI (German Association of Consulting Engineers), FIDIC Member Association

German National List of Dispute Adjudicators at <http://www.vbi.de/english/>

DRBF (Dispute Resolution Board Foundation) at <http://www.drb.org/Member/index.html>

Members Resumes for potential candidates

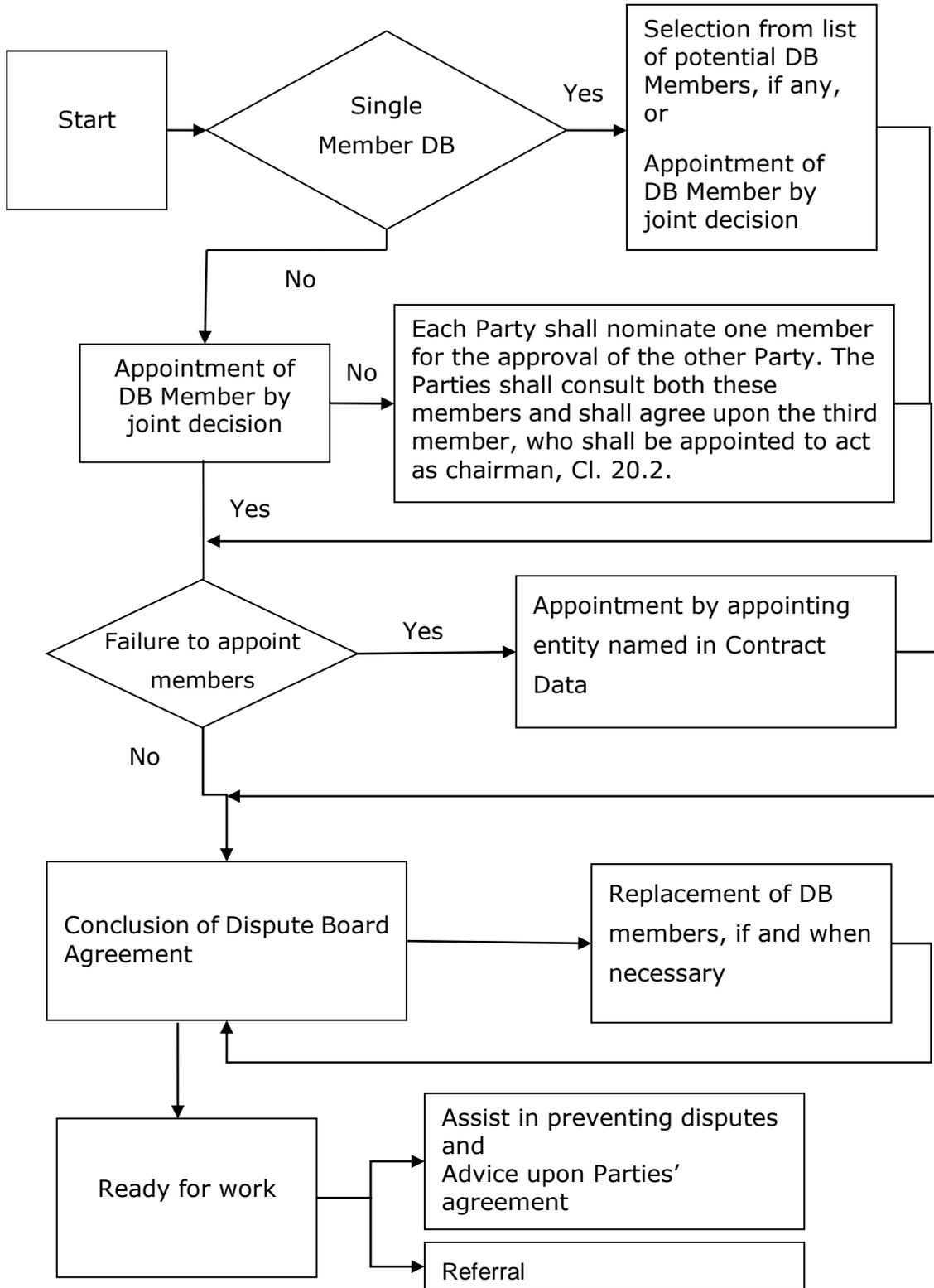
- DB member appointing services: The following organizations provide DB member appointing service.

