

# Dispute Prevention – The Role of the DB and Other Factors {The Importance of Being Expert}

- **Synopsis**
- The paper reviews the science of contractual disputes from their conception, through prevention to formal resolution. It looks at basic preventive measures that can be adopted through the cooperation of the contracting parties or by the assistance of a third party. It concludes by reviewing the formal means of dispute resolution and identifies how best to achieve resolution when such is needed.

## 1. Introduction

- The past two decades have seen a rapid introduction of alternative dispute resolution (ADR) procedures and in particular the increased acceptance of adjudication in the form of dispute boards or dispute resolution experts. These innovations have primarily been the result of dissatisfaction with established forms of resolution: arbitration and litigation. Both procedures suffer from high, most time prohibitive costs. They are normally concluded well after the principal objectives of the contract have been finished or in some cases the means of achieving those objectives had been terminated. A party might achieve the satisfaction it sought at the end of a long and painful road but it could well be a Pyrrhic victory with its business destroyed in the process. The affected industries recognised that something had to be done. Better procedures had to be developed such as would provide the means to:
  - prevent the generation of disputes or;
  - eliminate the causes as quickly as possible before a genuine dispute was created;
  - resolve disputes in a fast and cost efficient manner.
- The following discusses some of the ways the above objectives have been addressed in recent editions of standard contract forms.

## 2. Dispute Creation

- In life nothing is perfect and for that reason we must accept that the seeds of disputes will always be present in contracts. This applies especially in construction contracts where the unknown will be a constant companion - a presence that can never be entirely eliminated.
- Contracts should be formed between two parties when their minds, intentions and objectives are mutually understood and their means of achieving their respective objectives are supposedly agreed. Their minds should have a "*consensus ad idem*". As the performance of the contract proceeds that consensus may become a matter of misguided conjecture or disagreement "I thought you understood I wanted ..." From such things disputes are born as well as from the unforeseeable when one party will exclaim "You didn't tell me about that or I didn't expect to find ..."

## 3. Dispute Prevention

- Getting the contract right is by far the best way of preventing disputes. It should be recognised and accepted that each party will have their particular obligations, liability and some degree of risk. What can be termed the principal elements of a contract. It is essential that the wording of the contract is clear so that each party is made fully aware of those elements it is to undertake and how it is expected to perform. The initiating party is the one that will most often draft the contract. No doubt that party will wish to build in a certain level of protection. That is understandable and the manner in which that protection is to operate can be seen as passing the associated risk to the other party. Basically there is nothing wrong with that. However, the risk must be reasonable. You gain nothing by imposing risks on a party that subsequently causes the contract to fail either by impracticalities or by financial losses or restrictions.

- It should go without saying that the parties should fulfil their respective obligations. The party responsible to pay should do so in the agreed manner and the party responsible for performance should likewise conform to the agreed requirements for time, quality and cost.
- The contract should make provision for change be it unexpected or desired and requested. Change should preferably be made with the mutual consent of the parties. If the contract makes provision for change then any request for change should be compliant with those prescribed provisions.
- The established forms of contract used in international contracts have been developed around the need for addressing the above measures on dispute prevention. The wording is such that each party is able to recognise what they are undertaking and what they have to contribute to achieve successful completion. In addition familiarity with these tried and tested forms of contract should give the adopting parties greater confidence that they are entering into a contract where the unknown will not be a companion to be feared.
- Then we come to the matter of attitude. The “Us and Them” syndrome is an attitude that unfortunately pervades contracts. Starting out each day of a contract with the objective of gaining “Brownie points” and making life difficult for the other party is most certainly not conducive to preventing disputes – it is totally counter productive. Likewise it does not help when one party adopts that other affliction of contracts – claimsmanship. Where we see the focus of contract performance moving from a mutual desire to build the contracts works to one of seeing who can build the largest mountain of paper.

- If the attitude is not right then most likely the result will not be right or at least will not be as easily obtained as it should have been. Contracting parties who fail to adopt a policy of mutual respect invariably end up in dispute. Establishing and maintaining the right attitude is a practice that can be added to the list of fundamental elements within a contract. Most disputes can be avoided by the simple expedient of the parties being willing to resolve issues as and when it is seen that trouble is brewing. Contracts can be worded to reflect that intention. The parties can make declarations of their good intentions or they can include facilities for a third party whose experience and expertise will enable the parties to see where the middle ground lies and how the issue can be addressed and settled fairly.
- However, as indicated before, nothing is perfect and the established forms of contract must therefore make provision for dealing with disputes as and when the preventive measures unfortunately fail to succeed.

