



RAJA, DARRYL & LOH
advocates and solicitors

DISPUTES, SETTLEMENT

new way forward
post COVID19



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Dispute ● Settlement

- The likely scenario – increase in disputes
 - It hits everybody through no fault of anybody
 - It has big impact – time and money – somebody has to foot the bill but who and how much?
 - It is unprecedented and with great deal of uncertainties –there are more rooms to push boundaries, create new battlegrounds and advance new arguments
 - The decision making and legal processes will take time – it will be some time before the law becomes settled
 - It is not something that parties to a contract would have paid attention to in negotiating the contract
 - The introduction of new elements e.g. Covid-19 Act creating new claims or new defences
 - The constantly and continually evolving situation – shadow chasing



Dispute ● Settlement

- The likely scenario – increase in disputes
 - Parties have to brace for more disputes and consequentially more engagement of dispute resolution processes
 - Financial pressure and the increased default and insolvency risk will hasten the trigger
 - “winning” may be the easy part; “recovery” will be the true challenge
 - The CIPA adjudications backlog will also contribute to the problem – increasing heat on an already hostile and litigious environment
 - It is hard to broker settlement when everybody is so wary, cautious and non-committal due to the prevailing uncertainties
 - But the reality check will come – the amount of time, cost and effort spent on dispute resolution processes no longer commensurate



Dispute • Settlement

- The limitations and constraints in confrontational-type dispute resolution processes
 - “Frozen in time” litigation mode cannot catch up with or react to developing situation
 - The conundrum of conclusion based on strict legal obligations or principles v creative resolution to achieve fairness and reasonableness in the context of a pandemic
 - The time and cost exposure in an already challenging environment
 - The uncertainty due to challenge and appeal procedures, especially with the uncertainty on the law
 - Ultimately it does not really help to save or smoothen projects



Dispute • Settlement

- Is this the awakening of mediation?
- Section 9 of the Covid-19 Act 2020:
 - SS(1) – Dispute arising from Section 7 may be settled by mediation
 - SS(2) – Minister may determine the mediation process
 - SS(3) to (5) – Parties shall enter in to a settlement agreement, which shall be binding on the parties.
- Will it work?
 - Section 7 already said a party will not be liable for inability to perform, what dispute is there to be referred to and settled by mediation?
 - It is not compulsory and doesn't even create any compulsion, incentive or encouragement
 - It is more a “reminder” of the existence of mediation being an option, as opposed to mediation being a designated or targeted mechanism

Dispute • Settlement

- Other than ALAM – Arbitration, Litigation, Adjudication and Mediation, what other ways?
- Consultant driven resolution process:
 - Consultant has been playing the first arbiter role
 - The nip it in the bud approach
 - Consultants in a unique multi-facet position, which can serve as an effective bridge to bridge the differences
 - No reason why consultant can't be the best mediator cum arbitrator
- Institution driven resolution process:
 - Time for institutions to think of having a dispute resolution service to cater for specific needs – similar to CIPA but is a non-statutory regime
 - 3 criteria – Cheap, Fast and Effective
 - The challenge will be how to get parties to sign up for it



Dispute ● Settlement

- Suggested techniques:
 - Divide and conquer – segmentized disputes into different time frames or different issues – resolve whatever you can while leaving the fight on the rest to later
 - Future proofing – focus on working out a solution moving forward to keep project alive and on-track, with past disputes to be dealt with separately or later
 - Realistic worst case scenario analysis – there is always only one winner in the battle between 2 Rs – Rights v Reality
 - Payment restructuring – using BG in lieu of retaining money; shorter payment cycle; advance payment (with security)
 - This is also an opportunity for Owners to rethink
 - Be the conscience checker!





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THANK YOU

by CHOON HON LENG

Partner, Messrs Raja, Darryl & Loh



honleng@rdl.com.my



+603 – 2632 9999



www.rajadarrylloh.com.my



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