

# FIDIC-GAMA 2017



## Conference on Infrastructure

7 - 10 May | Cape Town | South Africa

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### African Partnerships for Sustainable Growth

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#### KEVIN SPENCE

PR Eng, MSAICE FIQ, FAArb, Member FIDIC President's List

#### Dispute Boards in Africa: Case Studies and Experiences



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# What is a DAB

- **DAB's should be known as Dispute Avoidance Boards rather than Dispute Adjudication Boards.**





# Reluctance to Appoint Dispute Boards

- Perception of high costs of DAB'.
- Tendency to consider Ad Hoc DAB's instead of Standing DAB's.
- New FIDIC Yellow Book now prescribes standing DAB's
- Refusal of Employers generally to accept DAB decisions.
- DAB's not appointed at commencement of contract and thus lose benefit of non-binding opinions of standing DAB's.



# Perception of Excessive Costs of Dispute Boards

- Average daily cost of DAB Member is approximately USD2000 per day.
- Average monthly retainer approximately USD2500 per month.
- Therefore, on a 24 month project the retainer costs for a 3 person DAB equates to USD 180 000 – this is paid equally by the Contractor and the Employer.
- 3 Site visits per year, i.e. 6 visits in total will equate to about USD 144 000 – excluding travel and accommodation costs.



# Perception of Excessive Costs of Dispute Boards

- One of the larger costs is the employment of DAB Members who do not reside in Africa as the travel costs could be considered excessive.
- (Perhaps) African problems should be resolved by Africans!
- The Construction Industry has a reputation for disputes and conflict.
- **50% of all legal costs incurred in construction projects are associated with disputes.**
- In 10% of all projects ca. **10% of the total project cost was legal cost.**



# Tendency to Consider Ad Hoc DAB's

- Ad hoc DAB's are more expensive than Standing DAB's!
- Standing DAB's are kept up to speed on a monthly basis by receipt of the Contractor's 4.21 Progress Reports which must be read in terms of the retainer paid.
- Ad hoc DAB's come in "green" and are expected to get up to speed by reviewing voluminous documentation – at the daily rate.
- Misconception to introduce the DAB only when the dispute arises.
- Ad hoc DAB can only give decision a single dispute after which time it becomes "*functus officio*" i.e. it's job is done.



# Ad Hoc vs Standing DAB

Ad Hoc DAB	Standing DAB
Appointed once there is the intention to refer a dispute.	Put in place at the outset of the contract.
Appointment expires when DAB has given its decision.	Kept on a retainer.
No prior communication.	Should be copied in on minutes of meetings/other documentation.
No first hand knowledge of Site conditions.	May make site visits (FIDIC Construction Contract: 70 to 140 day intervals).



# Refusal to Accept Bad Decisions

- Experience shown that Employers are reluctant to appoint DAB's if previous decisions on other contracts have gone in favour of the Contractor.
- Numerous instances in Mozambique.
- Notices of Dissatisfaction seem to be issued as a matter of course.
- DAB decision is often used as a “bargaining chip”.
- Reluctance to accept DAB decision has resulted in matters landing in the courts.





# Not all doom and gloom!

- Many DB's and DAB's appointed with great success in Africa.
- For example:
  - Neckartal Dam, Namibia (Standing DAB)
  - TCTA Pipeline Contracts in South Africa
  - Maputo Airport, Airside Facilities (Standing DB)
  - Various Contracts in Zambia
  - SANRAL in South Africa have adopted Adjudication as a dispute resolution process.
  - New fossil fuelled power station projects – Kusile and Medupi (Ad Hoc DAB's)
  - Anticipate that phase 2 of Lesotho Highlands Water Project will definitely have a Standing DAB



# Appointment of DAB's in Southern Africa

- Generally appointment's done in Southern Africa by:
  - FIDIC President's List
  - Association of Arbitrators (Southern Africa)
  - South African Institution of Civil Engineers
  - Engineering Professions Association of Namibia – National Adjudicators List
  - Other Engineering Associations
  - By reputation – word of mouth

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**Thank you for attending.**



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