## 4. Contractual Cooperation

- The fundamentals of most legal jurisdictions, including Romania, hold that contracts should be prepared, operated and interpreted according to the principles of fairness and justness. It's on that basis that the parties should enter into their agreement while at the same time establishing a spirit of cooperation.
- Some of the faithful believe that the parties should go further and make a declaration of their empathetic intent and that they will work in harmony towards the achievement and completion of a successful contract. The doubting amongst are not sure. While it is agreed that all contracts should be based on mutual respect of one party for the other it may be difficult to stretch that concept any further. The New Engineering Contract (NEC) prepared as a new generation of contract form by the Institution of Civil Engineers (ICE) in the UK seeks to do just that. Core Clause 10.1 of the NEC (now in its third edition 2005) signs up the main players, the Employer, Contractor Project Manager (replaces the Engineer or Architect) and the Supervisor (Senior Material/QA Engineer) to a pact of "*mutual trust and co-operation*". Some would say that the pact works but for many the jury is still out.

## 5. Third Party Assistance and Resolution

- When parties failed to settle their differences they previously had a choice of using an informal means of resolution or going directly to a formal arbitration tribunal or litigation in the courts. That choice still remains but the options available for both processes have been enlarged and improved.
- The most popular means of informal resolution was the use of the Engineer as a quasi-judicial body. Such was the provision in the ICE and FIDIC forms of contract. However, the Engineer being employed by one of parties led to his impartiality being questioned and speculation that his decisions were biased towards the party paying his fees. Most times unfair criticism but the exception serves to prove the rule. Consequently the NEC has opted to such an option and has gone as far as removing the position of Engineer and replacing it by the positions of Project Manager and Supervisor. In the 1999 series of FIDIC the position of Engineer remains but his facility to decide on disputes has been reduced to a fair and unbinding determination. That's not to say that the Engineer cannot and should not continue to use his professional expertise to keep disputes to a minimum.
- Other means of informal, third party assistance in settling disputes can be found in the use of Mediation and conciliation. Both of these procedures adopt policies that seek to help the disputing parties find their own solutions to their problems. Another process involves the use of a Dispute Resolution Expert (DRE) who acts as an advisor and mediator when so requested and as a formal decision maker when likewise asked to do so.

- When the informal process fails to achieve resolution then the parties must turn to the formal procedures. Current focus of dispute resolution is on the use of adjudication as proposed by a number of contract forms. Adjudication is seen as the primary choice as against arbitration which still remains but only as the ultimate resolution process. In the UK the Housing Grants, Construction and Regeneration Act 1996 has made it mandatory to include provision for adjudication in construction contracts.
- Why is adjudication the popular choice? Hopefully the following will answer that question. However, the adjudication procedures developed by the established forms of contract may not be the most efficient. Perhaps a combination of the informal with the formal can breed a hybrid variety that gives an even better bloom of success.

## 6. Basics of Dispute Resolution

- Procedures for the resolution of disputes in contract come in many forms. The merit of each can be measured in the first instance by how it is received by the disputing parties. Are they satisfied by the outcome; how it was obtained; are the parties at least prepared to accept the result? That assessment will undoubtedly be based on the cost and time of the procedure and not unnecessarily on the justice of the decision – unless you are the loser. However, real appreciation of each procedure will come from its anxious observers those directly involved in dispute resolution within the various industries where such resolution is fundamental to successful contract execution.
- The relative merits of a resolution procedure can be measured by:
  1. Fairness;
  2. Effective utilisation of expert knowledge; experience and determination;
  3. Ease of initiation with an emphasis on the priority of time;
  4. Simplicity in operation in respect of the working of the procedures, their conclusions and the decisions awarded at the end – all to be readily understandable by both parties;
  5. Satisfaction in that there is no need for further challenge;
  6. Timely in terms of overall operation and conclusion;
  7. Minimisation of cost;
  8. Ease and certainty of decision enforcement.

## 7. The Range of Resolution Procedures

- Resolution procedures range from litigation through arbitration to adjudication, mediation, and conciliation. With the exception of the first two procedures the rest are normally termed “Alternative Dispute Resolution” or ADR. Straddling the ADRs is the additional procedure of determination by an expert which is primarily a form of adjudication but can incorporate a blend of mediation and conciliation. This makes Expert Determination an excellent resolution tool when properly applied. The development of ADR has seen Expert Determination evolve as a separate entity albeit in name only.

