

# The Dispute Board Federation

Excellence in Dispute Resolution since 2001

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**Featured Events  
and  
Continuing  
Professional  
Development Units**

**2011**

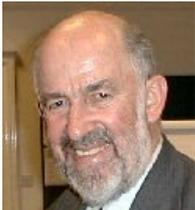
There are several new programmes and events which are shown on our website and these include:

**DBF Members Dinner  
September 15, 2011  
Singapore**

**The DBF Intensive DAB  
Training Programme  
November 14-15, 2011  
Luxembourg**

## Summer

With the summer almost over we can look forward to new events and activities which will commence in the Autumn. It is however with sadness that we note the passing earlier this month of our good friend, colleague, and Fellow of the DBF Brian Totterdill. Brian was an Adjudicator's Adjudicator and a leader in the construction field. He was also a noted author and among his many works are: *FIDIC Users Guide: A Practical Guide to the 1999 Red and Yellow Books*; *Ice Adjudication Procedure 1997*; *Adjudication for Architects and Engineers*; and *Dispute Boards: Procedures and Practice* which he co-authored with Gwyn Owen. Our condolences go out to his family and other friends.



As many of our members know the DBF sponsors students and provides scholarships to deserving individuals to assist them in furthering their education through the various training programmes we offer. Over the next several months we will increase our efforts in this regard and will be setting up a separate grant for this purpose.

Now to complete your summer reading we have printed below a paper about DAB use in Botswana written by Patrizia Palmitessa-Savric one of our recent FTIP Graduates.

**Herbert Wilson**  
Executive Director

For further information on any of these please contact Anne Eve our Programme Administrator at [anne.eve@dbfederation.org](mailto:anne.eve@dbfederation.org)

For a full listing please go to our website [www.dbfederation.org](http://www.dbfederation.org)



By  
Patrizia Palmitessa-Savric

It was not until recently that FIDIC documents have become a contract of choice across the construction industry in Botswana and in particular in the infrastructure sector. Although the 1987 documents could still be found, it is the 1999. editions that are now predominantly opted for. With that move, DABs have also entered the market, albeit somewhat silently and often as if wearing a Harry Potter invisibility cloak.

This paper reviews Dispute Adjudication Boards from aspects that stem not only from the construction industry's perception of DBs as devised in FIDIC documents, but also from its understanding of the adjudication process in general.

### **DAB - when, who, how?**

The one question that is missing in the above heading is **how many?** The industry is unanimous in giving the answer: one! Well, almost unanimous, but the odd exception confirms the rule.

The pros and cons of a standing DAB v. an ad hoc DAB appear to be well known and well understood, although the distinction and, in turn, the decision between the two, do not result from, as one could think, the difference in concepts between the current editions of the Red and Yellow Books, but rather from a very simple reason: cost. Although the industry may very well join the drafters of the next edition of the Yellow Book and recognize that a standing DAB is, in a number of ways, more beneficial to resolution of disputes as well as to possible dispute avoidance (although this may not really be of a concern, as we will see later on), the one argument that stops further discussions is, yet again: cost.

Cost is also the reason that the **how many?** question was not included in the above heading. The answer is a default answer, however not the default offered by FIDIC, but the default established by the cost constraints.

Should a conclusion be drawn that the projects are relatively small and do not warrant a 3-man standing DAB panel? Not really. Irrespective of the size of the project, the thinking behind the DAB costs' arguments originates from the misconception that a DAB is an addition to a project. It is not viewed as a part of a project and thus there is no margin for it in the allocation of the project funds.

Efforts, that encompass adjustments to a number of issues including project budgeting and DAB members' fees, are now being undertaken to overcome the situation and ensure that projects are afforded the benefits of standing DABs. The next hurdle, once this one is surmounted, is to change the answer to **how many?** from the beginning of this discussion from one to three.

In appointing DAB members, the great weight is put on the significance of the contractor being comfortable with the choice, so great that even the perception of bias takes a back seat to it. It is strongly believed that for the DAB process to succeed, it is of utmost importance that DAB is believed to be fair and trusted, that members are known in the industry circles, and, as an imperative, that DAB is respected. The preference is thus given to professionals within the industry, and generally, to those with whom parties have had some direct experience previously. If the perception of bias is such that narrows the choice, a search would be widened, but would still be restricted to professionals within the region and with mandatory local market experience.