FIDIC (International Federation of Consulting Engineers) at <http://www.fidic.org/>

ICC (International Chamber of Commerce), Dispute Resolution Services at http://www.iccwbo.org/court/dispute_boards/id4527/index.html

ICC provides services not only of appointing DB members but of Decision upon a challenge of a DB member and Review of a DAB or CDB Decision as to form if the ICC Rules are used.

Appendix 5.2: Flowchart of appointing DB members



Appendix 5.3: Form of Three-Party Agreement for 1-person DB (FIDIC MDB version)

Appendix 5.4: Form of Three-Party Agreement for 3-person DB (FIDIC MDB version)

Appendix 6: Payment of Remuneration to DB members

Payment to DB consists of the retainer fee, daily fee and the reimbursement of reasonable expenses. (Definition and estimate of these fees were dealt with in Appendix 3.2.)

6.1. Invoices for fees and expenses (Section 6, Appendix to Conditions of Contract)

- (i) The member should submit invoices for payment of monthly retainer and air fares quarterly in advance;
- (ii) Invoices for other expenses and for daily fees shall be submitted following the conclusion of a Site visit or hearing;

As to (i) above, air fare may change during the time between the foreseen date of the Site visit or hearing and the actual date. Also, it does not cover what happens with air fare if an unscheduled Site visit occurs or when a Referral occurs the DB meets separately for its deliberations and preparation of its Decision. As to (ii) above, expenses and daily fees for the work done during the intervals of the Site visits will not be paid until after the next Site visit. Therefore, it is suggested and actually a practice that the retainer is to be billed quarterly in advance, expenses and daily fees for work done are to be billed monthly and expenses and daily fees for Site visits are to be invoiced following the Site visit.

- (iii) All invoices above shall be accompanied by a brief description of activities performed during the relevant period and shall be addressed to the Contractor. It is not necessary to supply another copy of a Site Visit Report as that will be distributed prior to departure from Site; see, Procedural Rule 3 of the Annex to the Appendix to Clause 20 of the Conditions of Contract.

6.2. Payment

- (i) The Contractor must pay each of the member's invoices in full (100%) within 56 calendar days after receiving each invoice. Although there is no requirement in the Conditions of Contract, it is advised that the Contractor should inform the Employer of payment to the DB members.
- (ii) The Contractor's monthly Statement following such payment should include it as an amount payable to the Contractor under the DB provisional sum in the Bill of Quantities.
- (iii) The Employer shall then pay the Contractor in accordance with the Contract.

Appendix 7: Site Visits

(i) How to organise the initial Site visit?

- As soon as the DB has been established, the Chairman will, after consultation with other members, contact the Parties to fix the date for the initial Site visit.
- If there is no contact from the Chairman within 2 weeks after the DB has been established, one or both Parties should contact the Chairman to fix the initial Site visit.
- A minimum duration of three days is advised to assure that the DB Site visit report is completed before the DB departs the Site. As soon as the timing is fixed by the DB in collaboration with the Parties and the Engineer, the logistics of the Site visit including preparation of documents, reserving meeting rooms, transportation and hotel accommodation should be arranged. Typically this is done by the Parties and the Engineer in liaison with the DB.
- Agenda for Site visit

An agenda should be prepared in advance by the Chairperson in consultation with fellow DB members and then with the Parties and the Engineer. (In the absence of agreement, the DB is empowered to set the agenda itself.) The DB should have received a full set of the Contract Documents, including Drawings, immediately after signature of the Three-Party Agreement(s). A working set of the Contract Documents should be kept available at the Site for exclusive use of the DB during its Site visits.

It should be emphasized at the outset that the Site visit is a friendly visit to be conducted in an informal way. DB members typically arrive in casual clothing; no neckties, perhaps work trousers and work boots – in short, attire appropriate for a construction site. Meetings at Site are informal and while the DB may join the Parties and the Engineer for dinner during a Site visit, there is no need for a banquet! Private socialising of one Party alone with the DB (or an individual DB member) is inappropriate.

During the day, lunch is informal and often is simply sandwiches shared by all at the table at which discussions are in progress or a quick lunch at the Site canteen. The DB is simply another member of the Project team, albeit one which is physically present on Site only at intervals. A sample agenda of Site Visit is shown in Appendix 7.1.