## 8. Development of Resolution Procedures

- Dispute resolution has evolved by applying the lessons of experience while maintaining the disputing parties' desire for a speedy and inexpensive conclusion of their troubles.
- The distinction between arbitration and litigation is one of chicken and egg in respect of which generated the other. We have come a long way from the original basic concept of arbitration – that of simply calling on a neighbour who is familiar with the issue and can settle your dispute, there and then with little formality. Arbitration is an ancient process originating in the market place. Its evolution has led it from those origins to a formal tribunal with procedures which many now consider too cumbersome, time consuming and expensive. It is also unfortunate that while arbitration still engages experts knowledgeable in the subject of the dispute, the rules governing the process of arbitration have evolved to effectively stifle the use of such knowledge. Now such knowledge is restricted to that of comprehension rather than intervention. It is true that through the use of constructive questioning an arbitrator may be able to extrude information that already existed within his expert domain. However, generally within arbitration the arbitrator must rely on the parties providing all of the relevant information through the use of expert witnesses. It is sad that arbitration has in general terms lost its capacity for expert determination. An arbitrator's award must be based on the facts presented to him and not on any judicial or expert knowledge. There is a tendency now for arbitrators to be more expert in the function of arbitration rather than the subject matter of the arbitration.
- Because of the availability of alternative means of dispute resolution the thought of going to arbitration has become in the minds of many an option that should be avoided. Strange that such judgement was previously made in respect of arbitration verses litigation. It's unfortunate that the steady increase in cost, formality and time absorption has categorised arbitration in such a manner but then that is evolution.

## 9. Dawning of ADR

- The departure from reality eventually led commerce to seek alternative forms of dispute resolution. Recently adjudication has gained favour principally because it resurrects the familiarity of earlier arbitration by requiring expert knowledge both in the selection of adjudicators and their operation. The attractiveness of adjudication is enhanced where there is strict control of time and where the implementation of procedures are made as easy as possible. Add to that a facility to mediate whereby disputes are cut in the bud before they become really troublesome and you have the potential of utopia as far as resolution is concerned.
- The benefits of adjudication and ADRs in general were enhanced by Sir Michael Latham in his report “Constructing the Team<sup>[1]</sup>”, Chapter 9 of which covers Dispute Resolution. Paragraphs 9.4 to 9.7 provide commentary on the use of Adjudication. The report sees the introduction of Adjudication to the standard forms of contract as a major development and welcomes improvements that should readily combat the unnecessary anguish generated by the previous methods of dispute resolution. Latham endorses the use of adjudication in the New Engineering Contract (NEC) but considers the Joint Contracts Tribunal (JCT) should do more to encourage adjudication in their forms of contract. Paragraph 9.10, “*Arbitration*”, of the Latham report cites “*there is considerable dissatisfaction with arbitration within the construction industry because of its perceived complexity, slowness and expense*”. Following further endorsement of the use of adjudication and its anticipated incorporation in the standard forms of contract, paragraph 9.10 of the report concludes with the expectation that “*Full arbitration after the completion of the contract will, hopefully, become much rarer*”.
- <sup>[1]</sup> “*Constructing the Team*”, Sir Michael Latham, Final Report of the Government/Industry Review of Procurement and Contractual Arrangements in the UK Construction Industry, HMSO, 1994.

## 10. Use of Experts

- While time and money may govern the choice of adjudication it is perhaps the choice of experts familiar with the subject of the dispute that is the core of its success, especially where adjudicators are allowed to use their expertise to determine a dispute as and when relevant.
- However, the use of expert knowledge for determining disputes can come at a cost – that of liability. If adjudication is to be effective and be allowed to proceed unhindered from the threat of legal action being taken against the adjudicator by a disgruntled losing party, then some measure of protection needs to be afforded to the adjudicator. The immunity from litigation as afforded to judges and arbitrators needs to be provided as well to adjudicators.
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- The case of ***Campbell v Edwards***<sup>[1]</sup> provided that immunity in the UK when Lord Denning MR ruled that an expert giving a valuation in a dispute over property rental could not be sued for negligence. Judicial recognition of an expert's determination can also be found in ***Halifax Life v The Equitable Life***<sup>[2]</sup> and in ***Dixons Group plc v. Jan Andrew Murray-Oboynski***<sup>[3]</sup>
- Such was the case with arbitrators and so it should be with expert determination or valuation. Where negligence was established the remedy was to turn the valuation aside and start again. The sincerity of expert determination should not be threatened by the fear of litigation. A likewise interpretation applies to the decisions of adjudicators. However, this immunity should be reinforced through suitable wording in the adjudication agreement entered into by the disputing parties and the adjudicator.

<sup>[1]</sup> *Campbell v Edwards* [1976] 1 WLR 403

<sup>[2]</sup> *Halifax Life Ltd v The Equitable Life Assurance Society* [2007] All ER (D) 212

