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Standardising Technology's Contractual Relationships and Alternative Dispute Resolution – The Construction Industry as a Model

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Over the past decade, technology has been seeping into our everyday life at an exponential rate. Accordingly, much like any other industry with rapid growth, contractual agreements are required to form the framework in which lasting relationships can be maintained and provide for mutually beneficial dispute resolution mechanisms ("DRMs"). As we introduce technology into almost every sector, including legal practice, the requirement for a standardised form of contract for the tech industry grows.

It is essential first to understand the existing types of technology and contractual relationships. Technology refers to both the hard (physical) machinery and equipment, such as computers and semiconductors, as well as soft tools, such as software, created using specialised and scientific knowledge. Physical technology has been prevalent in various industries for quite some time; however, soft technology's inclusion is more recent. Accordingly, the contracts relating to technology in already developed sectors, such as the construction industry, are far more advanced than those of soft technology.

Given the large increase in companies requiring online tools in their everyday operation, the need for various contracts – whether it be teaming agreements, sale and purchase agreements, cloud contracting, licensing agreements, support and maintenance agreements, open-source software agreements, or non-disclosure agreements – will also be on the rise. Therefore, this article explains how the use of standard form contracts ("SFCs") within the construction industry can act as an example for the tech industry. Such SFCs not only assist in providing a framework for contractual relationships that are inclusive of dispute resolution procedures but also encourage a more cohesive working environment in the industry by building lasting relationships between stakeholders.

Construction SFCs

As early as 1945, the construction industry has used SFCs for varying types of projects, including plant, design-build, turnkey, dredging and reclamation works, minor works, and electrical and mechanical works, as well as subcontract, consultancy, and joint venture agreements. Typically, these SFCs have been used by either the parties filling out or amending where necessary, and then

executing the contract or incorporating such into the letter of award.

Providing the stakeholders with the options to use the SFCs not only helps ensure that there is a template inclusive of the relevant provisions for software development contracts; it also means that when a dispute arises, there is a reduced chance that the parties will disagree on the meaning of a particular clause. In using the same contracts, the global construction industry has become familiar with the terms and conditions, thereby lessening the chance of confusion between the parties, which can easily result in disputes.

Additionally, the SFCs have been created by industry experts such as the International Federation of Consulting Engineers ("FIDIC"), Joint Contracts Tribunal, or Association of Consultant Architects. The involvement of industry experts in the creation of the contracts ensures that the contacts contain less legalese – which reduces the chance of confusion by those using the SFCs – and the information vital to the project is included and indicated. Moreover, these SFCs can assist in balancing the risk, obligations, and liabilities of the various stakeholders.

Importance of SFCs in DRMs

A benefit of SFCs is the creation of standard DRMs. One example of such is the FIDIC's inclusion of a Dispute Adjudication Board, to which parties to the contract can refer disputes throughout the contract period. Other contracts will appoint a third-party neutral to determine all disputes throughout the duration of the contract. In contrast, some contracts will designate the architect, employer, or contract administrator, *i.e.*, the Asian International Arbitration Centre's (AIAC) Standard Form of Building Contracts 2018, as the stakeholder tasked with determining disputes. These mechanisms aim to ensure the project is completed without causing undue delays.

However, some argue that the creation of layered DRMs can lead to more problems than solutions. For example, in layered DRMs, also known as waterfall clauses, there may be mandatory pre-conditions to commencing arbitration. Therefore, parties who are not aware of the specific pre-conditions of the SFC may expend additional monies and time by failing to meet the pre-conditions. Further, the process of mandatory pre-conditions may delay the resolution process rather than promote negotiation or mediation as forms of DRMs.

While having mandatory pre-conditions may create hurdles for those not familiar with the process, when used correctly or made optional, it can help promote a less adversarial process for resolving disputes. To cater to the needs of the relevant stakeholders, some contracts include the use of expert determination or contractual adjudication in their DRMs. These processes allow for a third-party neutral to decide on an issue related to extensions of time/delays, payments, etc. in an expedited manner compared to litigation, mediation, and arbitration, while at the same time allowing the parties to continue with the projects. Additionally, in small-value or Minor Works contracts, the use of expedited procedures such as the AIAC's Fast Track Arbitration Rules can be included for the resolution of disputes.

Implementation of SFCs in the Tech Industry

The creation of SFCs for the tech industry would not only assist stakeholders when contracting

with one another, but it would also assist in standardising the DRMs within the industry. Currently, for building, civil, electrical, mechanical, and chemical engineers, various SFCs such as the New Engineering Contract, Joint Institute of Electrical Engineers and Institution of Mechanical Engineers Model Forms of General Conditions of Contract, and Institute of Chemical Engineers contracts already exist. However, these SFCs are heavily intertwined with the construction industry. As for other types of technology, such as software development, while templates are available, there is no standardised form akin to those in the construction industry.

As explained above, by having DRMs that are industry-specific, it can allow for the use of specialised methods such as adjudication, expert determination, and expedited procedures, amongst others, to resolve disputes while the project is ongoing or after the termination/completion of the project. Disputes related to software development are similar to those encountered in construction, the primary difference being that the project in the former is created online or virtually rather than physically. Common disputes which arise in both fields, throughout the project, include those relating to late payments, extensions of time, or delays, all of which could be resolved by having DRMs that allow for the making of interim decisions by either appointing a neutral for the term of the contract or creating a panel like the DABs in FIDIC. Additionally, like in construction contracts, stakeholders in the tech industry are likely to have ongoing relationships, and sometimes multiple projects take place at the same time. Therefore, the creation of holistic DRMs can assist in ensuring those relationships are maintained and not strained through drawn-out disputes which may lead to an incomplete project.

Another feature of having a standardised DRM through SFCs is that stakeholders can ensure that those determining the dispute have industry knowledge. In the 2016 Queen Mary International Dispute Resolution Survey: Unveiling Technology, Media and Telecoms (TMT) Disputes (2016 QMUL Survey), IT and Telecoms suppliers preferred litigation and expert determination, respectively, over arbitration. However, arbitration was overall the preferred method with 92% believing international arbitration was well suited for TMT disputes and would continue to grow. The Silicon Valley Arbitration & Mediation Center's Technology Dispute Resolution Survey also echoed these results. To make international arbitration more appealing, one of the top three changes suggested was appointing more industry experts. One method of ensuring that those appointed as experts have industry knowledge would be to require the same in the arbitration clause that is included in SFCs.

Conclusion

Given the success of the SFCs in the construction industry and the use of SFCs for tech-related construction projects, other areas of the tech industry are well suited for the use of similar SFCs. Specifically, the tech industry could benefit from a standardised DRM that would provide not only for interim decisions to be made while the project is ongoing, but also to ensure that the neutrals appointed in arbitration (or other ADR mechanisms) have industry knowledge. Premised upon this, the AIAC has launched its Tech Expert Committee (AIAC TEC) to spearhead initiatives related to ADR and the tech industry. The AIAC TEC aims to create a community in which lawyers and key players within the tech industry can discuss recent developments and brainstorm solutions, project collaborations, and knowledge transfer initiatives for the advancement of ADR within the tech industry. The AIAC TEC activities will include publications of articles and white papers, creation of standard form contracts, promotional roadshows, opportunities to pitch new technology to end-

users, and seminars and workshops. The first initiative of the AIAC TEC is to create a SFC for software development – a survey is on foot to gain insight from industry players in this regard, and input is welcome from industry players. As the world becomes more digitised, disputes surrounding software and other various technology will also rise, thereby creating a need for the standardisation of the contracts used and DRMs implemented.

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