Suggestions regarding the initial Site visit

As only a few requirements are specifically provided in the MDB Conditions for managing operation of DB, the procedure and the roles of the Parties and the Engineer could be flexibly decided among them. While the Chairperson takes the lead of managing DB process, the Parties together with the Engineer should discuss their roles for proper operation of the DB process. It should be noted that the management of DB process should not necessarily be the same as other projects.

- DB members should meet with the Parties, the Engineer and the sub-contractors, if possible, to be acquainted with the whole project team and to build up the relationships for the smooth communication.
- The DB's Site Visit is possibly the only occasion that senior staff from the Employer, Contractor and Engineer will visit the site and the working areas together. It could be considered to be one of rare occasions where they could discuss on problematic matters. Therefore it is highly recommended that the seniors from Parties join the DB on Site visits, especially on the initial Site visit.
- Following brief introduction of the members, make and distribute a list of contact addresses including Company or Government department, position, address, telephone number, fax number, email address. This is useful for all, even if business cards are exchanged.
- Discuss and re-confirm the role of the DB and how it will operate to assist the Parties and the Engineer to avoid disagreements becoming formal disputes.
- Briefly discuss the project. It is the best practice that the Engineer gives this overview, followed by additional comments or explanations of the Parties regarding their principal concerns.
- Following this opening meeting, proceed to Site tour / Site inspection. All of the DB members, the Engineer, and the Employer and the Contractor should attend. It is useful for the DB to have with them layout drawings for the Site. All principal points of interest on the Site should be visited and the DB oriented by the Engineer, with all of the DB and the Parties in attendance, and with the Parties offering any comments they may wish to add following the Engineer's orientation. Private discussions with DB members, either collectively or individually are inappropriate
- After the initial meeting at the Site office and Site tour, it is useful to have a further meeting to enable the DB, the Parties and the Engineer to discuss any further aspects of the Site and the Contract to help DB members' acquire a full understanding of the project and its challenges.

- Confirm the logistics regarding future Site visits, such as dates, accommodation, means of local transportation, each Party's person in charge of logistics and the person(s) with whom the DB should liaise regarding future Site visits. The date of at least the next scheduled Site visit should be established at the initial Site visit.
- Decide the documents to be provided to DB members during the intervals between Site visits, and the manner of their distribution. The DB should review with the Parties and the Engineer the forms planned for Contractor recording of labour, equipment, and materials usage – daily records kept in the various Site locations and submitted to Engineer. Also, review the plans for use of Contract Programme and its updating, and the system planned for variation orders of the Engineer. The DB has full power and wide latitude to request documents which it considers will assist it in its work, and the Parties and the Engineer should cooperate fully with DB requests for copies of documents relevant to the planning and progress of the Works, and any contractual disagreements which may arise.
- The room where DB members work or conduct hearings at the Site should be equipped with a set of project-relating documents.
- Usually, each Site has its own safety guidelines; therefore, DB members should be briefed on those guidelines and abide by them. DB members should be properly clothed and equipped (including any protective shoes or rubber boots and hard hats) when touring the Site. This typically is done by the Contractor.
- At the time of the initial Site visit typically important information has been developed since the creation of the Contract Documents. This information should be reviewed with the DB. For example: approved-for-construction drawings are being prepared by the Contractor and the Engineer, initial entry/residence permit will have been processed for the Contractor's personnel, arrangement of import permits for the materials and equipment and materials for temporary works will have begun, sub-contractors will have be under consideration or already approved, and the status of site acquisition and right of way for the temporary roads clarified. All of these should be discussed with the DB at the time of the initial Site visit. If these matters are delayed, it likely will influence the progress of the Contract. Discussion with the DB can assist in the cooperation of the Employer, the Contractor and the Engineer for early recognition and resolution of such difficulties and avoid formal disputes over any difficulties which have arisen. The Site visit is an excellent opportunity to deal with any disagreements.
- A sample Site visit agenda is attached as Appendix 7.1.

- Planning future Site visits

According to Procedural Rules in the Annex to the Appendix to the Conditions of Contract, the intervals of Site visit shall not be more than 140 days and the period between consecutive visits shall not be less than 70 days. Based on this provision and taking the particularity of the project into account, a rough plan for the future visits should be agreed among the Parties/Engineer and DB, especially, the dates for the next visit should be agreed to assure availability of all.

