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Alternative dispute resolution for energy and infrastructure projects – what are the alternatives?

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Introduction

Energy and infrastructure construction projects take time, are technically complex, are of significant value, and involve a spectrum of participants with different interests. It is inevitable that there will be claims and disputes arising out of these projects. The contractor will ask for more time, more money, or both. Whilst not all claims will become disputes, it would be a rare owner that accepted every claim.

So, acknowledging that claims and disputes are going to arise, what is the best procedure to try and resolve them without having to resort to formal litigation or arbitration proceedings?

Agreeing your dispute resolution provisions – invest time now, save time and money later

Naturally, disputes are the last thing on the parties' minds as they work long and hard to negotiate and agree detailed contract provisions and to close the deal. However, a midnight-hour handshake on an agreement which includes boilerplate or unconsidered dispute resolution provisions is best avoided. Careful thought about the most suitable type of dispute resolution provisions at the outset will pay dividends on large-scale construction contracts. This is because the dispute provisions present the parties with a real opportunity to put in place alternative processes which will allow claims and disputes to be identified quickly, resolved efficiently and, above all, will allow the parties to maintain their focus on the real objective – the completion of the project.

A multitude of alternative dispute resolution processes can be used to try and resolve disputes in advance of formal proceedings.

Alternative methods of dispute resolution – what are they and why should parties use them?

Construction contracts are usually arranged so that, where possible, practical issues, including claims, are dealt with during the currency of the works. As a first step, the claim will be notified to and determined by the owner or its representative (the Engineer or Project Manager). If either party is dissatisfied with that determination, a number of other processes can be pursued to try and resolve the dispute in advance of formal proceedings. Typically, the procedure will involve at least one, but probably a combination, of the following, and the parties may be required to go through one step before they can proceed to the next:

- Negotiation
- Conciliation or mediation
- Adjudication
- Litigation or arbitration, or, in some instances, expert determination

There are a number of reasons why alternative dispute resolution processes can be advantageous:

- They encourage the contractor to present sound and supported claims as early as possible. If a contractor knows that in order to establish its claim it is likely to have to go through not one, but a number of processes, it may take more care with claims it advances. The time and cost expended in order to follow the process will go some way toward convincing the contractor not to pursue weak or unmeritorious claims. It is also hoped that the process will encourage the contractor to provide more, rather than less, in the way of support and substantiation of its claims at an early stage.
- They can be used to test and challenge claims and/or to try to start a more commercial dialogue about resolving them.
- They encourage the parties to deal with claims and disputes early and cost effectively; further proceedings can be avoided. But there is also another, less obvious, saving. Contractors required to assess claims early, as and when the issues arise, will usually provide a more realistic, less strategic, assessment of their loss. The later the claim the higher the risk that the contractor will become entrenched in its position and develop an unrealistic view of its claim. Owners who fairly engage in the process, and deal with claims as they arise, will maintain the goodwill of the contractor and allow the parties to focus on the successful delivery of the project.
- They provide the parties with an opportunity to learn more about claims which, if not resolved, may result in formal dispute proceedings. This knowledge is valuable because it enables the parties to adjust their positions and prepare for such proceedings.

So, in the context of the above, what are the various methods and what do they have to offer?

Negotiation

If the parties are willing to make a real attempt to resolve the dispute, this is probably the most simple and cost-effective way of doing so. This method can also help to preserve a good working relationship between the parties, which, on a project that is likely to take a reasonably significant time to complete, is of real value.

If negotiation is to be attempted, parties commonly agree that the discussions should be held by senior management or executives in the respective companies who are not part of the project delivery team and/or are not involved in the day-to-day project work. This is because these individuals often find it easier to see the bigger picture and to view things from a more

commercial perspective, rather than being focussed on who is right and who is wrong. This process is completely within the parties' control and the parties do not have to reach an agreement. The other advantage is that, if appropriate steps are taken, the parties can be relatively free in their discussions and can make concessions and/or offers to settle without adversely impacting their position in any later arbitration or litigation if the matter is not resolved. This can be achieved by stating that the discussions and correspondence are 'without prejudice' or, in some jurisdictions, entering into a separate confidentiality agreement covering the negotiations.

Conciliation and Mediation

These terms are often used interchangeably and without consistency. Both describe a dispute resolution method where a neutral third party, the conciliator or mediator, assists the parties to reach a settlement. This process remains non-binding, private and non-discloseable unless and until a settlement is reached, and is particularly useful where direct negotiations are considered unlikely to resolve the issue, whether because the parties' relationship has started to break down or otherwise.

