

Topic Four – Dispute Avoidance Processes

1. Concept and Philosophy of DAPs

a. DAPs

DAPs are a recent innovation designed at changing the current adversarial, self-interested nature of construction projects which facilitate & foster disputes to one that enables proactive dispute avoidance and if unsuccessful, provides real time resolution. DAPs are a circuit breaker preventing escalation of inevitable conflict into avoidable disputes (**G and Ong pg 91**) Incorporating a DAP sends clear message to contracting parties of a commitment to engage in problem-solving and innovation. This facilitates positive working relations between contracting parties, provides for open lines of communication, reciprocal trust and provides a mechanism to identify and quickly resolve project problems. These benefits help prevent often constructive task conflict (with its ability to allow for better quality decisions and cooperative relationships) from turning into generally always destructive relationship conflict, which involves a perception of interpersonal incompatibility, promotes antagonistic behaviour and can be negative and dysfunctional form of conflict. (**D De Clercq**) A multifaceted approach, with strategies for primary, secondary and tertiary dispute prevention are key to success of DAPs.

- **Concept of DAPs**
 - Definition:
 - Nip a conflict in the bud; facilitate resolution rather than escalation of conflicts; NOT to prevent conflict (can be positive)
 - Issue with litigation: technical and very document intensive.
 - Act as a circuit breaker, preventing escalation of inevitable conflict into avoidable disputes (**G and Ong pg 91**)
 - Rare for ADR to take place during construction – often invoked after project completed; positions finalised and know where they stand.
 - Changing the culture:
 - Many disputes are direct result of adversarial K environment
 - Contracts follow traditional, not relationship contract theory.
 - Encourage self-interest & protection of individual positions
 - ❖ If problems, parties focus on *identifying fault*, and liability for costs, cf. working cooperatively to develop solutions to issue
 - Parties stop communicating openly, are inflexible, resistant to each other's views & adhere to strict reliance on legal rights.
 - ❖ More interested in 'finger-pointing' than problem solving, and then find themselves in a *constant state of confrontation*.
 - Strict reliance on legal rights not always best outcome; may spend thousands to get a judge to say that is your legal right.
- **Choice of DAPs**
 - Most appropriate depends on complexity and cost of protect as well as time available
- **Benefits:**
 - Prevent disputes, AND If dispute does develop, provide 'real time' resolution.
- **Terminology**
 - Term 'DAPs' was not coined until early 2000.
 - Umbrella term for proactive processes designed to prevent disputes
 - Covers many models of dispute avoidance/prevention
 - Many DAP models are still incorrectly categorised as ADR.
 - Mislabelling DAPs as ADR leads to some users only establishing DAPs on their projects *after* the onset of the dispute.
 - Why? ADR is saying that the dispute has already arisen.
 - Unsuccessful DAPs are ones often set up when the dispute has arisen, rather than at the start of the project.
 - This stymies capacity of DAPs to proactively *prevent* disputes.