(ii) How to conduct the regular Site visits

- Typically, each Site visit follows the same pattern as the initial Site visit: arrival meeting, Site tour, and post-Tour meeting and discussion.
- The Parties sometimes ask DB to postpone a scheduled Site visit if they are in a very critical construction phase or a problematic Site operation at the time planned the visit because they do not want to spare time for the DB visit. This is completely contrary to the purpose of DB Site visit because the Site operation at such a crucial time should be observed by the DB. Remember that DB members are a vital part of the project team!

(iii) Site Visit Report

During Site visit, making Site visit report by DB is as important as the Site tour and the reporting from the parties and the Engineer about the situation of the project. This report will be a vital record of DB's understanding of the Works and the contract management situation, existing and potential problems of the Site especially any claims of either Party and the status of each such claim. Also, the Site Visit Report provides daily record of DB activities.

This report must be prepared for each Site visit and should contain the type of detail shown in the sample at Appendix 7.2

The Contract requires the DB to issue its Site Visit Report before departing the Site. The report should be shown in draft to the Parties and the Engineer for review to make sure facts referenced are correct and DB wording is clear to the Parties and the Engineer, especially if the working language of the Contract is one which is not the first language of the Parties and the Engineer, This review is not build consensus with DB's view but to check the accuracy of facts and clarity of DB comments. Then the DB should finalize the report and deliver signed copies to each Party and the Engineer before leaving the Site. If during the Site visit the Parties asked the DB for informal opinions, it is essential those opinions be included in the Site Visit Report.

Appendix 7.1: Site Visit Agenda

Date	Time	Place	Contents	Responsible	Participants
Sunday 6	14:00	Airport	Foreign DB member met at and taken from int'l airport to hotel	Mr. X	Cont.
Monday 7	08:00	Hotel	DB picked up and taken to Site Briefing & tour	Mr. X	DB, Emp, Cont, Eng
	12:30	Site Office	Lunch	Mr. Y	DB, Emp, Cont, Eng
	13:30		Complete Site tour and discuss progress & problems	Mr. X	DB, Emp, Cont, Eng
	18:30	Camp Canteen	Dinner & to Hotel	Mr. Y	DB, Emp, Cont, Eng
Tuesday 8	09:00	Hotel	DB picked up and taken to Site. Continue discussions; review of any disagreements & progress on any claim	Mr. X	DB, Emp, Cont, Eng
	12:30	Site Canteen	Lunch	Mr. Y	DB, Emp, Cont, Eng
	13:30 – 18:30		Afternoon session & to Hotel	Mr. X	DB, Emp, Cont, Eng
Wednesday 9	09:00	Hotel	DB picked up to Site office & prepare draft report, Review of draft report, DB prepares final version of Site Visit Report	DB	DB, Emp, Cont, Eng
	14:00		Foreign DB member taken to int'l airport and depart	Mr. X	Cont

Appendix 7.2: Sample Site Visit Report

Note: The term “Dispute Review Board” shall be read as “Dispute Board” and “DRB” shall be read as “DB”.

Appendix 8: Information during Intervals between Site Visits (FIDIC MDB version)

It should be noted that, in accordance with Procedural Rules 3, all communications between the DB and the Employer or the Contractor shall be copied to the other Party. If the DB comprises three persons, The Employer and the Contractor shall send copies of documents requested and the communications as below to each of these persons.

8.1 What kind of information shall be given to DB?

Between each periodical Site visit which is usually several months, the project may make certain progress and claims may arise. For the DB, keeping familiarity with the progress of the Works and other relevant events between each periodical Site visit is essential for prevention and early resolution of claims and disagreements. The DB should be provided with copies of updated CPM programme, monthly progress reports, Variations and any other Amendments to the Contract Documents, and claim notices issued by either Party, all at the times they are issued. Progress on issues identified in the previous Site Visit Reports is of special interest to the DB and should be reported to the DB as it occurs. The DB may ask some question about the information provided, to which the Employer or the Contractor must promptly answer, or, if they can not, then so advise the DB and prepare the answer by no later than the next periodical Site visit. Documents should be distributed directly to each DB member, not via Chairperson. Emails/letters/calls should be addressed to Chairperson but emails/letters simultaneously copied to other DB members.