<sup>[3]</sup> *Dixons Group plc v. Jan Andrew Murray-Oboynski* (1998) 86 BLR 16

## 11. ADR Popularity

- As noted above the comments in the Latham report at that time reflected a growing popularity for adjudication. The inclusion of provision in the consultative edition of the NEC issued by the Institution of Civil Engineers (ICE) in 1991 was followed by similar provision in the FIDIC Orange book in 1995. Then along came the Housing Grants, Construction and Regeneration Act of 1996 (HGCRA) which required adjudication to be included in any construction contract or failing that the provisions of the Schemes for Construction Contracts enacted in 1998 (SCC) had to be adopted. All of these innovations followed procedures developed in the USA and were encouraged by the Dispute Resolution Board Foundation (DRBF). Everybody and his dog then proceeded to get in on the act. The ICE in addition to the provisions of the NEC published their own procedures as did the Centre for Dispute Resolution (CEDR); the Technology and Construction Solicitors Association (TeCSA); the Construction Industry Council (CIC); the Chartered Institute of Arbitrators and eventually the JCT in 2005.
- As mentioned earlier alongside adjudication another procedure developed. This focussed more on the expertise of the individual assigned the task of resolving the dispute. Japanese consultants have initiated a procedure of expert determination that has been adopted as Dispute Review Expert by the World Bank which is used as an alternative to their Dispute Review Board. A similar procedure has been introduced by the Institute of Chemical Engineers (IChemE) in their standard form of contract. CEDR also developed similar rules in their Model Expert Determination in 1999. The term Dispute Resolution Expert (DRE) is also used to describe this procedure which seeks a greater interplay between the DRE and the disputing parties in the hope that a speedier, more efficient and less costly end to the dispute can be achieved. In effect the DRE is an attempt to get dispute resolution back to the earlier form of commercial arbitration.

## 12. The Hybrid Takes Shape

- Irrespective of how attentive each of the adjudication and DRE procedures may be none of them are perfect. Experience of the operation of adjudication procedures has shown that a more effective process can be achieved by taking the best of each of the established procedures and mixing them to form a hybrid variety.
- There are essential ingredients required in an adjudication procedure. These can be summarised as follows:
- The use of an adjudicator who is
  - skilled and experienced in the subject matter of the dispute;
  - skilled in the procedural and legal rules of adjudication.
- The adoption of procedural rules that:
  - Identify the qualities, expertise and independence of the adjudicator within the wording of the main contract;
  - Indemnify the actions and decisions of the adjudicator through suitable wording within the adjudication agreement drawn up between the disputing parties and the adjudicator;
  - Minimise the costs;
  - Promotes a speedy conclusion ;
  - Allow an interrogative process by the adjudicator rather than a judicial one that presides over adversarial presentations by the representatives of the parties;
  - Allow the adjudicator to use his judicial knowledge rather than purely rely on the facts presented – or at least allow a proactive approach by the adjudicator to solicit information and clarification from the parties;
  - Provide for a standing adjudication facility , i.e. one that is maintained throughout the course of the project by paying the adjudicator a monthly or quarterly retention while paying fees (adjusted for the retention) and expenses for any visits to site and formal meetings;

- Allow as an alternative to a standing adjudication a facility that as a minimum allows for *ad hoc* attendance of the adjudicator whenever problems arise on the project;
- Allow for regular transmission from the project of critical correspondence and documentation to the adjudicator so that he can keep abreast of developments on the project;
- By the suitable adoption of the above allow the adjudicator to operate his secondary, perhaps primary, function: that of a mediator;
- Maintain as much as possible the informality of the proceedings and deter the evolution towards the formal, litigation format that now pervades arbitration;
- Ensure that the jurisdiction of the adjudicator does not cover the giving of a decision on the costs of counsel or the preparation of material laid before him – this will deter the use of counsel and the big stick approach that some parties with more money than sense are inclined to adopt;
- Address the matter of the binding nature and enforcement of the adjudicator's decision in a clear and unequivocal manner;

### **13. Final and Binding Nature of Adjudicator's Decision**

- The last item 12.m above concerning the binding authority of the adjudicator's decision may be thought unusual and irrelevant considering that a primary objective of adjudication is to achieve finality of the issue. However, some Employers responsible for the drafting of contracts are reluctant to include powers that assign adjudicators such authority. This issue obviously does not arise where an Employer is required by statute to either provide for adjudication or accept the statutory alternative (HGCRA and SCC). The informal nature of the adjudication procedures may be considered insufficient and thereby bar payment where substantial public funds are involved. A wavering Employer may be more inclined to accept a binding decision if he sees by the working of a dispute resolution expert that the decision is most likely the best he is going to obtain. But he will prefer to have that choice available rather than prohibited.

## 14. Concluding Remarks

- It is recognised that the prevention of disputes within contracts is the goal of all those who are genuinely interested in having their contracts succeed. There are means whereby most situations that have the potential to generate a dispute can be curtailed and settled without the need for third party intervention. These means are to be encouraged. However, it must be recognised that from time to time disputes will arise and therefore the parties need to have in place an effective resolution procedure. Such provision is an essential ingredient of a successful project – be it the informal variety of the contract administration or the more formal ADR. Of the latter the blending of ADR procedures into the hybrid variety described above is to be encouraged. The use of expert determination within a framework of semi-formal procedures makes it by far the most effective.

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