A mediation usually consists of an opening session with both/all parties and the mediator. The parties get to briefly state their case and there are then a series of private meetings between each party and the mediator (caucuses), during which the mediator explores each party's issues and expectations to see if a settlement can be achieved, as this of course is not guaranteed. The mediator cannot discuss what is said in caucus with the other party unless authorised to do so.

The real advantages of this method are that it is relatively cost effective (as compared with the sums the parties may have to spend if the dispute is not resolved) and commercial. A well-run mediation will not focus on who is right and who is wrong, but on the legal, commercial, reputational, etc. risks associated with each party's position and the 'dollar value' of the same.

The other real benefit of mediation is its flexibility. Both the process and terms of any settlement are in the hands of the parties. The settlement can be wide-ranging and can encompass, for example, agreements as to future business.

Adjudication

In adjudication, a neutral adjudicator gives a decision or recommendation on the dispute between the parties, following written and sometimes oral submissions, within a predetermined and usually very short time limit.

The UK provides a statutory right to adjudicate and there is a similar right in other jurisdictions, such as in Australia, New Zealand and Singapore. That means that even where the contract does not provide for it, either of the parties may refer disputes to adjudication, although this is usually a right, rather than an obligation.

Regardless of any statutory rights, any contract may make provision for adjudication. This is now common on international construction projects and will take the form of a dispute board. Dispute

boards usually consist of one or three members (though there may be more). They may operate as a dispute review board, which provides a non-binding recommendation, or a dispute adjudication board, which gives an interim binding decision.

Dispute boards can be formed on an ad-hoc basis, solely for the purpose of a particular dispute, or they can be a full-term panel engaged from the commencement of a project and then kept up to date on progress and developments, including by way of periodic site visits.

An adjudicator's decision is or can become binding on the parties. It is not usually final at the time it is given, but may become so in certain circumstances, depending on the contract. However, in most cases, the parties can challenge an adjudicator's decision and take the dispute on to arbitration or litigation.

If the parties accept the adjudicator(s)' decision and do not seek further relief, then adjudication can be a quick and cost-effective way to resolve disputes and avoid formal proceedings. For larger projects where full-term panels are engaged, there is a further time and cost-saving, in that the adjudicators ought to be up-to-speed on the background to and status of the project, and it should not be necessary to spend time rehearsing those details when referring a claim.

The other potential benefit to adjudication is that the process requires the parties to engage with the dispute and to consider, investigate and present their own position and the evidence in support of it. Being forced to do this early means that more, and better quality, information and evidence concerning the claim will be captured.

However, on the flip side, the very short timescales in which adjudication takes place does mean that for some disputes, particularly the large and complex ones, the parties and the panel will not have sufficient time to address the claims in a manner they perhaps deserve. Thought should be given to the disputes likely to arise and the timescales to be imposed when considering any contractual adjudication provision.

A high percentage of disputes referred to dispute boards are thought to be resolved, without further recourse to arbitration or litigation. Thus the trend for adjudication internationally is very likely to continue, not least because the World Bank, other multilateral development banks, the Fédération Internationale Des Ingénieurs-Conseils (or FIDIC) and the International Chamber of Commerce (ICC) all now advocate use of the dispute board process.

Expert Determination

Expert determination is a dispute-resolution process in which an independent individual, who is an expert in the subject matter of the dispute, is appointed by the parties to resolve the matter. The contract may provide for the expert's decision to be final and binding and, if so, it is extremely difficult to overturn the expert's determination. Whilst, for this reason alone, it is not for the faint hearted, the parties can control the timetable and process, and expert determination can therefore be a speedy and cost-effective method of dispute resolution.

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How to use alternative dispute resolution

The methods set out above may be used alone or in an agreed combination. However, the dispute resolution process must always end with a procedure which provides for a final and binding resolution of the dispute, such as litigation, arbitration or expert determination.

A multi-tiered dispute resolution provision has a number of advantages, but real thought should be given to the full implications of using such processes. Which are more likely to work in the context of the project, parties and their personalities? Will the processes in fact save time and money, or will the cost and time taken to move through the tiers become disproportionate given the likely type and value of the disputes?

Once the procedures have been chosen, the relevant clause must be clearly and carefully drafted. Each 'tier' must have an express start and end point, and it should be clear when a party has completed a tier and can move on to the next, where progressing through the tiers is a mandatory requirement. This is important, as failure, or perceived failure, to comply with a mandatory process can lead to jurisdictional challenges in later proceedings.

Conclusion

Only a small percentage of disputes end up in litigation or arbitration, so it is clear that alternative dispute resolution methods are working to resolve disputes. However, proper consideration is required at the outset of any contract to assess and put in place the most suitable type of alternative processes for your project. Once they are in place, parties must learn how to operate them to their advantage. The investment needed to get familiar with these processes and to thereafter become adept at using them can pay real dividends in terms of better claim outcomes.