8.2 How to forward the information?

Telephone is necessary in case of emergency, but ordinary information may be delivered through email or facsimile. However, monthly reports which contain photos, CPM programmes, or other data not easily transmitted by email or facsimile may be sent by air courier to the DB members. Recently ftp Internet storage websites using URL designations beginning with “ftp://” have become increasingly popular for storage of construction project Contract Documents and other related data and correspondence which are protected by password. The cost for utilizing an ftp site or other electronic file transfer services) is modest and less expensive than constant use of air courier. However, the effective use of an ftp site requires constant input by personnel to keep the site current as the Contract performance progresses. Also it is not easy to work with documents in an ftp site and often printing is necessary. To give a single example, it is a lot easier to compare a Monthly Progress Report for February with the one for January if both are at hand in hard copy, and much time is saved.

Remember that especially if a retainer fee is eliminated or deleted by agreement, each DB member is going to be charging for all time spent on DB matters.

Finally, it is important for the Parties to avoid the “mind set” that the DB is only available to the Parties and the Engineer during the regularly scheduled Site Visits (or unscheduled Site visits in case the DB presence is beneficial in connection with some unanticipated construction event such as a landslide or a tunnel collapse). In today’s rapid communication world, the DB is available whenever its assistance may help the Parties or the Engineer to overcome a disagreement. Early involvement of the DB is the likeliest timing to avoid “deadlock” on Site over some disagreement on contractual issues. It is unhelpful to the entire team if a disagreement arises a week after a DB Site visit and the matter is “shelved” or allowed to fester until the next scheduled DB Site visit, which may be several months away: do not “shelve” disagreements about Contract interpretation or application!

Appendix 9: DB Informal Opinion (FIDIC MDB version)

Paragraph 4 (f) of the Appendix to Clause 20 states:

“[The Member shall] not give advice to the Employer, the Contractor, the Employer’s Personnel or the Contractor’s Personnel concerning the conduct of the Contract, other than in accordance with the annexed Procedural Rules.”

Also, Paragraph 4(k) of the same Appendix says;

“[The Member shall] be available to give advice and opinions, on any matter relevant to the Contract when requested by both the Employer and the Contractor, subject to the agreement of the Other Members (if any).”

However, Procedural Rule 4 (in the Annex to the Appendix to Clause 20) states:

The purpose of site visits 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 disputes.” (Emphasis added)

Thus clearly the DB is expected to be “pro-active”, to take the initiative with respect to potential problems or claims. As indicated in paragraph 4(f), the DB is not to involve itself in the Parties’ or the Engineer’s performance of their work under the Contract except in respect of potential or actual disagreement. The DB is free to suggest to the Parties that it can provide an informal opinion on such potential or actual disagreement. If either Party is reluctant, the DB can seek to persuade them of the value of the DB offering its advice or opinion, as it is anyway informal and non-binding. It would be rare that a Party rejects such a proposal.

It should be understood that for either Party to withhold participation in the other Party’s request is contrary to the spirit and intention of the Contract, which is that both parties shall in good faith avoid confrontation and seek amicable resolution of any disagreements about Contract interpretation and operation.

(i) When to obtain DB’s advice or opinion?

DB advice or opinion can be obtained at anytime. If it is during intervals between Site visits, it can be by email if it has been agreed by the Parties. If a regular Site visit is imminent, the question can be proposed to the DB for inclusion in the Agenda for that Site visit. During a Site visit, either Party can seek the agreement of the other to put a question to the DB while the DB

is on Site. The DB itself may offer to give advice or opinion if it senses from discussions that such might be helpful to the Parties or the Engineer to resolve a disagreement and avoid a formal Dispute.

The availability of the DB for informal views is valuable. However it is not a substitute for serious effort by the parties and the Engineer to resolve disagreements through discussion and negotiation. An example of appropriate use is where the Contractor and the Engineer are in disagreement regarding the reasonable interpretation of a section of the Specification, they may ask (without offering their own respective views) for its informal opinion on the interpretation of that section, and use the DB response as a basis for further private discussions and negotiations.

The parties should always be willing to enable the Engineer to participate in consulting the DB for informal views, irrespective of whether the disagreement is between the two parties or between the Engineer itself and one of the parties.

(ii) **Is DB's informal opinion binding?**

DB's advice or informal opinions are not given through the procedure defined in Sub-Clause 20.4 [Obtaining Dispute Board's Decision] of MDB Edition, but rather under Rule 2 of the Annex to the Appendix to Clause 20. Consequently it must be remembered that DB informal views are not binding on anyone, including the DB itself, and the DB remains free to modify its views if a matter on which it gives an informal view becomes a formal dispute as a result of a formal referral to the DB for decision.

