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DISPUTE BOARDS and THE ADVANTAGES OF EARLY EXPERT EVALUATION

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HARNESSING
OPPORTUNITIES
and
OVERCOMING
CHALLENGES

Advantages of early expert evaluation

- Dispute Boards in their various forms were developed to avoid costly arbitrations on construction contracts both internationally (e.g. Dispute Adjudication Board or “DAB” under FIDIC) and locally (e.g. Dispute Resolution Advisor or “DRA” under Hong Kong Government Contract Conditions)
- Both systems intend to provide early expert evaluation of disputed issues arising during construction
- Advantages are obvious



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Advantages of early expert evaluation

- Contemporaneous review of the facts whilst fresh in everyone's mind (most construction disputes in arbitration are largely about facts)
- In the absence of the old fashioned independent Engineer as contract administrator, provides true independence to assist in the resolution of differences between Employer/Engineer and Contractor
- Focused inquisitorial review by an independent expert familiar with project is far more efficient and economical than adversarial arbitral processes involving personnel not involved in project
- Reduces risk of wrong decisions by arbitrators not sufficiently familiar with construction matters



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Comparison of Systems

- **DRA -v- DAB (although both used for Dispute Avoidance), very different systems.**
- **DAB – established process for dispute avoidance and adjudication on international projects using FIDIC.**
- **DRA invented and used in Hong Kong primarily for dispute avoidance but also advice on dispute resolution.**



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Dispute Adjudication Board (“DAB”)

- DAB is defined in FIDIC Conditions of Contract for Construction (“CC”) 1.1.2.9 as follows:

“DAB” means the person or three persons so named in the Contract, or other person(s) appointed under Sub-Clause 20.2 [Appointment of the Dispute Adjudication Board] or Sub-Clause 20.3 [Failure to Agree Dispute Adjudication Board]



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Dispute Adjudication Board (“DAB”)

- **DAB can be**
 - **full term (one or three members) appointed before commencement;**
 - **“ad-hoc” (one or three members) when dispute arises.**



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Dispute Adjudication Board (“DAB”)

- **DAB:**
 - visits Site on a regular basis (70 to 140 days intervals);
 - adjudicates disputes referred to DAB which are final and binding unless arbitration;
 - can **AVOID** disputes by giving opinions on matters referred to DAB by Parties at any time but typically before determination under CC 3.5.



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Dispute Adjudication Board (“DAB”)

- CC 3.5 provides:

Whenever these Conditions provide that the Engineer shall proceed in accordance with this Sub-Clause 3.5 to agree or determine any matter, the Engineer shall consult with each Party in an endeavour to reach agreement. If agreement is not achieved, the Engineer shall make a fair determination in accordance with the Contract, taking due regard of all relevant circumstances.



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Dispute Adjudication Board (“DAB”)

- CC 3.5 provides:

The Engineer shall give notice to both Parties of each agreement or determination, with supporting particulars. Each Party shall give effect to each agreement or determination unless and until revised under Clause 20 [Claims, Disputes and Arbitration].



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Dispute Adjudication Board (“DAB”)

- (in practical terms) DAB can only be effective in DISPUTE AVOIDANCE if appointed for full term so that matters which cannot be agreed between the Parties (in consultation with the Engineer) and which the DAB is likely to be familiar with can be referred to the DAB before determinations are made by the Engineer under CC 3.5.



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Dispute Adjudication Board (“DAB”)

- DAB under FIDIC waits for matters to be referred by the Parties.
- DRA System as implemented by Hong Kong Government in its building and Civil Engineering Contracts is far more flexible and the DRA is able to be proactive in terms of DISPUTE AVOIDANCE, possibly because DRA has NO adjudication role, unlike DAB under FIDIC.



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Introduction of DRA

- Upon appointment, DRA gives presentation to project teams to introduce himself and DRA System
- Principal role is Dispute Avoidance.
- Dispute Resolution Clause (replacement to GCC Cl 86)
“ The role of DRA is to foster co-operation between the Contractor and the Employer and their consultants and sub-contractors, minimise the number of claims, avoid conflicts in the first instance and settle disagreements or disputes as they emerge and before they become Disputes which shall be dealt with in accordance with Special Conditions of Contract Clauses”.



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Background to DRA system

- Increase in claims and disputes in 1980s and costly arbitrations:
 - DRA system introduced by ArchSD as pilot scheme in 1991;
 - procedures formalized in 1995.



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Background to DRA system

- **Combined dispute avoidance and dispute resolution process with objectives to:**
 - encourage cooperation and joint problem solving to prevent disputes arising;
 - resolve disputes at site level;
 - resolve disputes quickly and cost effectively;
 - ensure all disputes resolved during life of project.



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DRA appointment

- Candidates must have knowledge and experience of dispute resolution, particularly mediation / conciliation, and construction qualification and experience.
- Jointly appointed by Employer / Contractor.
- Selection from approved list.
- Submissions:
 - Technical Proposal;
 - Financial Proposal.
- Selection through ranking system.
- Introductory meeting to explain DRA system to project teams.



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Scope of DRA appointment

- Agreement between DRA / Employer / Contractor.
- Tenure of DRA until Maintenance Certificate unless:
 - agreement to extend;
 - dispute resolution in process.
- Obligation to act fairly and impartially as between Employer and Contractor.
- No difference to parties' obligations under Contract.
- Fees shared equally between Employer and Contractor.



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Scope of DRA appointment

- Familiarization (review of contract documents, programmes, correspondence, site visits etc).
- Advise how to avoid disputes.
- Attendance at progress meetings.
- Confidential / without prejudice communications.
- Employer and Contractor required to participate fully in DRA process (includes Engineer / Architect / Contract Manager / Surveyor / Sub-Contractors).
- Prompt supply of information to DRA.
- Need not accept DRA's proposals / opinions to resolve problems but must comply with decisions / directions on procedural matters.



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Scope of DRA appointment

- Important that Parties are aware of DRA's objectives in terms of dispute avoidance so can utilize system to their mutual benefit.
- DRA needs to keep up to date with all developments on the project.
- Encourage parties to highlight potential problems.
- DRA needs to be proactive to avoid disputes arising.
- DRA Report if disputes not avoided.
- Advice on ADR procedures.



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Amendment of GCC Clauses 48, 50, 61 and 63

- Specific time frames for variations and claims and EOT, allowed for evaluations, ascertainties and determinations by Engineer / Architect / Contract Manager / Surveyor.
- Contractor to provide information to Engineer / Architect / Contract Manager / Surveyor within specific period.
- Time frames can be extended by agreement between Employer and Contractor or by decision of DRA.
- Important to make sure time frames are complied with as far as possible (depends on scope and complexity of issues).



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Potential areas of Dispute and Strategies for Avoidance

- Set out in DRA's Technical Proposal and explain at introductory meeting.
- Identify critical project interfaces and other potential problems and areas of risk.
- Time (programme) and cost implications of identified risks.



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Potential areas of Dispute and Strategies for Avoidance

- Strategies for avoiding disputes by keeping up to date with what is happening on project and encouraging the tabling of problems and seeking solutions at DRA meetings.
- Advice on how differences can be resolved through discussions at joint or separate DRA meetings or written or oral opinions to Parties jointly or separately.



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DRAs' Experience and Training

- Detailed knowledge of and expertise in procurement and construction processes and contract requirements essential.
- Extensive experience and expertise in contract administration essential.
- Some knowledge and experience of mediation and arbitration also essential.
- Adjudication role (as DAB) could be bolted on.



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Application of DAB / DRA

- Every contract throughout the supply chain in PPP structure



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Thank You



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