

PROCEDURE – HOW PROACTIVE SHOULD A DB
BE TO FIND THE TRUTH?

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- DB powers
 - DB procedure – “golden rules”
 - DB procedure - particular issues
 - Acting impartially
 - Taking the initiative
 - Taking advice from others
 - Preliminary views/draft decisions
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DB powers

- FIDIC Procedural Rule 8
 - To establish the procedure
 - To decide its own jurisdiction
 - To conduct a hearing
 - To take the initiative
 - To use its own specialist knowledge
 - To decide upon the payment of finance charges
 - To decide upon provisional relief
 - To open up review and revise any certificate, decision, etc of the engineer
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DB powers

- FIDIC 20.4
 - Additional information
 - Site access
 - Appropriate facilities
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DB procedure – the “golden rules”

- FIDIC Procedural Rule 5

- To “act fairly and impartially”
 - To give each party a reasonable opportunity of “putting his case”
 - To adopt suitable procedures, to avoid unnecessary delay or expense
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DB procedure –
particular
issues

- Standing or ad hoc
 - Nature and complexity of the dispute
 - Written submissions required
 - Number (right of reply)
 - Timing (sequential service/exchange)
 - Length
 - Should deadlines be imposed?
 - Is additional information/documentation required?
 - Is a meeting(s) required? Documents only?
 - Subcontract disputes (Clause 20 FIDIC Subcontract)
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Acting impartially

- Independence
 - Rules of natural justice
 - No bias (Glencot Developments v Ben Barratt)
 - Fair hearing (Woods Hardwick v Chiltern Air Conditioning)
 - Avoid private discussions
 - Simultaneous communications with both sides
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Taking the initiative

- FIDIC Procedural Rule 6
 - “Except as otherwise agreed in writing by the Employer and the Contractor, the DAB shall have the power to adopt an inquisitional procedure ...”
 - FIDIC Procedural Rule 8
 - “The Employer and the Contractor empower the DAB to: ...take the initiative in ascertaining the facts and matters required for a decision”
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Taking the initiative

- Risks
 - Excess of jurisdiction
 - Rules of natural justice
 - (Balfour Beatty Construction v London Borough of Lambeth)
 - (RAL (South West) v Stansell)
 - Practicalities
 - Time to investigate?
 - Time to obtain comments?
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Taking advice from others

- Power to obtain legal or expert advice?
 - Risks
 - Appearance of bias
 - Infringements of natural justice
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Indications of preliminary views/draft decisions

- FIDIC Procedural Rule 9
 - “The DAB shall not express any opinions during any hearing concerning the merits of any arguments advanced by the Parties ...”
 - Natural justice
 - Adjudicator’s own conclusions
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