To clarify this, usually DB adds such remarks as follows in its advice or informal opinions:

“The DB has been asked to give its advice or opinion on the matter ofwhich it is pleased to do, on the understanding that the advice or opinion is not binding on the Parties or the Engineer or the DB, and the DB remains free to alter its advice or opinion on the basis of further information provided to it in the future whether in the course of another request for advice or opinion or as part of a possible future Referral to the DB for Decision under Sub-Clause 20.4.”

Appendix 10: Referral and DB Decision

- **Procedural Requirements**

There are only few procedural requirements for the DB operation. They are as follows:

- The DB shall be deemed to be not acting as arbitrator(s), Sub-Clause 20.4, third paragraph.
- Within 84 days after receiving such reference, the DB shall give its decision which shall be reasoned and shall state that it is given under this Sub-Section, Sub-Clause 20.4, fourth paragraph.
- The DB shall act fairly and impartially as between the Employer and the Contractor, giving each of them a reasonable opportunity of putting his case and responding to the other's case, and adopt procedures suitable to the dispute, avoiding unnecessary delay or expense, Procedural Rule 5.
- The DB may conduct a hearing on the dispute, and may request that written documentation and arguments from the Employer and the Contractor be presented to it prior to or at the hearing, Procedural Rule 6.

Under Procedural Rules 7 & 8, the DB has all the control and freedom to deal with the dispute that any third Party could reasonably be dealt with. Or the referral may be made without hearing while the Parties shall have a reasonable opportunity to present their cases. Thus the DB procedure is far more flexible than any arbitration rules or court procedure.

Documentation for the referral could be done by letters or by simple memo, without need for a multiple volumes of documents. If a hearing is held, it can be (and often has been) held at a round table with everyone in work clothes, without the trappings of a Courtroom. Again, the DB is NOT an arbitral tribunal; it is not a Court; it is part of the Contract team trying to assist in resolving disagreements without having the Parties engulfed in costly and lengthy arbitral proceedings.

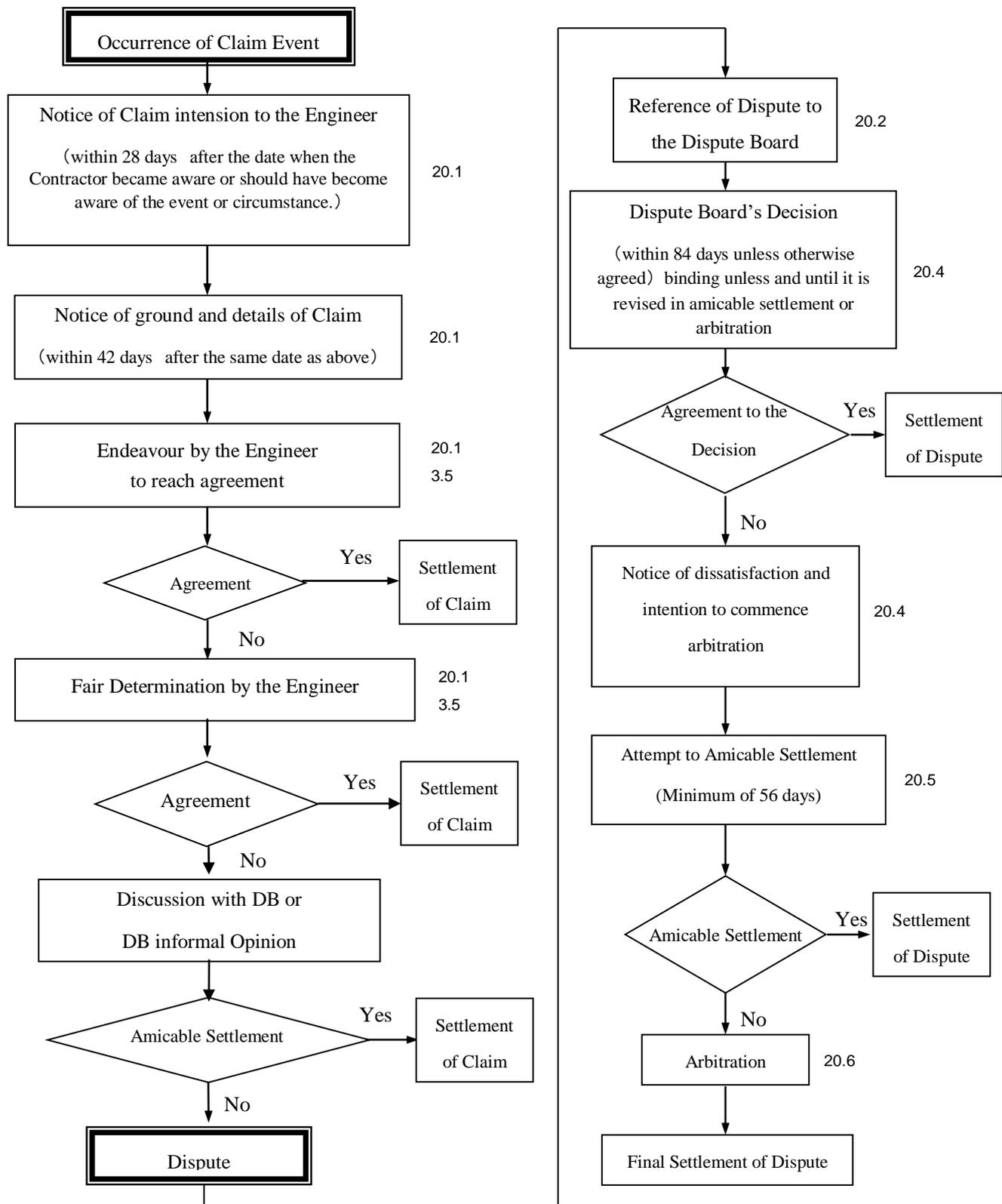
- **Time Limit for DB to publish its decision**