This is not a bad thing as it promotes the very essence of the adjudication process: to have the dispute resolved as it arises and to foster an environment in which the project would continue after the dispute as opposed to having a dispute as a hindrance to a project's normal life to completion. It is suggested that a decision by a respectable DAB would achieve just that, as it would be considered to have been made in good faith, taking into account various aspects of the established industry practice.

So, if it means that the DAB would have to be proposed by the contractor, so be it. The market is such that results in intertwined relations amongst the Employers, Engineers (in FIDIC terms) and Contractors within the industry. The worst case scenario is that the Employer has not worked with a proposed DAB member in which case it will request more info before making its decision and only in rare cases will suggest to the Contractor to propose an alternative. In a market like ours, it could be suggested that the IBA so called "traffic light" lists would possibly have to be reconsidered to accommodate the peculiarities of a small industry.

### **Opinions vs. Recommendations vs. Decisions**

Without entering into a territory of detailed analysis and comparison between DRBs and DABs, and the whole structure of FIDIC clause 20 sub-clauses, it will suffice to say that the industry's expectations at present are that a DAB is to deliver a Decision. Full stop. The concept of a DAB giving an opinion has not taken roots as it appears to raise a number of issues that possibly smudge and blur the lines between making one party's case and being independent and impartial. The same is believed for informal assistance of DABs. This, in turn, makes parties uncomfortable and the industry opts to steer clear from it.

It is not clear at the moment whether this is a result of bad past experiences or of lack of experience in dealing with DABs. The industry has not dismissed the possibility of having the DAB give opinions, but that is an option that tags along for the time being. This is understandable, if one accepts that public general knowledge of DABs is that they provide dispute resolutions and that it is the very concept on which DAB idea hinges on. Introduction of DABs in the market is quite a bite to chew, and while the industry is conversant with theoretical basis of its modus operandi, the practical experience is still to come. Despite reversed logics, ways in which DABs may assist in preventing disputes to arise will have to remain in hibernation for a while. But not for long, as the DABs role in controlling posturing on building sites will, once and for all, open the door to full blown dispute avoidance. The way forward could then be to recognize DABs as a forum for discussions.

#### **And, at the end - arbitration**

True, it is there. But, is it really? We do not know. At least not yet. The ones that did go to arbitration, ended up in Paris. The fact that there are not many disputes referred to arbitration on projects with DAB in operation is not proof enough to conclude that DABs are fulfilling their intended purpose. That may very well be true, but since we are quite new at this, the reasons may also lie in any of the following: there may be arbitration cases within the industry, parties have no need to go to arbitrations as they are happy to honor a decision by a DAB that is respected, parties have not yet become proficient with time bars attached to the matters, there is a confusion as to difference between adjudication and arbitration, the lawyers are still picking up the pace or, simply, the projects with DABs in operation are still at an early stage of the completion period and there are not so many disputes piled up so the likelihood of some being referred to arbitration is minor. Or none of the following. Only time will tell.

#### **TO SUM UP:**

DABs have been present on the market for a while and have been used and have operated as intended. These cases, however, are found on projects within some specific construction industry branches and, to date, are not found throughout the sectors. The construction industry in Botswana has not yet fully adopted DABs, although the number of projects under FIDIC contracts, mainly Red and Yellow Books, is growing. The industry seems to be very open to the concept of DABs but the cost thereof sometimes prevents any further considerations. It is definitely an issue that will take shape alongside with some other construction contracts' issues that the industry is faced with at the moment. Once the cost is no more a determining factor in deciding, it is suggested that the industry will have an opportunity to further explore the main and other features of having a DAB on a project. It will be interested to see whether a push in that direction will be made by the Employers or by the Contractors and whether it will, in time, balance itself out with use and experience or whether it will be a constant seesaw. However, one think is certain: before it reaches a steady position within the industry, DAB will peak both ways. Or will it?

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