It is important for the Parties to consider carefully the use of the suggested 84 day time limit. The 84 days starts from the day of the Referral and the DB is required to publish its decision before the expiry of the next 84 days. This number of days reflects the FIDIC MDB wish to have the Decision promptly. Usually this is what both Parties desire. But there is a risk that if the

DB fails to meet the agreed deadline, one Party may immediately give Notice of Dissatisfaction and begin the march to arbitration (See, Sub-Clause 20.5, fifth paragraph, last sentence.).

The Parties must note that the 84 day limit will apply *only* if the Parties do not agree otherwise. In complex Disputes, it may be beneficial for both Parties to agree a longer period, especially if for some reason the DB is not already thoroughly familiar with all of the facts and Parties' arguments from Site visits or other previous discussions with the Parties and the Engineer. For example, on some Contracts it has been found acceptable to agree a shorter time limit for complex disputes, such as 30 days, but to have the time limit start after close of any hearing and submission of all written documents, including any post-hearing document submissions requested by the DB. This gives the Parties and the DB greater flexibility and time for careful presentations and consideration of them by the DB. Eighty-four days has proven to be a very short time, especially if the DB is 3 persons and any of them are resident outside the country of the project for which the Contract is made.

Appendix 10.1: Flowchart of dispute resolution procedure (FIDIC MDB version)



Appendix 12: Arbitration (FIDIC MDB version)

The Employer shall insert indications and data on arbitration in Particular Conditions – Part A: Contract Data which is attached as Appendix 4.1

- **Arbitration Institution and Rules of arbitration (Sub-Clause 20.6 (a))**

Any dispute which has not been settled by negotiation or a DB decision which has not become “final and binding” shall be finally settled by arbitration. If the Contract is with foreign contractors, arbitration shall be international arbitration.

There are two alternatives for the Employer:

- (1) The arbitration can be administered by an international institution designated in the Contract Data, and conducted under rules of arbitration of such institution; for example the ICC International Court of Arbitration or the Stockholm Chamber of Commerce;
- (2) The arbitration can be conducted under the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) which do not require the use of an administering institution, and can have the arbitration administered by the arbitral Tribunal itself. However, there are many international institutions which will administer UNCITRAL arbitrations for a fee, and this is likely to be less expensive than having the arbitral Tribunal administer itself.

There are significant differences between the various published rules for international commercial arbitration, and the costs of administered vs. non-administered arbitration, and legal advice should be obtained before deciding upon which approach to use.

- **Place of Arbitration**

The place or seat of arbitration is to be the neutral location specified in the Contract Data. Careful consideration should be given to the place of arbitration as indicated in the main part of the section 12 of this Manual.

Appendix 12.1: Fee Scale of the International Court of Arbitration of
International Chamber of Commerce (ICC)